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Corporate Liability for Toxic Torts Abroad: V*edanta v Lungowe* in the Supreme Court[†]

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Abstract: Multinational corporate groups pose a challenge to traditional methods of legal control, particularly when corporations domiciled in wealthy western countries exploit, through foreign-domiciled subsidiaries, the resources and 'weak governance' of the developing world. In holding England as the proper place in which to bring a claim against *both* a UK-domiciled company and its Zambian subsidiary, for environmental damage abroad, the Supreme Court has allegedly 'opened the door' to similar future actions. However, in the absence of robust and mandatory due diligence requirements, parent companies may simply retreat from comprehensively reporting on group-wide systems of management and control. A desire to avoid future 'voluntary assumptions of responsibility' may be the undoing of post-*Vedanta* optimism.

Keywords: jurisdiction; corporate groups; parent company duty of care; environmental damage; environmental management systems.

THE LEGAL AND FACTUAL BACKGROUND

The challenge that multinational corporate groups pose for traditional methods of legal control is well documented, particularly when corporations domiciled in wealthy western countries exploit, through foreign-domiciled subsidiaries, the resources and so-called 'weak governance' of the developing world.[1] Central to this challenge are the doctrines of separate personality and limited liability, which are cornerstones of company law. A company is a legal person separate from its

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[1] Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2009); Peter Muchlinski, 'Limited Liability and Multinational Enterprises: A Case for Reform?' (2010) 34 Cambridge J Econ 915.

shareholders,[2] and shareholders are not, in the event of a company being wound up, liable to contribute to the company's assets beyond the amount unpaid on their shares.[3] It is well-rehearsed in the literature that, whatever the economic benefits of these cornerstones, they are the ingredients for a cocktail of externalising environmental and other types of harm, moral hazard, and a catalogue of corporate irresponsibility.[4] In the context of corporate groups, this cocktail is particularly toxic. Parent companies, which own all or the majority of shares in a subsidiary, reap the financial rewards of risky activity but are, generally, insulated from the subsidiary's liability; to hold otherwise would be to 'pierce the corporate veil'.[5] Furthermore, corporate groups do not respect the territorial boundaries of nation states. Victims of this cocktail are, as a result, often left without an effective remedy.

Vedanta Resources Plc v Lungowe[6] is one of many cases seeking to provide such a remedy, through tort law, for the activities of multinational corporations abroad.[7] The case concerns the Nchanga Copper Mine ('the Mine'), situated in the Chingola District of Copperbelt Province, Zambia.[8] The Mine in part is open-cast, and the second largest in the world.[9] A group of 1,826 Zambian citizens allege that their health and livelihoods have been fundamentally and irreversibly damaged by repeated discharges of toxic emissions, from the Mine, into local watercourses, over a 15 year period. These very poor members of local farming communities rely on those local watercourses as their only source of water. They drink this water. Their livestock drinks this water. The water provides irrigation for crops that they eat and sell.

In July 2015, these claimants issued proceedings against two defendants (appellants in this appeal), not in Zambia, but in England. The first defendant, Vedanta Resources plc (Vedanta), is domiciled in the UK and listed on the London Stock Exchange. Vedanta employs only 19 people, eight of whom are directors, but it is the parent company of a large multinational corporate group employing 82,000 people across four continents in operations stretching from minerals to power,

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[2] *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL).
[3] Companies Act 2006, s 3(2).
[4] See, for example, Bruce L Hay, Robert N Stavins and Richard HK Vietor (eds), *Environmental Protection and the Social Responsibility of Firms: Perspectives from Law, Economics, and Business* (Resources for the Future 2005); P Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2010) 34 Cambridge Journal of Economics 837; Carrie Bradshaw, 'The Environmental Business Case and Unenlightened Shareholder Value' (2013) 33 Legal Studies 141.
[5] On the very limited circumstances in which veil piercing is permitted, see *Prest v Petrodel Resources Ltd* [2013] UKSC 34.
[6] *Vedanta Resources plc v Lungowe* [2019] UKSC 20.
[7] See Richard Meeran, 'Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013).
[8] *Vedanta* (n 7) paras 1–3.
[9] ibid.

oil and gas.[10] Vedanta's connection to the Mine in Zambia is through its ultimate ownership of the second defendant, Konkola Copper Mines plc (KCM).[11] KCM is a public company incorporated in Zambia. It is KCM who owns the Mine. However, whereas KCM is of doubtful solvency in a country where conditional fee agreements (CFAs) to facilitate access to litigation are unlawful, Vedanta is a deep pocket in a jurisdiction where CFAs are available.[12] Claiming against both defendants, in England, has obvious appeal.

The actions were brought in negligence and breach of statutory duty. The claim against KCM is as owner of the Mine. As against Vedanta, the claimants argue that the company exercised a high degree of control over the Mine and KCM's compliance with health, safety, and environmental standards such that Vedanta *directly* owed them a duty of care. It is direct 'control' over a subsidiary which allows tort claimants to skirt, if not pierce, the veil within corporate groups,[13] often structured with the deliberate purpose of avoiding the very type of liability for which, as a result of the unanimous decision in the Supreme Court, Vedanta could be on hook when the case proceeds to trial.

However, the questions before the Court were 'all (and only) about jurisdiction': could the claimants bring an action, against both defendants, in England?[14] To do so, the claimants relied on the recast Brussels Regulation to sue Vedanta in the UK,[15] and sought to serve KCM outside of its own jurisdiction through the 'necessary or proper party' gateway under the English Civil Procedure Rules (CPR).[16] Challenges to jurisdiction, as the courts are well aware, are a tactical expression of corporate might often 'used by a richer party to wear down a poorer party'.[17] This may be why the defendants challenged the English jurisdiction granted by the trial judge and the Court of Appeal[18] all the way to Supreme Court. In order to do so, the defendants argued that the claimant's use of the Brussels Regulation amounted to an abuse of EU law, and that no real triable issue arose against Vedanta to render KCM a proper party to proceedings in England. They also argued that Zambia was the proper forum for the claim to be heard, and that substantial justice could be achieved there.

In dismissing the defendants' appeal, the Supreme Court has allegedly 'opened the door' to

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[10] ibid.
[11] The Zambian government has a significant minority stake in KCM, but given materials published on Vedanta's website stating it has ultimate control of KCM, it is regarded as wholly owned by Vedanta: ibid.
[12] ibid 24 & 90.
[13] *Chandler v Cape plc* [2012] WLR 3111.
[14] *Vedanta* (n 7) para 4.
[15] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[16] CPR Practice Direction 6B, para 3.1.
[17] *VTB Capital plc v Nutriek International Corp* [2013] UKSC 5, para 82 *per* Lord Neuberger.
[18] [2016] EWHC 975 (TCC) and [2017] EWCA Civ 1528.

claims against UK-domiciled companies for the operations of foreign subsidiaries.[19] However, there are reasons to sound a more cautious note regarding the effects of *Vedanta*. The court placed limits on jurisdiction, and its focus on a voluntary assumption of responsibility may be the undoing of post-*Vedanta* optimism. If robust forms of due diligence, including Environmental Management Systems (EMSs), continue to exist on a largely voluntary and unexacting basis, then corporations may simply retreat from implementing and reporting comprehensively on group-wide systems of management and control.

Before discussing these implications, it is first necessary to explain the Court's ruling on the four issues placed before it: (i) abuse of EU law, (ii) real triable issue, (iii) proper place and (iv) substantial justice.

THE SUPREME COURT'S DECISION

(i) Abuse of EU Law

Jurisdiction, according to EU law applicable in this case, depends on whether the defendant is domiciled in an EU Member State.[20] Article 4 of the Brussels Regulation provides that 'persons domiciled in a member state shall … be sued in the courts of that member state', irrespective of the claimant's own domicile.[21] For defendants outside of the EU, jurisdiction is largely determined by residual English rules on serving claims.[22] These two regimes meet in the 'necessary or proper party' gateway for serving claims outside of jurisdiction under the Civil Procedure Rules.[23] This gateway allows jurisdiction of a 'foreign defendant' (in this case, KCM) to *piggyback* on the jurisdiction of a UK-domiciled 'anchor defendant' (Vedanta), provided the foreign defendant is a 'necessary or proper party' to the claim against the anchor.

Courts used to be able to decline jurisdiction over a foreign defendant pursuant to English rules regarding the 'appropriate forum' (discussed further, below), but since *Owusu v Jackson*, they cannot decline jurisdiction over an anchor defendant domiciled in an EU Member State. A court thus has 'one hand tied behind its back'[24] when faced with the risk that irreconcilable judgments

[19] Margherita Cornaglia, 'Vedanta Resources Plc v Lungowe [2019] UKSC 20' (2019) 3 European Human Rights Law Review 309, 309 and 315.
[20] Brussels Regulation, Arts 4-6.
[21] *Owusu v Jackson* (Case C-281/02) [2005] QB 801.
[22] Brussels Regulation, Art 6.
[23] William Day, 'Piggyback Jurisdiction and the Corporate Veil' (2019) 135 Law Quarterly Review 551.
[24] *Vedanta* (n 7) para 39.

may be delivered if parallel claims proceed against both defendants, albeit in different jurisdictions (for example, as against KCM in Zambia, and Vedanta in England). As a result, English jurisdiction over *both* defendants has almost invariably been granted.[25]

To block this forgone conclusion, the defendants argued that piggybacking jurisdiction over KCM onto the English jurisdiction granted over Vedanta under the Brussels Regulation, amounted to an 'abuse of EU law', the sole purpose being to have English courts assume jurisdiction over the 'real target' defendant, KCM.[26] The Supreme Court rejected this argument. Lord Briggs noted that the threshold for abuse is very high, that there was a genuine purpose in obtaining damages against Vedanta (KCM might be insolvent),[27] and that the gist of the complaint was not an abuse of EU law, but the subsequent use of the 'necessary and proper party' gateway.[28]

(ii) Real triable issue

The second issue before the Court was whether the claim against Vedanta contained a real issue that it is reasonable for the court to try, as required by the 'necessary or property party' gateway to serving KCM outside of its jurisdiction.[29] The appellants argued that finding a duty of care against Vedanta would 'involve a novel and controversial extension' of the boundaries of negligence, which further required a more detailed investigation than either the trial judge, or the Court of Appeal, had carried out.[30] It was common ground that the Zambian courts would identify the relevant principles of Zambian common law in accordance with those established in England,[31] and that the same enquiry was necessary for the breach of statutory duty claim.[32]

The Supreme Court rejected the appellant's arguments, holding that 'there is nothing special or conclusive about the bare parent/subsidiary relationship'.[33] Rather, a parent company duty may arise under ordinary principles of negligence, particularly those concerning duties to third parties under *Dorset Yacht Co Ltd v Home Office*.[34] The question to determine is 'whether A owes a duty of care to C in respect of the harmful activities of B'.[35] There is nothing novel in this analysis, as Lord Briggs rightly points out, nor does it create a separate category for parent

[25] ibid.
[26] ibid 18.
[27] ibid 24 & 27.
[28] ibid 40; Day (n 25).
[29] It was agreed that the claims against KCM had a realistic prospect of success: *Vedanta* (n 7) para 21.
[30] ibid 46.
[31] ibid 56.
[32] ibid 65.
[33] ibid 54.
[34] [1970] AC 1004; ibid.
[35] ibid.

companies.[36] No additional analysis, beyond the appropriate summary judgment at first instance, was therefore required.[37]

Whether Vedanta itself owed a direct duty of care would depend on whether it had intervened in, or controlled relevant activities of, KCM. As noted by Lord Briggs, this was a question of fact to be determined on a case-by-case basis, and it was 'blindingly obvious that the proof of that particular pudding' would depend on, as yet, undisclosed materials.[38] The single task for the trial judge was to determine summarily whether the claim against Vedanta could be rejected without a trial, but also, in the interests of proportionality, without conducting a 'mini-trial' within a procedural hearing about jurisdiction.[39]

Vedanta's own published materials, reporting on the implementation of its group-wide policies on environmental management, formed the basis of the judge's conclusion that there was an arguable case against Vedanta.[40] The Supreme Court agreed, noting in particular a report, 'Embedding Sustainability', which stressed how oversight of Vedanta's subsidiaries rested with the board of Vedanta.[41] Central to Lord Briggs' reasoning was how Vedanta, through this report, had '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 had 'not merely … laid down but also implemented those standards by training, monitoring and enforcement.'[42] It would also appear that a duty of care to relevant third parties may arise if a parent company 'holds itself out' as exercising such control over its subsidiaries 'even if it does not in fact to do so', confirming that the duty of care covers acts, omissions, and representations.[43]

Given there was a real triable issue against Vedanta, KCM was a necessary and proper party to that claim in England. With an arguable case in negligence established, the statutory duty question fell away.[44]

(iii) Proper place

A Court can only give permission to serve a foreign defendant out of jurisdiction if England is

[36] ibid 60.
[37] ibid.
[38] ibid 44 and 57.
[39] ibid 42–43.
[40] ibid 58.
[41] ibid 61–62.
[42] ibid 61.
[43] ibid 53.
[44] ibid 65.

the 'proper place in which to bring the claim'. This third issue before the Court is the latest label for appropriate forum, or *forum conveniens*.[45] It requires a summary examination of connecting factors between the case and the relevant jurisdictions.[46] As explained above, where jurisdiction has been granted over an anchor defendant under the Brussels Regulation, then frequently, the risk of irreconcilable judgments was decisive in holding England as the proper place, even where other connecting factors favoured a foreign jurisdiction.[47] The first instance decision in *Vedanta* displays this fait accompli. Despite finding all the connecting factors pointed to Zambia, the trial judge found '[t]he alternative - two trials on opposite sides of the world on precisely the same facts and events - unthinkable.'[48]

The Supreme Court disagreed, overruling the trial judge's decision and prior rulings, to hold that avoiding irreconcilable judgments was not a decisive 'trump card', but just one factor to be considered.[49] Upon a fresh examination of connecting factors, the Court found that the proper place was 'overwhelmingly' Zambia.[50] A claim concerning alleged wrongful acts or omissions occurring primarily in Zambia, causing damage to claimants in Zambia, with a majority of Zambian witnesses, ought to be heard in Zambia.[51]

(iv) Substantial justice

However, on the fourth issue before the Court, Lord Briggs agreed with the trial judge's finding of a real risk that the claimants could not obtain 'substantial justice' in Zambia. The lack of legal aid and litigation funding in Zambia meant the claimants, living in extreme poverty, were reliant on CFAs, available in England, but unlawful in Zambia.[52] While funding difficulties will be determinative only in 'exceptional' cases,[53] the Court also found that there was not 'sufficiently substantial and suitably experienced' legal teams to enable group litigation of 'this size and complexity' in Zambia, particularly against an 'obdurate opponent' such as KCM.[54] The Supreme Court cited in support two Zambian cases which failed due to the inability of legal teams to fund expert evidence needed to prove causation and specific losses.[55] Dismissing the appeal means the

[45] ibid 66.
[46] ibid.
[47] ibid 70.
[48] ibid 71.
[49] ibid 84–5, 87.
[50] ibid 84–85.
[51] ibid 85.
[52] ibid 89–90.
[53] ibid 93.
[54] ibid 89.
[55] ibid 99–100; *Nyasulu v Konkola Copper Mines plc* [2015] ZMSC 33; *Shamilimo v Nitrogen Chemicals of Zambia Ltd* (2007/HP/0725).

matter against both defendants can now proceed to trial in England.

ANALYSIS AND IMPLICATIONS

Vedanta is clearly a steppingstone on the path to possible justice for these particular claimants. Whether it is now easier for future claimants to sue parent companies in England, for environmental and other infractions committed by foreign subsidiaries, is more difficult to assess. This is because the Court has placed some limits on jurisdiction. Furthermore, the conceptual incoherence of 'voluntary assumption of responsibility' reasoning may be unhelpful to claimants in the context of corporate groups; and the decision might lead to a retreat from comprehensive reporting and control if associated standards continue to exist on a voluntary basis.

(i) Jurisdiction war not over

The Supreme Court has clearly lost its patience with the sort of tactical challenges to jurisdiction mounted in *Vedanta*, litigated in contravention of Lord Templeman's assertion in *The Spiliada* that jurisdiction disputes should rarely go beyond first instance, with submissions 'measured in hours, not days'.[56] The Court's frustration was palpable in Lord Briggs' irritated rebuke to the defendants for 'ignoring' the well-known warnings regarding proportionality, as evidenced among other things by the submission of nearly 9,000 pages of documents.[57] 'The fact that it has been necessary, despite frequent judicial pronouncements of the same effect, yet again to emphasise the requirements of proportionality in relation to jurisdiction appeals' led Lord Briggs to threaten imposing condign costs to avoid the court 'banging its head against a brick wall.'[58]

This unsympathetic approach to jurisdiction battles leads some commentators to conclude that it may now be easier to sue UK-domiciled companies for the torts of their foreign subsidiaries.[59] However, it remains to be seen whether the bar for substantial justice under *Vedanta* has been placed insurmountably high. While the outcome was favourable to these claimants, Zambia is one the poorest countries in the world.[60] A similar finding concerning another, perhaps

[56] *Vedanta* (n 7) paras 6–14; *Spiliada Maritime Corpn v Cansulex Ltd* (1987) 460 AC 465.
[57] *Vedanta* (n 7) paras 10–11.
[58] ibid 14.
[59] Suzanne Chiodo, 'UK Supreme Court Rules That English Companies Can Be Sued for Actions of Foreign Subsidiaries in the Interests of "Substantial Justice": Vedanta Resources v Lungowe [2019] UKSC 20' (2019) 38 Civil Justice Quarterly 300.
[60] *Vedanta* (n 7) para 90.

more economically advantaged, jurisdiction is not inevitable. Furthermore, while Lord Briggs was at pains to avoid accusations of neo-colonialism by exporting Zambian justice to the UK, the decision 'had nothing to do with any lack of independence or competence' in Zambia's judiciary or any lack of a fair procedure.[61] But the corruption risks in Zambia are high,[62] and the Court itself recognised that the Zambian government holds a large minority stake in KCM.[63] At the same time, the literature is replete with accounts of how 'weak governance zones' allow UK-domiciled corporate groups to commit environmental and human rights violations 'with impunity'.[64] One might suggest this is part of the jurisdictional appeal, and precisely why a Zambian-incorporated subsidiary of a UK-domiciled parent even exists. In addition, given the risk of irreconcilable judgments is no longer a 'decisive' factor in determining proper place, *Vedanta* has in some ways reintroduced *forum non conveniens*. Rather than the doors to the courts of England being flung open, they have been left ajar, and battlegrounds may simply shift to determining the boundaries of substantial justice.

These doors may also be closed in the future. It is unclear whether a substitute for the Brussels Regulation will be negotiated following the UK's departure from the EU.[65] If a similar regime is not negotiated, then *forum non conveniens* will again exist for declining jurisdiction over anchor defendants in all cases.[66] It is worth noting the UK government's history of (hitherto, unsuccessfully) intervening in cases and proposing legislation to police the gates to English courts.[67] As such, the battle for these particular claimants may have been won, but the war concerning jurisdiction over parent companies and their foreign subsidiaries is not over.

(ii) Duty of care and assumption of responsibility: reasons for optimism and concern

The finding in *Vedanta* that a duty of care was arguable is clearly significant, but whether this makes a finding of a parent company duty of care more likely is unclear. The case certainly provides some optimism in the wake of recent Court of Appeal rulings against claimants in similar, though distinguishable, cases. *AAA v Unilever plc* concerned the liability of a parent company in respect of violence committed by third parties against workers and visitors of its subsidiary's tea plantation

[61] ibid 89; Andrew Sanger, 'Parent Company Duty of Care to Third Parties Harmed by Overseas Subsidiaries' (2019) 78 The Cambridge Law Journal 486, 488, arguing that granting English jurisdiction disempowers the states in which harm occurred.
[62] The Zambian High Court in *Nyasulu v KCM* [2011] ZMHC 86 noted that KCM had been 'shielded from criminal prosecution by political connections and financial influence, which put them beyond the pale of criminal justice'.
[63] *Vedanta* (n 7) para 2.
[64] Cornaglia (n 21) 315; McBarnet, Voiculescu and Campbell (n 2); Meeran (n 8).
[65] Day (n 25).
[66] ibid.
[67] Meeran (n 8) 381.

in the wake of Kenyan national elections.[68] *Okpabi and Others v Royal Dutch Shell plc and Another* concerned oil spills in the Niger Delta arising from the alleged negligence of a Shell subsidiary.[69] Both claims failed at the jurisdiction stage largely due to a lack of proximity between the parent and its foreign subsidiary. However, permission to appeal in *Okpabi* has been granted, so there will be more to come from the Supreme Court on this issue in due course.

There has been some suggestion that *Vedanta* has extended the parent company duty of care beyond previous findings, and maybe even beyond the reach of the corporate group.[70] While the Court of Appeal's decision in *Chandler v Cape plc* recognised a duty to employees of a parent's subsidiary in respect of asbestos exposure (i.e. personal injury), *Vedanta* involves a duty to neighbours and the local community affected by damage caused to the environment.[71] However, Lord Briggs saw little significant difference between the situation of employees and neighbours when viewed in the context of general tort law principles governing third parties.[72] Vedanta may thus confirm (rather than extend) the boundaries of parent company duties to broader corporate 'stakeholders'.[73] However, the fact that nothing of significance seems to turn on the parent/subsidiary relationship could stretch duties beyond the corporate group to contractual relationships within supply chains. This may be particularly significant given the challenge that outsourced global supply chains present for legal control.[74]

Finally, *Vedanta* potentially establishes a 'straight forward line of liability' where a parent company has *voluntarily* assumed responsibility in writing.[75] Conceptually, however, it is difficult to see how responsibility can be said to have been voluntarily assumed when the entire purpose of a corporate group is to limit this type of liability.[76] Indeed, the centrality of the assumption of responsibility analysis in the Court's reasoning may not be especially useful to claimants seeking to skirt the corporate veil. This is particularly the case if the immediate consequence of *Vedanta* is a retreat on the part of parent companies from group-wide disclosure and control of subsidiaries. Without information concerning the relationship between the parent and its subsidiary made

[68] *AAA v Unilever Plc* [2018] EWCA Civ 1532.
[69] *Okpabi v Royal Dutch Shell plc* [2018] EWCA Civ 191.
[70] Samantha Hopkins, 'Vedanta Resources Plc and Another v Lungowe and Others' (2019) 70 Northern Ireland Legal Quarterly 371; Sanger (n 63).
[71] Hopkins (n 72).
[72] *Vedanta* (n 7) para 52.
[73] Robert McCorquodale, 'Parent Companies Can Have a Duty of Care for Environmental and Human Rights Impacts: Vedanta v Lungowe' (*Cambridge Core Blog*, 11 April 2019) <https://www.cambridge.org/core/blog/2019/04/11/parent-companies-can-have-a-duty-of-care-for-environmental-and-human-rights-impacts-vedanta-v-lungowe/> accessed 8 November 2019; Hopkins (n 72).
[74] Sanger (n 63); Charlotte Villiers, 'Collective Responsibility and the Limits of Disclosure in Regulating Global Supply Chains' (2018) 23 Deakin Law Review 143.
[75] Hopkins (n 72).
[76] Day (n 25).

publicly available prior to formal pre-trial disclosure, claimants may struggle in making an arguable case at summary judgment on jurisdiction.

(iii) Tort as last resort: a retreat from control and the regulation of EMSs

Whether such a retreat from reporting and control is possible depends in part on the strength of voluntary CSR trends towards transparency, and residually, on the strength of relevant domestic obligations and international standards.[77] Given the significance of published materials to the Court's ruling on jurisdiction, it is true that CSR reporting can no longer be regarded as 'window dressing'.[78] However, what really gets Vedanta 'on the hook' is not reporting *per se*, but reporting on the implementation of a group-wide sustainability policy, including an ISO 14001 certified EMS.[79] EMSs are a procedural regulatory tool comprising a series of internal planning and operational processes which seek to ensure regulatory compliance, improve environmental performance, and embed environmental considerations within the decision-making of a company or corporate group.[80] Managers and employees are assigned responsibility for generating a system of environmental management which is periodically reviewed, revised, and audited in accordance with a 'plan-do-check-act' cycle of continuous improvement.[81] ISO 14001 is the most well-known EMS and is a *de facto* requirement for market entry in many industries.[82]

In many ways, EMSs mirror the due diligence required under the UN Guiding (or 'Ruggie') Principles (UNGP).[83] As was submitted to the Supreme Court by intervening NGOs, UNGP-due

[77] For an overview of weaknesses of the non-financial narrative reporting regime pursuant to the Companies Act 2006, see e.g. Olaojo Aiyegbayo and Charlotte Villiers, 'The Enhanced Business Review: Has It Made Corporate Governance More Effective?' (2011) 7 Journal of Business Law 699. For a more optimistic view on the impact of *Vedanta* on reporting, see Tara Van Ho, 'Vedanta Resources Plc and Another v. Lungowe and Others' (2020) 114 American Journal of International Law 110.

[78] Hopkins (n 72).

[79] *Vedanta* (n 7) para 61; Vedanta, 'Embedding Sustainability' (Vedanta Resources plc Sustainable Development Report) 39 <https://www.vedantaresources.com/SustainabilityDocs/Vedanta_SD_Report_2012_13.pdf.downloadasset.pdf> accessed 16 November 2019; Vedanta, 'Our Journey...towards a Sustainable Future' (Vedanta Resources plc Sustainable Development Report 2013) 30 <https://www.vedantaresources.com/SustainabilityDocs/vedanta-full-report.pdf.downloadasset.pdf> accessed 8 November 2019; Linda Scott Jakobsson, 'Copper with a Cost - Human Rights and Environmental Risks in the Mineral Supply Chains of ICT: A Case Study from Zambia' (SwedWatch Report #94 2019) 36.

[80] Cary Coglianese, 'The Managerial Turn in Environmental Policy' (2008) 17 NYU Environmental Law Journal 54, 55–56.

[81] ibid.

[82] Aseem Prakash and Matthew Potoski, *The Voluntary Environmentalists: Green Clubs, ISO 14001, and Voluntary Environmental Regulations* (Cambridge University Press 2006).

[83] United Nations Human Rights - Office of the High Commissioner, 'Guiding Principles on Business Practice and Human Rights' (UN 2011). See also renewed attempts to agree a legally binding iteration, under the 'Zero Draft' treaty: Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (revised draft 17.7.2019).

diligence constitutes steps that any responsible enterprise would take in complying with a duty of care to those at risk from the operations of parent companies and subsidiaries.[84] While these non-binding international standards did not feature in Lord Briggs' judgment, the particular attention paid by the Court to Vedanta's report 'Embedding Sustainability' shows the significance of management-based systems of control to establishing both a duty of care and, if those systems contain systematic errors, breach of that duty.[85]

The factual matrix of *Vedanta* might be seen as evidence of the failure of such tools of regulation, given the catastrophic environmental harm which ensued at the Nchanga Mine notwithstanding the presence of a management system. Alternatively, part of the failure might reside in the continued voluntary or 'soft law' status of such instruments. The robustness of ISO 14001 certification has been questioned, particularly by comparisons to the EU's Eco-Management and Audit Scheme (EMAS),[86] which incorporates the ISO 14001 standard but includes more exacting auditing and verification requirements.[87] At the same time, there is some evidence to suggest that when EMSs are taken seriously, the iterative processes they require provide greater salience to environmental issues within routine day-to-day and board level decision-making,[88] and can lead to the prevention of environmental harm and improved environmental performance.[89]

Vedanta can in many ways therefore be understood as plugging a gap in a jurisdictional and regulatory vacuum. But tort law, for reasons well-rehearsed in the literature, is often the forum of last resort for environmental protection, not least because there is no guarantee that damages paid to claimants will be applied to environmental remediation.[90] A better approach might be to place robust management systems and other forms of due diligence on a statutory footing, with these obligations enforced by a well-resourced and independent public agency, not by private (and in this case, desperately poor) citizens, seeking a remedy through tort law which will likely be of only incidental benefit to the environment, if any. Indeed, EMSs properly regulated, perhaps within

[84] McCorquodale (n 75).
[85] *Vedanta* (n 7) para 94; Day (n 25).
[86] Regulation EC 1221/2009 on the voluntary participation by organisations in a Community eco-management and audit scheme.
[87] Carrie Bradshaw, *Corporations, Responsibility and the Environment* (Hart Publishing forthcoming); see also Carrie Bradshaw, 'Corporations, Responsibility and the Environment' (University College London 2013) ch 7 <http://discovery.ucl.ac.uk/1414312/>.
[88] Oren Perez, Yair Amichai-Hamburger and Tammy Shterental, 'The Dynamic of Corporate Self-Regulation: ISO 14001, Environmental Commitment, and Organizational Citizenship Behavior' (2009) 43 Law & Society Review 593.
[89] Prakash and Potoski (n 84); Artitzar Erauskin-Tolosa and others, 'ISO 14001, EMAS and Environmental Performance: A Meta-Analysis' [2019] Business Strategy and the Environment Online Version of Record before inclusion in an issue (Early View).
[90] This is not a criticism of claimants who chose not to do so, but simply part of the environmental limitations of tort law. On this see e.g. Liz Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases & Materials* (2nd edn, Oxford University Press 2019) ch 3; Jane Rooney, 'Case Review: Extraterritorial Corporate Liability for Environmental Harm: Okpabi v Royal Dutch Shell' (2019) 70 Northern Ireland Legal Quarterly 157.

directors' duties pursuant to company law, coupled with the threat of extraterritorial responsibility, would provide a meaningful environmental procedure within corporate decision-making,[91] and allow company law to play a more preventative role in environmental protection.[92]

It remains to be seen whether voluntary CSR transparency trends will be strong enough to discourage parent companies from rolling back disclosure of exacting, group-wide systems of environmental management in light of an increased threat of litigation (or if renewed attempts to mandate such disclosure at the international level come to fruition).[93] In the meantime, there is a risk that *Vedanta* may trigger such a corporate retreat, if not from disclosure altogether, from publically outlining a robust, company-wide management system.

CONCLUSION

In holding England as the proper place in which to bring a claim against *both* a UK-domiciled company and its Zambian subsidiary, for environmental damage abroad, the Supreme Court has granted a small victory to these particular claimants. However, the doors to English courts have not been flung open. Brexit presents the UK government with an opportunity it has long coveted to close these doors altogether, and in the meantime, jurisdictional battlegrounds may shift to whether claimants can achieve substantial justice in their own jurisdiction. Furthermore, the 'voluntary assumption of responsibility' reasoning may be unhelpful to claimants in the context of corporate groups, while potentially provoking a retreat from comprehensive, but voluntary, reporting and control. While *Vedanta* might optimistically be understood as (temporarily?) plugging jurisdictional and regulatory gaps, tort law is often the forum of last resort for environmental protection, and the environmental opportunities remain limited.

[91] On the limitations of the relevance of the environment within company law mandated decision making, see Bradshaw, 'The Environmental Business Case' (n 5).
[92] Bradshaw, 'Corporations, Responsibility and the Environment' (n 89) ch 7; Colin Mackie, 'The Regulatory Potential of Financial Security to Reduce Environmental Risk' (2014) 26 Journal of Environmental Law 189.
[93] Zero Draft Treaty (2019).