

Parent Company Liability for the Actions of Foreign Subsidiaries

The English Courts have issued a series of significant decisions in recent years addressing the issue of parent company liability. These developments have important implications for those looking to bring or defend claims in the jurisdiction, as well as corporates considering issues around liability.

This note sets out the factors the English Courts will look at in deciding questions of liability of a parent company.

Supreme Court Guidance on Parent Company Liability

As set out further below, the UK Supreme Court's landmark decision in *Lungowe v Vedanta Resources PLC* ("**Vedanta**") provided guidance on the factors the English Courts may take into consideration when determining whether the parent company owed a duty of care to those affected by the actions of a subsidiary.

1. **Do the parent and subsidiary carry on similar business?** Where the parent company is involved in similar business to that of its subsidiary, that may strengthen the suggestion that the parent owed a duty of care.
2. **What is the extent (if any) of the parent company's knowledge of the subsidiary's actions?** Knowledge is not a necessary factor but one of many factors the Court may look at. Where board members are shared between a parent and a subsidiary, it may be easier to establish that the parent company (through its board) knew of the subsidiary's actions.
3. **Extent to which, and the way in which, the parent company takes over, intervenes in, controls, supervises, or advises on the relevant operations of the subsidiary.** In the *Shell* decision, the Supreme Court stressed that the courts should not focus inappropriately on the issue of "control" but rather, as stressed in *Vedanta*, the issue is the extent to which the parent did take over or share with the subsidiary the management of the relevant activity. That may or may not be demonstrated by the parent controlling the subsidiary. As above, having shared board members could strengthen an argument that the parent has taken over or supervised the relevant operations of the affiliate.
4. **Has the parent company laid down group-wide policies and guidelines, and expected the management of each subsidiary to comply with them.** In *Vedanta*, the Supreme Court provided an example of a situation where the fact the parent company has done so may be sufficient to

establish a duty of care: where 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.

5. **Has the parent company taken steps to implement group-wide policies?** If the parent company takes active steps, by training, supervision and enforcement, to see that the group-wide policies are implemented by relevant subsidiaries, this could strengthen the argument that a duty of care is owed.
6. **To what extent has the parent, in published materials, held itself out as exercising that degree of supervision and control of its subsidiaries?** Even where the parent company does not in fact do so, the Supreme Court in *Vedanta* found that "its very omission may constitute the abdication of a responsibility which it has publicly undertaken."

Most of these factors are based on the supervisory role of parent companies in relation to their subsidiaries, however, each of those are still greatly dependent on how each specific company's managerial structure, projects interferences, meetings scope, and precise relation with other companies of their group are or were organised.

Overview of Key Cases

Lungowe v Vedanta Resources PLC [2019] UKSC 20

On 10 April 2019, the UK Supreme Court handed down its Judgment in Vedanta. The question before the Supreme Court was whether Vedanta could be held liable for alleged environmental damage in Zambia stemming from a copper mine run by Vedanta's subsidiary Konkola Copper Mines PLC ("KCM").

The claimants, Zambian villagers allegedly impacted by the pollution, sought to bring claims for common law negligence and breach of statutory duty against Vedanta and KCM. Vedanta argued, amongst other things, that it did not owe a duty of care to the claimants.

The Supreme Court held that the case could be brought against Vedanta in the English Courts because, as the parent company of KCM, there was a good arguable case that Vedanta owed a duty of care to the villagers. The Supreme Court found:

"There is no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-à-vis persons affected by those activities. Parent and subsidiary are separate legal persons, each with responsibility for their own separate activities.

"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".

The Supreme Court gave useful guidance as to the factors that the Court may take into consideration when considering whether a duty of care was owed by a parent company to those impacted by the actions of a subsidiary (see previous page).

Following the Supreme Court's ruling, the Vedanta claim was settled outside of court for an undisclosed amount and without an admission of liability.

Okpabi & Others v Royal Dutch Shell PLC & Another [2021] UKSC 3

On 12 February 2021, the UK Supreme Court gave judgment in the latest case raising the question of whether the claimants have an arguable case that a UK domiciled parent company owed them a common law duty of care so as properly to found jurisdiction against a foreign subsidiary company as a necessary and proper party to the proceedings.

The claims were brought by a group of more than 40,000 citizens of the Ogale and Bille communities in the Niger Delta who allege they suffered loss stemming from the operation of oil pipelines and associated infrastructure. The claimants argued that the damage was caused by the negligence of the pipeline operator, a Nigerian subsidiary of UK domiciled company Royal Dutch Shell.

The Supreme Court found that the lower courts had undertaken far too much analysis on the merits of the claim at the jurisdiction stage and that they had conducted a "mini-trial" that should not be permitted. All that was required was for the Court to look at the pleaded allegations and determine whether those allegations supported the cause of action.

Given the Supreme Court's decision in Vedanta that parent companies could owe a duty of care to a persons impacted by actions of their subsidiaries, the allegations were sufficient to establish that there was an arguable case against the parent company.

Parent Company Documents

Parent companies' documents can be considered to be in the "control" of subsidiaries for the purposes of giving disclosure in English Court proceedings.

On 16 April 2021, the High Court ruled in *Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd* [2021] EWHC 849 (Ch) that documents held by the claimants' parent companies, and individuals connected with those entities, were within the claimants' "control" for the purposes of their disclosure obligations in the litigation.

Mr Robin Vos (sitting as a judge of the Chancery Division) recognised that the starting point is that a party will not normally have control over documents held by a third party unless it has a legal right to access those documents. This is the case even if there is a close relationship between the persons in question.

The Judgment referred back to the House of Lords decision of *Lonrho v Shell* [1980] 1 WLR 627 that a parent company does not automatically have control of the documents held by a subsidiary. Similarly, a subsidiary does not automatically have control of the documents held by its parent.

Where there is no automatic legal right, the question of whether a specific parent or subsidiary has control over documents held by the other is a question of fact. The following points can be made in determining whether documents held by one person are under the control of another where there is no legally enforceable right to access the documents:

1. The relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship;
2. There must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched;
3. The arrangement may be general in that it applies to all documents held by the third party or it could be limited to a particular class or category of documents. A limitation such as an ability to withhold confidential or commercially sensitive documents will not prevent the existence of such an arrangement;
4. The existence of the arrangement or understanding may be inferred from the surrounding circumstances. Evidence of past access to documents in the same proceedings is a highly relevant factor;
5. It is not necessary that there should be an understanding as to how the documents will be accessed. It is enough that there is an understanding that access will be permitted and that the third party will co-operate in providing the relevant documents or copies of them or access to them;
6. The arrangement or understanding must not be limited to a specific request but should be more general in its nature.

Key Lessons

1. Claims against parent companies for the activities of overseas subsidiaries are likely to continue to increase. Following *Vedanta*, it is established that a parent company is capable of owing a duty of care to those impacted by the actions of subsidiaries.
2. The English Courts have made clear that jurisdiction challenges should not be a "mini-trial" of the case. The Supreme Court's decision in *Shell* makes very clear that the Courts should not tolerate the vast cost associated with such a "mini-trial" of the issues. The analysis of the Court should be limited to whether the pleaded allegations are sufficient to give rise to a cause of action. The Court should not consider the detailed evidence unless the allegation is demonstrably untrue or unsupported. This is likely to result in more cases being commenced as it should be seen as easier and cheaper to do so.
3. Companies within the same group should think twice before giving access to each other's documents where one is involved in legal proceedings before the English Courts. There is a risk that the Court will infer the existence of a "control" relationship for the purposes of disclosure where a parent has previously given access to the subsidiary to its documents.

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