The law catches up:

Vedanta and parent company liability in the UK

Cherie Blair CBE, QC and Gabrielle Holly of Omnia Strategy LLP write about acting pro bono for the International Commission of Jurists and the CORE Coalition as interveners in a high profile UK Supreme Court appeal concerning the liability of a parent company for environmental damage caused by a foreign subsidiary.

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In the UK, there have been a number of recent cases which have attempted to bring some of the world's biggest companies before the courts to answer for the actions of their foreign subsidiaries.

One of the most high profile of these was brought against Vedanta Resources Plc and KCM Plc, its Zambian subsidiary, by a group of 1826 Zambian villagers who claim to have suffered as a result of toxic discharges from one of the world's largest copper mines. They allege that Vedanta, the UK parent company, owed a duty of care to them because it exercised control over KCM's operations in Zambia.

Foil Vedanta protest © Foil Vedanta

In September 2018 our firm, Omnia Strategy LLP, was approached by two prominent NGOs, the International Commission of Jurists ("ICJ") and the CORE Coalition, to assist them to intervene in the UK Supreme Court appeal of *Vedanta Resources PLC and anor v Lungowe v and ors* [2019] UKSC 20. The appeal would decide whether the case would be allowed to continue in the UK courts. The ICJ and the CORE Coalition wished to make submissions to the court in support of the claim proceeding, and for the existence of a duty of care owed by Vedanta to the villagers.

The global reach of transnational corporations brings tremendous potential for companies to impact on the rights of those it interacts with, whether those it employs, the communities in which it operates or those working in its supply chain. These impacts can be positive, but they can also result in violation of human rights and harm to the environment.

Seeking remedy for such harms is difficult where a business is part of a complex corporate group operating in multiple jurisdictions. The law has been slow to catch up with the realities of transnational business and the complexity of multinational enterprises. However, this may well be changing.

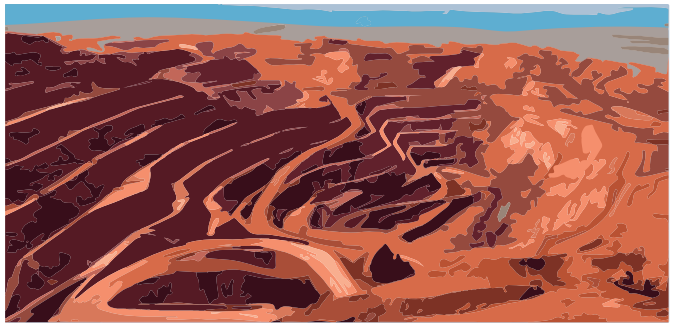
The Intervention

We wanted to take the matter on pro bono as we felt that the ICJ and the CORE Coalition had a valuable contribution to make by drawing the court's attention to global developments in business and human rights and the environment, including comparative case law and standards set out in relevant international frameworks. Among other things, the interveners' submission referred to the UN Guiding Principles on Business and Human Rights, the UN Global Compact, the OECD Guidelines for Multinational Enterprises, and commentary from the UN Committee on Economic, Social and Cultural Rights, arguing that:

- these standards do not confine the responsibilities of a parent company to the actions of its own direct employees, rather, they set out standards of conduct for enterprises and corporate groups;
- the international standards indicate that a reasonable enterprise will take steps to conduct due diligence to prevent and mitigate adverse human rights impacts and appropriately remediate those which do occur; and
- the recognition of a direct duty of care of a parent company for acts done by a subsidiary under UK tort law is consistent with international law standards found in treaties to which the UK is a party.

While the case law is still developing, the direction of travel marked out by these international frameworks trends toward recognition of corporate responsibility for their global operations and supply chains and the gradual hardening of the penalties for falling short.

The trend in the case law mirrors a trend in the legislatures of a number of states, where the transnational obligations of companies are firmly on the agenda. France has recently introduced a duty of vigilance law that imposes mandatory due diligence obligations on French companies at home and abroad and the Netherlands has recently introduced a mandatory human rights due diligence obligation in relation to child labour. Similar measures are contemplated in Switzerland, Germany, Finland, Norway, Sweden and the UK. A binding international treaty designed to regulate transnational corporations is also under negotiation.



Open pit mining in Zambia

The *Vedanta* appeal

The decision in the *Vedanta* appeal was handed down on 10 April 2019. In the decision, the Supreme Court held that case could proceed in the UK courts, and made some observations about the nature of the duty of care that may be owed by a parent company.

Rather than a distinct category of liability in tort law, the court found that the parent-subsidiary relationship provides an opportunity for a parent to exercise a degree of control sufficient to give rise to a duty of care. The Supreme Court considered a number of examples in which a parent could owe such a duty:

- where it has set down group guidelines which contain systemic errors that cause harm to third parties;
- where it has taken active steps to implement guidelines in the operations of its subsidiary; and
- where it has represented that it has a relevant degree of supervision and control (even where it does not in fact).

It is arguable that these findings may have a chilling effect on companies' willingness to set or implement policies centrally, or report that they have done so, for fear of exposing themselves to liability. However, the circumstances in which a parent may owe a duty for the acts of a subsidiary are not limited to these examples. Creating distance between a parent company and the activities of other entities within a corporate group is by no means a guaranteed shield against liability.

With the spectre of legal liability and potential for legislative reforms, leading UK companies are having to rethink how they identify and manage their human rights and environmental risks. The *Vedanta* case has impact not only on the development of the law in the UK, but also on the case law of other common law jurisdictions, including Australia. It also provides a powerful impetus for states to regulate the extraterritorial activities of business, whether through mandatory human rights due diligence obligations, or other means.

We were delighted to have been able to assist the ICJ and the CORE Coalition to make such a valuable contribution to the development of the law in this area.

Omnia acted alongside a stellar counsel team led by Tim Otty QC, which included Robert McCorquodale, Tim Johnson and George Molyneaux, who each acted pro bono. ■

***Cherie Blair CBE, QC**, is a leading international lawyer, arbitrator and mediator, a former judge and a committed campaigner for women's rights. She is a Queen's Counsel and the wife of former British Prime Minister Tony Blair. Cherie is the Founder and Chair of Omnia Strategy LLP, a boutique international law firm focusing on dispute resolution and business and human rights. She is also the Founder of the Cherie Blair Foundation for Women, Chancellor of the Asian University for Women, Chancellor Emeritus of the Liverpool John Moores University, President of the Loomba Foundation, Honorary Vice President of Barnardo's and Patron of Scope, as well as a number of other charities. Cherie was awarded a CBE in 2013 for services to women's issues and to charity in the UK and overseas.*

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