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UK Companies Responsible for Business and Human Rights Violations Overseas

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Employment + Labor and Litigation

Client Alert

English courts have been busy passing judgment on UK companies that have allegedly violated business and human rights (BHR) obligations overseas. UK businesses (or large corporations with a presence in the UK) with operations in other jurisdictions should see this as a significant risk and consider whether now is a good time to review their international BHR implementation. In addition to any reputational harm, defending allegations of overseas BHR violations can be costly: some ongoing cases refer to claims worth billions of pounds in damages, in addition to all further costs associated with defending legal claims that can linger for a number of years.

The *Vedanta* Case

On 10 April 2019, the UK Supreme Court gave judgment in *Vedanta Resources PLC and another v. Lungowe and others* [2019] UKSC. The Supreme Court found that a claim for negligence and breach of statutory duty against a Zambian mining company *and its English parent company*, regarding its operations in Africa, could be heard before the English courts. Almost 2,000 villagers from the Chingola District of Zambia, where Konkola Copper Mines plc (KCM) operated the Nchanga copper mine, had brought a claim before the English courts against both the Zambian subsidiary, KCM, and its English parent company, Vedanta Resources plc. The villagers alleged that their health and farming activities had been damaged by toxic water pollution caused by KCM's mine.

The question before the Supreme Court was whether Vedanta Resources plc had assumed a duty of care in relation to the operation of KCM's mine. The Supreme Court clarified that such duty of care "depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary". [1] Referring to published materials, the Supreme Court concluded that it "may fairly be said [that Vedanta Resources plc has] 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

Contacts

Gareth Rees QC
+44 (0)20 7920 4103
grees@mofo.com

Annabel Gillham
+44 (0)20 7920 4147
agillham@mofo.com

Pietro Grassi
+44 (0)20 7920 4070
pgrassi@mofo.com

Rayhaan Vankalwala
+44 (0)20 7920 4081
rvankalwala@mofo.com

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice

operations at [KCM's mine]". [2] Accordingly, the Supreme Court held that it was at least arguable that a duty of care was owed.

Vedanta is relevant for two main reasons. First, the UK Supreme Court confirmed the *potential* liability of a parent company in relation to the activities of its subsidiaries. Second, the judgment clarified that where there are serious obstacles to claimants obtaining justice in their domestic jurisdictions, their claims against the foreign subsidiary may be heard before the English courts. The villagers now await for a trial of the merits before the English courts.

The *African Minerals* Case

Interestingly, the Court of Appeal in *Kadie Kalma & ors v. African Minerals Ltd & ors* [2020] EWCA Civ 144 held that UK AIM-listed company African Minerals Ltd was not liable for unlawful acts of the Sierra Leonean police. More than 100 individuals alleged that they had been beaten, robbed, shot at, and sexually assaulted by the Sierra Leonean Police during outbreaks of unrest and violence connected to African Minerals Ltd's iron ore mine in Tonkolili, a remote and inaccessible district in the north of Sierra Leone.

Whilst the Court of Appeal accepted jurisdiction, it decided against the attribution of police misconduct to African Minerals Ltd. The Court of Appeal found that it would not be "fair, just or reasonable to impose the alleged duty of care" as "the respondents' employees were not involved in the unlawful acts and did not encourage or incite those unlawful acts. The assistance they provided was reasonable and proportionate in all the circumstances and did not cause the alleged or any loss". [3] It is interesting to compare the underlying facts in *African Minerals* with the facts in *Vedanta.* Whilst the alleged BHR violations had been caused by a subsidiary company in *Vedanta,* the actions that prompted a claim in *African Minerals* had been perpetrated by the Sierra Leonean Police and not directly by the subsidiary of the UK company in question. The UK Supreme Court may, nevertheless, give leave to hear an appeal lodged in May 2020 by two UK-based NGOs, which have requested the Supreme Court to reverse the Court of Appeal's judgment in *African Minerals* and find the UK company owed a duty of care.

The Court of Appeal decision may be read as an important delimitation of the circumstances in which English companies can be held liable for harm caused by third parties, but by no means should it be interpreted as a relaxation of the principles established in *Vedanta*. Despite the fact that the alleged human rights violation

based on particular situations. Prior results do not guarantee a similar outcome.

had taken place in Sierra Leone, the English court accepted jurisdiction over the case because the third respondent, Tonkolili Iron Ore Ltd, had previously been a subsidiary of African Minerals Ltd, and *had its head office in the United Kingdom at the time*. This should be enough to encourage UK companies to carefully consider whether they owe a duty of care in their operations overseas and, where needed, redress BHR violations to avoid a potential lawsuit in the English courts.

The Case Against BHP Billiton

In addition to *Vedanta* and *African Minerals*, there is another case before the English courts involving alleged BHR violations and environmental harm, which has received global attention. On 5 November 2015, the *Fundão* dam collapsed in Minas Gerais, Brazil, unleashing approximately 60 million cubic metres of toxic waste, and killing 19 people. Known as the *Samarco* disaster, this has triggered one of the biggest legal claims ever filed in an English court.

A class action has been filed in the High Court in Liverpool against BHP Group plc (formerly BHP Billiton), an Anglo-Australian mining company *listed on the London Stock Exchange*, on behalf of over 200,000 individuals, 25 municipal governments, 700 businesses, a Catholic archdiocese, and members of the Krenak indigenous community. The claimants are requesting £3.8 billion in damages. An application has been made by some of the defendants for a stay of the proceedings on jurisdictional grounds, which is due to be heard in July 2020 (the date for the hearing having recently been extended in light of challenges posed by the COVID-19 crisis). [4]

International Trend

Despite the English courts' willingness to hear claims issued for BHR violations taking place outside the UK, many alleged human rights victims struggle to have their day in court. Enforcing BHR obligations outside the countries where the violation occurred has proved difficult as foreign courts may be unwilling or unable to prosecute. And where the victims have found a court willing to hear their claims, there is the extra hurdle of attributing the violation to the company, which is not always overcome (see, for example, the *African Minerals* case above).

To counter this type of issue, The Hague Rules on Business and Human Rights Arbitration (the Hague Rules) were adopted in December 2019 to promote international arbitration as an available forum for BHR disputes. Under the United Nations (UN) Guiding Principles on Business and Human Rights (the UN Guiding

Principles), victims of human rights abuses must have access to an effective remedy. BHR arbitration clauses can be included in supply chain contracts and would, in theory, enable originating businesses to arbitrate against any BHR-breaching supplier that is part of the supply chain. This could potentially offer a remedy to the originating business against the supplier in the event of BHR violations perpetrated by the latter. BHR arbitration offers some additional advantages: (i) neutral and impartial proceedings; (ii) provisions as to third-party participation, e.g., businesses, individuals, labour unions, and states; (iii) the possibility of choosing subject-matter experts as adjudicators; (iv) binding international arbitral awards; and (v) a broader scope for remedies.

In the same vein and taking into consideration the additional hurdles posed by COVID-19, in April 2020, the UN Working Group on Business and Human Rights (the UN Working Group) issued a statement reminding companies of their duties to conduct BHR due diligence. As the crisis puts significant strain on numerous businesses across sectors, "human rights due diligence is key to ensuring that any risks to people are identified and mitigated", including taking preventive measures to ensure the health and safety of workers. According to the UN Guiding Principles, the responsibility of businesses extends beyond their own activities, i.e., it extends to assessing the impact on workers in their supply chain. For instance, by "taking action to pay workers in sub-contracted companies, or avoiding automatically triggering *force majeure* clauses to cancel payments and orders which would hurt struggling suppliers." This responsibility "also applies to tech companies developing applications to monitor the spread of the virus, who need to address the human rights risks of intrusive data collection and surveillance", and to the financial sector, which "will need to address the impact of rigidly enforcing loan or consumer obligations".

Businesses should also consider compliance with International Labour Organisation (ILO) Standards (legally binding international treaties that apply to ratifying states), which cover, among other things: equal opportunity and treatment, forced labour, child labour, occupational safety and health, and wages. The ILO notes in its report on "Decent work in global supply chains", that it is common for lead businesses to take active measures in agreements with suppliers to coordinate and control standards (especially in certain sectors, like food and supermarkets), requiring in particular that producers or suppliers down the supply chain comply with specific codes of conduct. The ILO points in particular to the payment of a specific minimum wage, noting that "some brands and retailers have included 'living wages' or 'fair wages' in their codes of conduct". Alternatively, businesses could include these

requirements as separate contractual terms to ensure that suppliers comply with these obligations.

Conclusion

Every company in any business sector has a potential impact on a range of human rights issues, including discrimination, poverty, and health and safety. For decades, there has been a call for companies to assume corporate responsibility to respect human rights. The number of reported human rights abuses actually reported is small, but it may become more common place as knowledge of this remedy becomes more widely understood.

UK companies need to be particularly aware of their human rights obligations, as English courts appear ready to find corporate entities potentially liable for human rights violations committed overseas. UK companies should take steps to avoid and, to the extent necessary, mitigate BHR violations in their operations overseas. The UN Guiding Principles recommend that companies should conduct human rights due diligence in their corporate structure and supply chain, and be prepared to redress any human rights abuse.

By taking steps anchored in the UN Guiding Principles to effectively deter the perpetrators of abuse, and compensate victims, whenever a BHR violation takes place, UK businesses have an opportunity to stem the filing of class-actions before English courts and advance their reputation through corporate responsibility.

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[1] *Vedanta Resources PLC and another v. Lungowe and others* [2019] UKSC, para. 49.

[2] *Vedanta Resources PLC and another v. Lungowe and others* [2019] UKSC, para. 61.

[3] *Kadie Kalma & ors v. African Minerals Ltd & ors* [2020] EWCA Civ 144, para. 146.

[4] *Municipio de Mariana & others v. BHP Group plc (formerly BHP Billiton)* [2020] EWHC 928 (TCC).

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