

International Corporate Liability: The Past, Present, and Future of ‘Class Action Tourism’ in England

Patrick Kenny*

ABSTRACT

Class action tourism refers to claims which are brought by a large number of claimants against parent companies in jurisdictions that are perceived to be claimant-friendly, and which are based on alleged wrongdoing by those companies’ subsidiaries elsewhere. Such claims, commonly arising under tort, environmental, or human rights law, have become increasingly prominent in recent years. This article explains the background to this trend before discussing two important matters in detail: parental liability and issues of jurisdiction. By analysing these two issues, it seeks to explain both the recent prominence of these claims and their prospects in coming years. In particular, it argues that political and legislative developments are likely to be crucial to the future of class action tourism. On the one hand, more stringent requirements upon corporations with regard to human rights and sustainability, combined with recent judgments, suggest that the courts may be increasingly willing to rule in favour of the claimants on the issue of parental liability. On the other hand, the EU legal regime aided the development of these cases and, post-Brexit, English courts have greater flexibility to decline jurisdiction over them. As a result of these developments, more cases may be struck out or stayed for jurisdictional reasons, but those that survive any jurisdictional challenge are less likely to be struck out on the ground that they cannot demonstrate potential parental liability and may be more likely to achieve ultimate success at trial or via settlement.

*LLM (BPP) ‘23. BA (Oxon) Arabic and Islamic Studies ‘18. Solicitor specialising in environmental and public law. Views are my own.

INTRODUCTION

Class action tourism has become increasingly prominent over recent years, both in English courts and abroad.¹ Such cases often involve claims for substantial damages, a very large number of claimants, and extensive media coverage.² Recent judgments exemplifying such claims have been discussed in the national and legal press: *Okpabi v Royal Dutch Shell Plc*,³ *Município De Mariana v BHP Group (UK) Ltd*,⁴ and *Vedanta Resources Plc v Lungowe*.⁵ These, and others, are examined below.⁶ An archetypal case would involve a subsidiary in the energy or mining sector allegedly allowing pollution or poor working conditions that harm local people in the Global South; all of *Okpabi*, *Município De Mariana*, and *Vedanta* fit this model. A claim is brought elsewhere, often in Europe, the USA, or Australia, against a parent company incorporated there (in addition to the immediate subsidiary) on the basis that the parent company is liable.

¹ For ease, I use ‘England’ and ‘English’ when the jurisdiction or court is that of England and Wales.

² The claim against BHP Group (UK) Ltd, discussed in more detail below, for example, involved over 200,000 claimants, a claim for billions of Brazilian reais in damages, and was reported in media sources including the Financial Times, Bloomberg, and Reuters; see *Município De Mariana v BHP Group (UK) Ltd* [2022] EWCA Civ 951, [2022] 7 WLUK 75 [2] and [14] and Jane Croft, Neil Hume and Michael Pooler, ‘BHP will face £5bn High Court lawsuit over Brazilian dam disaster’ (2022) Financial Times <<https://www.ft.com/content/75ffb4eb-195f-460c-b2b0-dfeca3b60ab9>> accessed 14 September 2022, Jonathan Browning and Katharine Gemmill, ‘BHP Set to Face \$7 Billion UK Suit Over Deadly Dam Collapse’ (2022) Bloomberg UK <<https://www.bloomberg.com/news/articles/2022-07-08/bhp-set-to-face-7-billion-london-suit-over-deadly-dam-collapse?leadSource=uverify%20wall>> accessed 14 September 2022, and Kirstin Ridley, ‘London judges reverse course to reopen \$7 bln Brazil dam lawsuit against BHP’ (Reuters, 2021) <<https://www.reuters.com/business/energy/london-judges-re-open-69-blm-brazil-dam-lawsuit-against-bhp-2021-07-27/>> accessed 14 September 2022.

³ *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3, [2021] 1 WLR 1294.

⁴ *Município De Mariana v BHP Group (UK) Ltd* [2022] EWCA Civ 951, [2022] 7 WLUK 75.

⁵ *Vedanta Resources Plc v Lungowe* [2019] UKSC 20, [2020] AC 1045.

⁶ For such an important field, there may appear to be relatively few actual judgments or trials; this is in part because many cases are settled, such settlement being a result of the various factors and interlocutory decisions detailed in this article.

Various requirements have to be satisfied for class action tourism claims to be brought successfully in England. It is trends or developments concerning these factors that have resulted in the current prominence of this form of litigation, and that are likely to influence its future. These requirements, inherent in this sort of claim, demonstrated by the cases that have been brought and which are detailed in this article, are: (1) a corporate structure involving English-domiciled parent companies with subsidiaries abroad; (2) wrongdoing committed by a subsidiary; (3) losses resulting from that wrongdoing;⁷ (4) a relevant cause of action under foreign or English law; (5) a claim brought against the parent and subsidiary in England is more attractive and viable than bringing the claim elsewhere (because, for instance, the English courts and judiciary are held in high regard, English lawyers are increasingly experienced with these sorts of claim, better funding mechanisms may be available in England, and greater media coverage in England can assist in achieving settlement);⁸ (6) English courts have jurisdiction to hear such cases; and (7) English courts are willing to find the parent companies liable. The requirements for this last condition may vary but often involve the usual tort elements including loss and causation. A particularly important issue here involves the need for a sufficient link between the parent and the wrongdoing to find liability on the part of the parent company.

The last two factors, those of liability and jurisdiction, are especially influential and have seen significant developments over recent years. They are likely to see further developments in the near future. This article looks at these two factors in turn. It first explains how parental liability has historically been treated by the English courts and the significant recent decisions that the Supreme Court has made in this regard. It then explores what we might expect in the future, arguing that developments in legislation and corporate practice may prove very helpful for claimants bringing foreign class action claims. The second half of the article examines the issue of jurisdiction. It first explains the position taken by the courts over recent years and why this position has made it relatively easy for claimants to bring their claims in England. It then again argues that political and legislative developments, particularly as a result of Brexit, will have a crucial effect on these cases, which is likely to be detrimental to those

⁷ Note that, for group claims, the claimants must all have a sufficiently similar interest.

⁸ Damian Grave, Maura McIntosh and Gregg Rowan (eds), *Class Actions in England and Wales* (1st edn, Street & Maxwell 2018) para 10-053.

seeking to bring their claims in England. It suggests that, in coming years, these cases will be far more dependent on access to justice in the jurisdiction where the alleged wrongdoing occurred and will be more likely to fail on jurisdictional grounds.

This may result in more cases being struck out at an early stage as a result of jurisdictional challenges. Those that are not will be less likely to be struck out or fail on the issue of whether a duty of care exists between the parent company and the claimants (or some statutory basis for parental liability applies). This latter issue has often been seen as particularly difficult for claimants to demonstrate. While success here does not mean that a positive outcome in any final judgment or via settlement is guaranteed, it may increase the probability of such an outcome.

I. PARENTAL LIABILITY

A. Early developments in case law

Generally, in these cases, both the parent company and the subsidiary are defendants. This section focuses on parental liability because: (1) this has tended to be a more complicated issue; (2) there have been important developments in the case law regarding parental liability over recent years; and (3) persuading the court of — at least the potential — liability of the parent company has been vital for jurisdictional reasons, as detailed below.

Liability is generally claimed under tort law and sometimes under specific statutory regimes in the jurisdiction where the wrongdoing took place. Only the former is discussed here in order to arrive at an analysis of general application: the same or similar tort principles apply across cases brought in England, whereas statutory liability will depend on the specific legislation in question and will, therefore, differ between cases. Such tort claims are generally based on local law. This law, however, is often considered sufficiently close to English law that English case law and principles apply. This, for instance, was the case for Zambian tort law in *Vedanta* and Kenyan tort law in *AAA v Unilever Plc*.⁹

⁹ *AAA v Unilever Plc* [2017] EWHC 371, [2017] 2 WLUK 681.

The crucial question in the context of tort claims, and the one examined here, is whether a duty of care arises on the part of the parent company. This is complex and case specific, but the analysis below explains important recent developments in England and principles to apply when evaluating a claim's chances of success or failure.

Generally, English law avoids piercing the corporate veil, drawing a distinction between the company (as a separate legal entity) and its members. Shareholders (who might themselves be corporate entities) are thus insulated from corporate liability where a claim is brought against the company they own.¹⁰ However, liability on the part of shareholders can be found where a duty of care arises independently on the part of the parent company towards the aggrieved party. Liability therefore arises not because the parent is the shareholder of a liable company; rather, the parent is liable for its own actions towards the claimants.¹¹

In the 1990s, the courts held in several personal injury claims (at pre-trial stage) that a parent may owe a duty of care to a subsidiary's employees.¹² This area of law continued to develop, and a particularly crucial judgment handed down after a full trial and frequently cited in foreign class action claims, came in the case of *Chandler v Cape Plc*.¹³ *Chandler* involved an individual employed by a subsidiary of Cape Plc, who was exposed to asbestos during his employment and was subsequently (after the dissolution of the subsidiary) diagnosed with asbestosis. He then brought a claim against Cape Plc alleging negligence.¹⁴ In *Chandler*, Arden LJ set out circumstances which may result in parental responsibility: (1) both parent company and subsidiary are involved in sufficiently similar businesses; (2) the parent has, or should have, superior health and safety knowledge; (3) the parent knew, or ought to have known, the subsidiary's system of work was unsafe; and (4) the parent knew or

¹⁰ *Salomon v Salomon* [1896] UKHL 1, [1897] AC 22.

¹¹ James Goudkamp and Donal Nolan, *Winfield & Jolowicz on Tort* (20th edn, Sweet & Maxwell 2020) para 5-037.

¹² See, for example, *Lubbe v Cape Plc* [1998] EWCA Civ 1351, [1998] CLC 1559.

¹³ *Chandler v Cape Plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111.

¹⁴ *ibid* [1].

ought to have known that ‘the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection’.¹⁵

Notably, *Chandler* involved liability for employees that were not third parties, loss as a result of asbestosis (a type of loss that courts and statute have been sympathetic to), and loss due to the fact that the subsidiary no longer existed.¹⁶ However, further developments have occurred in the field of class action tourism in addition to these factors. These cases have primarily concerned the interlocutory stage but, as explained further below, such developments are nevertheless significant. In particular, after various judgments in which the lower courts had refused to countenance parental liability, the Supreme Court handed down two significant pre-trial judgments that favour claimants in class action tourism cases.

B. Vedanta

The first was *Vedanta*, involving a claim against the UK-domiciled Vedanta Resources Plc (‘**VR**’) and their Zambian mining subsidiary, Konkola Copper Mines Plc (‘**KCM**’), that alleged losses from toxic discharge in Zambia. In *Vedanta*, the court set out that: (1) at the pre-trial stage, the claimants only needed to prove that, based on the facts available, their claim against the parent was arguable to proceed;¹⁷ (2) the relevant category of common law negligence was not new, and the test from *Caparo v Dickman*¹⁸ (a three-stage test that is applied to determine whether a duty of care exists in novel scenarios) was unnecessary;¹⁹ and (3) the crucial question was how ‘the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations ... of the subsidiary’²⁰

The court said it was not possible to list prescriptively the categories or models that could give rise to parental liability, but did indicate what it found

¹⁵ *ibid* [80].

¹⁶ Harry Steinberg, Michael Rawlinson and James Beeton, *Asbestos: Law & Litigation* (1st edn, Sweet & Maxwell 2019) para 4-014.

¹⁷ *Vedanta* (n 5) [61].

¹⁸ *Caparo v Dickman* [1990] 2 AC 605.

¹⁹ *Vedanta* (n 5) [49], [56].

²⁰ *ibid* [49].

suggestive in *Vedanta*, including: (1) evidence that VR took, or even just claimed to take, ‘responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries’;²¹ and (2) evidence that VR was involved in training, monitoring, and enforcing standards (although Lord Briggs suggested that producing deficient standards alone could also give rise to a duty of care).²²

The lower courts also remarked upon a management services agreement between defendants that suggested VR was involved in the mine’s management, although the Supreme Court found that less compelling.²³

C. Okpabi

In the second case, *Okpabi*, thousands of Nigerian citizens brought claims against a Nigerian subsidiary (“SPDC”) of the UK-domiciled Royal Dutch Shell (“RDS”) and against RDS itself, alleging losses caused by oil spills from SPDC-operated pipelines in Nigeria. The judgment was similar to that of *Vedanta*, and offered further guidance: (1) the focus at interlocutory stage should be on whether the case is ‘arguable’ and that ‘factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupported’;²⁴ (2) the relevant question was ‘the extent to which the parent did take over or share ... the management of the relevant activity’;²⁵ and (3) the Court of Appeal had erred, including by asserting that group-wide policies could never result in a duty of care.²⁶

The claimants in *Okpabi* listed ‘routes’ (for which various pieces of evidence were provided) that they claimed gave rise to liability based on the findings in *Vedanta*, and the Supreme Court in *Okpabi* accepted these to be appropriate headings, though it was stressed that they were not the only issues that could be relevant. These were: (1) RDS controlling the management of

²¹ *ibid* [61].

²² *ibid* [52], [53].

²³ *ibid* [61]; *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528, [2018] 1 WLR 3575 [84].

²⁴ *Okpabi* (n 3) [107].

²⁵ *ibid* [147].

²⁶ *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191 [2018] Bus LR 1022 [140]; *Okpabi* (n 3) [143].

SPDC's activities; (2) RDS promulgating defective group-wide safety policies which were implemented by SPDC; (3) RDS actively engaging with that implementation; and (4) RDS holding out that it supervised and controlled SPDC's activities.²⁷

Further, and 'significant[ly]' for subsidiary employees,²⁸ the Supreme Court agreed with Sales LJ, who dissented from the Court of Appeal's judgment, that the Shell group's organisation along 'Business and Functional lines' with a 'vertical structure' and 'significant delegation' was suggestive of parental control and thus liability.²⁹

D. The current position in case law

The cases discussed above are generally encouraging for foreign action litigants. They demonstrate the courts' willingness to find that cases against UK-domiciled parent companies are arguable, including on the difficult issue of parental liability. Further, since liability does not revolve around a shareholding relationship, affiliate companies and perhaps even related third parties, such as those financing operations, could be similarly held liable. It has been suggested that *Chandler* could allow for liability on the part of long-term supply contract counterparties, and Sales LJ in *AAA* noted that a consultant's liability could be considered similar to that of the parent company.³⁰ Indeed, such supply chain or outsourcing-related cases have been brought in recent years and, at the very least, *Vedanta* and *Okpabi* are useful for claimants seeking to defend strike out applications, who can plead that their claims are at least arguable and their factual averments should be accepted at interlocutory stage.³¹ To the extent that this grants those who have suffered losses the opportunity to argue their case

²⁷ *ibid* [26].

²⁸ Andrew Tettenborn, *Clerk & Lindsell on Torts* (23rd edn incorporating first supplement, Sweet & Maxwell 2021) para 12-011.

²⁹ *Okpabi* (n 3) [156].

³⁰ Andrew Sanger, 'Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary' (2012) 71(3) CLJ 478, 480; *AAA v Unilever Plc* [2018] EWCA Civ 1532, [2018] BCC 959 [36].

³¹ See *Hamida Begum v Maran (UK) Limited* [2021] EWCA Civ 326, [2021] 3 WLUK 162 which includes reference to these points at paras [22] and [119], and *Josjya v British American Tobacco Plc* [2021] EWHC 1743 (QB), [2021] 6 WLUK 369 which deals with liability across a supply chain.

for redress in a full trial and avoids extended and resource-intensive hearings on preliminary matters, this seems a positive development.

The significant judgments mentioned above took place at the interlocutory stage. It will be a different matter for claimants to show liability at a full trial. A number of the judgments referenced here explicitly recognise that the claimants will have to demonstrate more than just that their case is arguable. Further, success on the issue of parental duty of care does not guarantee the overall success of a claim or that it will not be struck out or rejected on some other basis. Other issues, particularly those typical of mass claims with vast numbers of (often poorly resourced) claimants based overseas (sometimes in dangerous or inaccessible locations), can still present a significant challenge to class action tourism claimants. This can happen at an interlocutory stage and when making an application for a group litigation order or representative action. This includes providing evidence to show that claimants have a sufficiently similar interest.³²

However, the findings from *Okpabi* and *Vedanta* detailed above: (1) demonstrate at least some willingness to countenance parental liability, which has been a particularly difficult issue for claimants; (2) make it harder to strike out these claims on the basis that there is no arguable case; and (3) may encourage defendants to settle. The parties in *Vedanta*, for example, have now settled.³³

It should be noted for completeness that the cases and analysis above relate to scenarios where damage is (allegedly) suffered as a result of poor working practices or environmental causes. A slightly different category of cases involves harm inflicted by unrelated third parties, where an employer or employer's parent company is alleged to be liable for not preventing that harm. Such issues may continue to face difficulties in demonstrating an arguable claim but are beyond the scope of this article.³⁴

³² See, for example, *Jalla v Shell International Trading* [2021] EWCA Civ 1389, [2021] 9 WLUK 299 and *Alame v Royal Dutch Shell Plc* [2022] EWHC 989 (ICC), [2022] 4 WLUK 319, the latter of which is related to the proceedings in *Okpabi*.

³³ Reuters, 'Vedanta Resources settles Zambia copper mine pollution claim' (*Reuters*, 2021) <<https://www.reuters.com/article/us-zambia-mining-vedanta-idUSKBN2901EL>> accessed 13 February 2023.

³⁴ See, for example, *Kalma v African Minerals Ltd* [2020] EWCA Civ 144 and *AAA* (n 30).

E. Socio-political and legislative developments in the UK

In response to these Supreme Court judgments, it has been suggested that companies could or should seek to avoid liability by reducing oversight of their subsidiaries and maintaining clear divisions between the members of their corporate groups.³⁵ While such an approach might be an ostensibly logical conclusion that can be drawn from an examination of these cases, and while this may be possible in certain circumstances and for certain companies, such an approach does not recognise political and legislative developments over recent years, as well as their likely future trajectory. Both legislative requirements and market practice suggest that such an approach will be difficult to achieve and that claimants in foreign-brought class action cases may have a greater chance of succeeding on the issue of parental liability in the future.

For instance, the Modern Slavery Act 2015 in the UK currently requires sufficiently large companies (which tend to feature more prominently in class action tourism) to disclose what steps they have taken to ensure their operations and supply chains are free from slavery.³⁶ Admittedly, studies suggest that only 88% of companies are complying with their reporting obligations and that statements are not always clear or comprehensible.³⁷ However, the government made various assurances throughout 2020 and 2021 that it would reform and improve the Modern Slavery Act 2015, including through the introduction of fines for those who do not comply with their obligations under

³⁵ For example, Charles Mayo, Chris Owen, Adam Bristow, 'Parent Company Liability' (2019) 2 Ethical Boardroom
<<https://files.simmons-simmons.com/api/get-asset/EBSumemr2019SimmonsSimmonsSingles.pdf?id=blt9b61f5b7cec8259d>> accessed 5 August 2022; Elvis Ojeda, 'Transnational Corporate Liability Litigation and Access to Environmental Justice: The Vedanta v Lungowe Case' (2021) LSE Law Review 6(3) 223, 246.

³⁶ Modern Slavery Act 2015, s 54.

³⁷ FRC, Lancaster University, and Independent Anti-Slavery Commissioner, *Modern Slavery Reporting Practices in the UK: Evidence from Modern Slavery Statements and Annual Reports* (2022) 3
<<https://www.frc.org.uk/getattachment/77c053d9-fe30-42c6-8236-d9821c8a1e2b/FRC-Modern-Slavery-Reporting-Practices-in-the-UK-2022.pdf>> accessed 13 September 2022.

the act.³⁸ Subsequently, in the Queen's Speech of May 2022, a new bill was announced, the provisions of which include a requirement to report on certain key criteria against modern slavery, the creation of a government registry on which all modern slavery statements will be published, and the creation of civil penalties for non-compliance.³⁹ However, the UK government has subsequently changed twice and it remains to be seen whether any such reforms will be made. It appears unlikely that they will happen imminently, given the absence of any commentary on reform from the current UK government.

Another example of a law in the UK that may impact companies seeking to distance themselves from their subsidiaries' actions is the Bribery Act 2010. It incentivises companies to institute procedures against bribery to avoid liability if employees, agents, or subsidiaries engage in corrupt practices, including in overseas operations.⁴⁰ The extent of enforcement is sometimes criticised, but an OECD Report notes that the Act has 'prompted substantial progress' on anti-corruption measures in the UK.⁴¹ This legislation is not new. However, the point here is that, even where a class action tourism claim does not specifically relate to wrongdoing associated with modern slavery or bribery, English parent companies seeking to separate themselves from any knowledge or involvement in their subsidiaries operating abroad in high-risk industries or jurisdictions are likely to find such an approach difficult due to the requirements of these Acts.

Additionally, prospective legislation in the UK seems likely to require continued involvement in and oversight of overseas subsidiaries. One example that might apply to companies operating in jurisdictions from which class action

³⁸ Victoria Atkins, *New tough measures to tackle modern slavery in supply chains* (2020) <<https://www.gov.uk/government/news/new-tough-measures-to-tackle-modern-slavery-in-supply-chains>> accessed 13 September 2022; Dominic Raab, *Human rights violations in Xinjiang and the government's response: Foreign Secretary's statement* (2021) <<https://www.gov.uk/government/speeches/foreign-secretary-on-the-situation-in-xinjiang-and-the-governments-response>> accessed 13 September 2022.

³⁹ Queen's Speech 2022: background briefing notes (2022) 83, 84 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1074113/Lobby_Pack_10_May_2022.pdf> accessed 13 September 2022.

⁴⁰ Bribery Act 2010, s 7.

⁴¹ OECD, *Implementing the OECD Anti-Bribery Convention* (2017) 78 <<https://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf>> accessed 5 August 2022.

tourism claims have previously emerged (such as Brazil) is the requirement under the Environment Act 2021 to avoid the use of products linked to illegal deforestation and to carry out due diligence to ensure supply chains are free of such products (the exact details of which are still to be outlined in regulations).⁴² Similarly, the government has proposed new sustainability disclosure requirements that would require companies to make assessments of their sustainability impacts, though the details are yet to be finalised.⁴³ Again, this suggests that it is likely to become harder for large multinational corporations subject to these new requirements to distance themselves from involvement in the activities of their subsidiaries abroad.

Moreover, other legislative and regulatory developments have been proposed which, if implemented in the coming years, could have a significant effect on class action tourism cases. For example, a 2017 Parliamentary Report recommended that the UK should impose a duty on companies to prevent human rights abuses by implementing due diligence processes, with failure to do so constituting an offence.⁴⁴ The government's response at the time was to state that it had 'no immediate plans to legislate in this area'.⁴⁵ However, in 2020, an independent research centre recommended legislating to penalise a company's failure to prevent human rights abuses, including environmental abuses. As with the Bribery Act, companies could avoid liability if they had reasonable procedures in place to prevent such abuses.⁴⁶ A similar proposal to this has now

⁴² Environment Act 2021, Schedule 17.

⁴³ HM Government, *Greening Finance: A Roadmap to Sustainable Investing* (2021) 18 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031805/CCS0821102722-006_Green_Finance_Paper_2021_v6_Web_Accessible.pdf> accessed 14 September 2022.

⁴⁴ Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability* (HL 153 HC 443) 59 <<https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>> accessed 5 August 2022.

⁴⁵ Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability: Government Response to the Committee's Sixth Report of Session 2016-2017* (HC 686) 15 <<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/686/686.pdf>> accessed 5 August 2022.

⁴⁶ British Institute of International and Comparative Law, *A UK Failure to Prevent Mechanism for Corporate Human Rights Harms* <https://www.biicl.org/documents/84_failure_to_prevent_final_10_feb.pdf> accessed 5 August 2022.

been included in the Options Paper produced by the Law Commission in June 2022, in response to the government's request for reform suggestions to corporate criminal liability, which the government is now to review.⁴⁷ There is no guarantee that these proposals will be transformed into law, but it does suggest a trajectory of development that, as explained below, could have significant impacts on class action tourism cases.

F. Socio-political and legislative developments outside the UK

In addition to these legislative proposals in the UK, comparable legal developments have occurred elsewhere, particularly in Europe. Some of these are likely to apply to English companies if they also operate in the relevant European jurisdiction. These include: (1) Norway's 2021 Transparency Act which requires all companies which do business in Norway, and which pass relatively low employee, balance sheet, or sales revenue thresholds, to carry out and report human rights due diligence and respond to third party requests for information regarding human rights impacts;⁴⁸ and (2) the Netherlands' 2019 Child Labour Due Diligence Act which obliges all companies who supply goods or services to Dutch customers, irrespective of size, to investigate whether their goods or services are the product of child labour and to prepare an action plan if there is a reasonable suspicion of this, for fear of both fines and criminal sanctions.⁴⁹ As a final example, albeit only of a draft instrument, the EU released in February 2022 a draft regulation that would require human rights due diligence be carried out and introduces penalties for those companies — including those which are not based in the EU but have sufficiently high numbers of employees and turnover in the EU — that fail to do so.⁵⁰

Other similar pieces of legislation will not necessarily impose human rights due diligence obligations on English companies directly, but might apply

⁴⁷ Law Commission, *Corporate Criminal Liability: an options paper* (2022) 114 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/06/Corporate-Criminal-Liability-Options-Paper_LC.pdf> accessed 13 September 2022.

⁴⁸ Transparency Act 2021 (*Lov om virksometers åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenbetsloven)*, LOV-2021-06-18-99).

⁴⁹ Child Labour Due Diligence Law 2019 (*Wet zorgplicht kinderarbeid*, *Staatsblad* 2019, 401).

⁵⁰ European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

to subsidiaries of English companies in the relevant jurisdiction or apply indirectly where an English company contracts with a company on which the obligations apply directly. For example, France's 2017 Corporate Duty of Vigilance Law and Switzerland's legislation covering child labour and conflict minerals apply to sufficiently large French and Swiss companies respectively, albeit with some exceptions.⁵¹ Germany's 2021 Due Diligence in the Supply Chain Act is similar: it applies to German companies that employ 3,000 employees, though in 2024 this will drop to 1,000 employees, and it introduces mandatory due diligence and reporting requirements that allows for fines to be issued for non-compliance.⁵² Again, the result of this is that English parent companies to which these laws apply, or which have subsidiaries or contractual counterparties to which these laws apply, may struggle to demonstrate to the courts (were a class action tourism claim be brought against them) that they are sufficiently separate and uninvolved in their subsidiaries' conduct to avoid a finding of liability.

A number of international bodies have introduced initiatives encouraging increased care on the part of companies regarding human rights and the environment. The United Nations Guiding Principles on Human Rights, which expect companies to take appropriate steps to determine whether they, their subsidiaries, and their suppliers are respecting human rights, have seen 'swift and widespread' uptake, and a large number of companies have publicly committed to them.⁵³ A similar framework is reflected in the OECD Guidelines for Multinational Enterprises which propose principles for responsible business conduct in areas including human rights, the environment,

⁵¹ Corporate Duty of Vigilance Law 2017 (*Loi no 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1)*); Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour 2021 (*Verordnung vom 3. Dezember 2021 über Sorgfaltspflichten und Transparenz bezüglich Mineralien und Metallen aus Konfliktgebieten und Kinderarbeit (VSoTr), AS 2021 847*).

⁵² Supply Chain Due Diligence Act 2021 (*Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, Bundesgesetzblatt Teil I, 2021, Nr. 46 vom 22.07.2021*).

⁵³ OHCHR, Guiding Principles on Business and Human Rights (2011) 13 <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciples_businesshr_en.pdf> accessed 14 September 2022; IBA, IBA Practical Guide on Business and Human Rights for Business Lawyers (2016) 17 <<https://www.ibanet.org/MediaHandler?id=d6306c84-c2f8-4c82-a86f-93940d6736c4>> accessed 14 September 2022.

and employment, and also require companies to undertake due diligence exercises, including with regard to their supply chain.⁵⁴ These have contributed to a ‘significant uptake’ in responsible business practices globally.⁵⁵ ESG-based investing is continuing to grow too, providing another impetus for companies seeking capital to become more involved in promoting good practices and policies across their business.⁵⁶ The nature of these frameworks is that they can indirectly affect and pass obligations onto even those companies that have not undertaken to respect them, where those companies demand suppliers also comply with responsible business practices.⁵⁷

G. The impact of socio-political and legislative developments on future class action tourism cases

Such developments — both legislative and non-legislative — could have substantial impacts on class action tourism cases in the coming years: (1) they could create new statutory bases for claims against parent companies in England that might replace tort claims, although the extent to which statutory heads of claim are used will be very case specific and will depend on the final drafting of the legislative proposals detailed above and the specific business models of potential defendants; (2) the generally more stringent legislation in European countries could mean fewer cases are brought in England, with claimants preferring to bring tort or statutory claims in those European jurisdictions. (3) Alternatively, they could provide a stronger basis for tort claims in England (for example, requirements – whether derived from statute or investor sentiment – to monitor, disclose, and implement policies related to human rights might aid claimants in showing parent companies were involved in managing their subsidiaries’ activities); (4) increased obligations may broaden the

⁵⁴ OECD, OECD Guidelines for Multinational Enterprises (2011) 19 <<https://www.oecd.org/daf/inv/mne/48004323.pdf>> accessed 14 September 2022.

⁵⁵ OECD, Stocktaking report on the OECD Guidelines for Multinational Enterprises (2022) 29

<<https://mneguidelines.oecd.org/stocktaking-exercise-on-the-oecd-guidelines-for-multinational-enterprises.html>> accessed 14 September 2022.

⁵⁶ Global Sustainable Investment Alliance, Global Sustainable Investment Review 2020 (2021) <<http://www.gsi-alliance.org/wp-content/uploads/2021/08/GSIR-20201.pdf>> accessed 14 September 2022.

⁵⁷ John Sherman, ‘Should a Parent Company Take a Hands-off Approach to the Human Rights Risks of its Subsidiaries?’ (2018) 19(1) *Business Law International*.

sort of business affected by claims beyond high-risk jurisdictions or industries;⁵⁸ or (5) fewer cases may be brought because companies implement more comprehensive governance policies that result in fewer instances of alleged wrongdoing.

What seems most likely is a combination of the above: greater due diligence requirements and the voluntary regimes that have been designed to achieve an improvement in corporate behaviour that reduces the number of claims brought. At the same time, where wrongdoing does occur and where related claims can be brought under new legislation, we should expect at least some claims that might otherwise have been brought under common law (as negligence claims, for example) being instead brought as statutory claims, whether in England or elsewhere. Finally, we might expect those tort claims that are brought to be more likely to succeed on the historically complicated issue of parental liability, given the increased obligations that large multinationals are likely to be under. Evidence of this third point can already be found. In *Vedanta*, Lord Briggs noted that ‘the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so’.⁵⁹ This is an important comment given some of the developments above are voluntary. Similarly, in *Okpabi*, group standards and policies were considered evidence of parental responsibility, including those produced for matters ‘subject to external stakeholder expectations and external disclosures’.⁶⁰ This is important as it means that even frameworks that have no enforceability mechanisms or are voluntary can be relevant in these cases. Similarly, in a 2016 case involving allegations that a mining company had failed to prevent police harming protesters at their mine, which was eventually struck out due to limitation issues, the claimants advanced their case on the basis that the defendant had fallen ‘below the standard of care set’ by the Voluntary Principles on Security and Human Rights to which it had signed up (though it was not clear that if they had fallen below these standards, this would amount to an

⁵⁸ James Brady, Marina Zarubin, Quinten De Keersmaecker, Clara Cibrario Assereto, ‘ESG Liability: Risks Increasing for Multinational Companies’ (2021) 32(5) PLC Magazine <<https://uk.practicallaw.thomsonreuters.com/w-031-0879>> accessed 5 August 2022.

⁵⁹ *Vedanta* (n 5) [53].

⁶⁰ *Okpabi* (n 3) [47].

automatic breach of a duty of care and expert evidence was not permitted on these principles).⁶¹

The issue of liability on the part of parent companies has been a vitally important one in class action tourism cases and the preceding analysis suggests that claimants may have an increased chance of success in demonstrating that liability. Regulatory changes and legislative proposals seem likely to force corporate groups to be more integrated and more likely to satisfy the requirements of case law, as recently articulated. However, when examining class action tourism cases more broadly, liability cannot be isolated, and the other crucial issue, in relation to which claimants may see less success in the future, is the question of jurisdiction.

II. JURISDICTION OF THE ENGLISH COURTS

Before turning to the current common law jurisdictional regime, it is worth considering the previous framework. This helps in understanding the rise of class action tourism and the different prospects for these cases now, and is potentially relevant for the future, as discussed by reference to the UK's application to join the Lugano Convention.⁶²

A. The Brussels Regime – the law

EU law has provided significant help to class action tourism claimants seeking to bring cases in England. The relevant jurisdictional regime immediately pre-Brexit was found in the regulation known as Brussels Recast.⁶³ This applied to proceedings instituted on or after 10th January 2015. In England, they continued to apply to cases brought before 11:00pm GMT on 31st December 2020.

⁶¹ *The Voluntary Principles on Security and Human Rights*

<<https://www.voluntaryprinciples.org/wp-content/uploads/2021/11/Voluntary-Principles-on-Security-and-Human-Rights-english-2.pdf>> accessed 18 December 2022; *Vilca v Xstrata Ltd* [2016] EWHC 2757 (QB), [2016] 11 WLUK 79 [10].

⁶² The Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2007] OJ L339/3.

⁶³ 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 (recast) [2012] OJ L351/1.

Crucially, for bringing class action tourism cases: (1) Article 4.1 of Brussels Recast states that ‘persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State’; and (2) the judgment from the case of *Onusu v Jackson*⁶⁴ confirmed that contracting states could not ignore such provisions on the common law principle of *forum non conveniens*, the concept that another jurisdiction is a more appropriate forum for a claim.⁶⁵ Article 63.1 of Brussels Recast states that companies are domiciled in the place where they have their statutory seat, central administration, or principal place of business; English-incorporated companies would be domiciled in England under this article.

Article 4.1 (and earlier EU law) therefore allowed claimants to bring cases in England against English-domiciled companies and *Onusu* confirmed that courts could not depart from that rule.

As noted above, these cases generally involve parent and subsidiary defendants. Article 4.1 allowed the claim to be brought against the parent and this ‘anchor defendant’ allowed for the local subsidiary to be joined, as Article 6.1 of Brussels Recast states that jurisdiction for claims against non-domiciled defendants is decided by the relevant Member State’s laws (with some exceptions). In England, non-domiciled defendants can be served a claim form on the basis that they are a ‘necessary or proper party’ to the claim, this being one of the jurisdictional gateways under the Civil Procedure Rules (‘CPRs’).⁶⁶

B. Brussels Recast – challenging jurisdiction against a parent company

Despite this position, it was still necessary for there to be a case against the parent company; otherwise, the claim was liable to be stayed or struck out.

⁶⁴ Case C-281/02 [2005] QB 801. This involved a British claimant bringing a claim against a British defendant for an injury suffered in Jamaica; the courts ruled that the claimant was entitled to bring his claim in England, even though Jamaica seemed a more appropriate forum.

⁶⁵ While this case referenced earlier EU law, rather than Brussels Recast, the relevant articles are sufficiently similar that such case law was considered persuasive.

⁶⁶ Civil Procedure Rules, 6B PD 3.1.

Then, the lack of an anchor defendant would result in a lack of jurisdiction as regards the subsidiary.⁶⁷

Although it was relatively difficult to strike out a claim, this was still attempted, and the case of *Vedanta* is useful for illustrating the difficulties involved. In *Vedanta*, the defendants argued that there was no triable case against the anchor defendant, VR, but that, even if the court found there to be a triable issue against VR, such a claim was an abuse of EU law: it was being used merely as a tool to secure English jurisdiction for the case against KCM and would not have been brought otherwise.⁶⁸ These arguments were rejected; the courts suggested that if the VR claim had been brought solely for the purposes of bringing the claim against KCM, that may have constituted an abuse of EU law.⁶⁹ However, there was a real claim to be tried against VR and the claim had been brought at least in part for the genuine reason of obtaining damages; the court stressed that the scope to strike out claims as an abuse of EU law was narrow.⁷⁰

There are exceptions under EU law to Article 4.1, but these are generally irrelevant to the sort of class action tourism cases examined herein. One potentially relevant exception is where a related action is already pending in the court of a non-EU Member State.⁷¹ However, it has not always proved straightforward for defendants to use this exception: Article 34 gives courts discretion to stay proceedings, directing them to consider expediency, the administration of justice, and judgment enforceability.

The High Court would have used this exception to stay the claims brought against the English-incorporated BHP Group (UK) Ltd (known then as BHP Group Plc) which sought damages in relation to losses suffered when the Fundão Dam (operated by a joint venture part-owned by a BHP subsidiary) collapsed in Brazil in 2015. The High Court did not use this exception because they had already decided such claims were to be struck out because of abuse of process which, in large part, was also tied to the fact that parallel litigation was

⁶⁷ *AK Investment CJS C v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 [80], [82].

⁶⁸ *Lungowe v Vedanta Resources Plc* [2016] EWHC 975 (TCC), [2016] BCC 774 [74].

⁶⁹ *ibid*; *Vedanta* (n 5) [40].

⁷⁰ *Vedanta* (n 5) [24], [29].

⁷¹ Brussels Recast, art 34.

considered to be ongoing.⁷² However, the Court of Appeal overruled that judgment, finding that: (1) given the *forum non-conveniens* arguments of BHP Group (UK) Ltd's Australian-incorporated co-defendant failed (as discussed below), it would be inappropriate to stay the claims against BHP Group (UK) Ltd;⁷³ and (2) there was insufficient overlap between the collective proceedings that had been issued in Brazil and the proceedings in England for a stay to be ordered under Article 34.⁷⁴

Similarly, in a judgment relating to claims arising out of an oil spill in Nigeria, the High Court refused to grant a stay despite broadly similar proceedings in Nigeria for several reasons, though most importantly because there were slightly different issues to be determined in Nigeria and the Nigerian proceedings did not all involve the English-domiciled company.⁷⁵

In sum, after *Owusu*, EU law proved exceptionally helpful for claimants seeking to bring their claims in England. While there was still some scope to strike out or stay such claims, broadly, 'the debate [had] moved on', and it became very hard to argue that the court did not have jurisdiction to hear claims against a domiciled parent.⁷⁶

C. Brussels Recast – challenging jurisdiction against a subsidiary company

Attempts to strike out a claim against a non-domiciled subsidiary are, theoretically, easier to achieve, as CPR 6.37(3) provides that the court will not allow a claim form to be served out of the jurisdiction (notwithstanding the jurisdictional gateways) unless England is 'the proper place in which to bring the claim'. Frequently in class action tourism cases, the courts state that the foreign jurisdiction where the claimants are based and wrongdoing and losses occurred is ostensibly a more suitable forum than England, as discussed below. Notwithstanding such a finding, claimants have often relied on two factors that persuaded the court to hear such claims in England.

⁷² *Município De Mariana v BHP Group Plc* [2020] EWHC 2930 (TCC), [2020] 11 WLUK 91 [265].

⁷³ *Município De Mariana* (n 4) [298].

⁷⁴ *ibid* [282]-[284], [309]-[311].

⁷⁵ *Jalla v Royal Dutch Shell Plc* [2020] EWHC 459 (TCC), [2020] 3 WLUK 1 [245].

⁷⁶ Adrian Briggs, *Civil Jurisdiction and Judgments* (6th edn, Routledge 2015) para 2-304.

The first was that the claim against the parent company could continue in England and ‘to grant jurisdictional relief to some but not to others [i.e. to non-domiciled defendants but not to domiciled defendants] will fragment what ought to be conducted as a single trial’.⁷⁷ Previous case law viewed this as a trump card. Cooke J, in a 2003 case involving alleged breaches of a loan relating to the purchase of coffee in Kenya, stated that ‘the fact of continuing proceedings in England against other defendants on the same or closely allied issues virtually concludes the question’.⁷⁸ Leggatt J, in a 2013 case involving multiple English and Russian defendants who were connected to a Russian company which was alleged to have defaulted on its loans, similarly stated that, ‘[t]he real question is whether it is more appropriate to have that claim [against the Russian defendant] tried in Russia in addition to the claim against the other defendants in England raising all the same factual and legal issues ... the answer to that question is clearly no’.⁷⁹ However, in 2019, ‘after anxious consideration’ the Supreme Court in *Vedanta* overruled this interpretation, at least where the parent company was willing to accept the foreign state’s jurisdiction and irreconcilable judgments would only prejudice the claimants.⁸⁰ Instead, the right to claim against the parent in England and the desire to avoid conflicting judgments should be considered another relevant factor, not the decisive one.⁸¹

The second factor was whether justice could be obtained in the foreign jurisdiction. In *Vedanta* (as will be discussed in more detail below), the High Court found there was ‘cogent evidence that the claimants would not obtain access to justice in Zambia’ and the Supreme Court agreed (such that the Supreme Court’s different approach to conflicting judgments and jurisdictions described above was not determinative).⁸²

In sum, prior to 2021, if claimants could show an arguable case against the parent company, they could bring claims against that parent largely without fear of strike out on jurisdictional grounds. Jurisdictional challenges against the

⁷⁷ Lord Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2018) vol 1, para 12-033.

⁷⁸ *Credit Agricole Indosuez v Unicoof Ltd* [2003] EWHC 2676 (Comm), [2004] 1 Lloyd’s Rep 196 [19].

⁷⁹ *OJSC VTB Bank v Parline Ltd* [2013] EWHC 3538 (Comm) [16].

⁸⁰ *Vedanta* (n 5) [75], [79].

⁸¹ *ibid* [84].

⁸² *Lungowe* (n 68) [169]; *Vedanta* (n 5) [98].

subsidiary are more complex. The foreign jurisdiction was often considered to be more appropriate, but the fact that the claim against the parent could continue in England was considered a strong argument against striking out the claim against the subsidiary. Before 2019, this was considered akin to a trump card although the strength of that argument was then weakened. A second crucial factor was whether the claimants could achieve access to justice abroad. The Brussels Regulations and EU case law have therefore been of substantial aid to class action tourism claimants, explaining, in part, the growth of these claims in recent years.

D. The Common Law

We turn now to the current regime and the prospects for future claims. In place of Brussels Recast, common law rules now apply to cases in England. These are examined first, before briefly considering what would happen if the UK were to join the Lugano Convention.

Under common law, effective service confers jurisdiction.⁸³ Service can be made on a registered UK company by, for example, serving at its registered address.⁸⁴ As before, a defendant properly served can be used as an anchor defendant for claiming against an overseas subsidiary. However, jurisdiction against that parent company can now be contested on *forum non conveniens* grounds. The two-stage test for this (the application of which is explored below) is found in *Spiliada Maritime Corp v Cansulex Ltd* (the ‘**Spiliada Test**’).⁸⁵ At the first stage, the defendant must show that another forum is clearly more appropriate than England; at the second stage, if stage one is met, a claim will be stayed unless the claimant can show (via ‘cogent evidence’) that justice requires that a stay not be granted.⁸⁶

⁸³ CPR 6.3 (n 66).

⁸⁴ Companies Act 2006, s 1139(1).

⁸⁵ *Spiliada Maritime Corp v Cansulex Ltd* [1986] UKHL 10, [1987] AC 460.

⁸⁶ *ibid* 478; there is some academic and judicial discussion about the line between these stages and whether certain factors – such as the practical availability of another forum that is theoretically available – fall into stage one or stage two; for a helpful summary of this discussion, which is not explored in detail here, see para. [334] onwards of *Municipio De Mariana*.

This test has been implicitly or explicitly applied in several recent class action tourism cases. For example, in *Vedanta*, the courts discussed these issues in relation to the claims against the subsidiary. On those issues that fall under stage one, the courts held that England was not the appropriate forum: Zambia was the location of the wrongdoing and losses, all the evidence and claimants were based there, and many did not speak English.⁸⁷

In the context of class action tourism and trans-national personal injury claims from the 1990s and early 2000s, stage two of the Spiliada Test, whether justice requires a stay not be granted, has often revolved around access to justice overseas.⁸⁸ In *Vedanta*, it was in relation to these issues that the claimants were successful. The courts held that justice did require that a stay should not be granted because of the risks to achieving justice in Zambia, namely: (1) the difficulty of funding these complex claims due to the claimants' poverty and the lack of funding mechanisms such as conditional fee arrangements, which are unlawful in Zambia; and (2) a lack of sufficiently capable legal teams.⁸⁹ In the High Court, Coulson J also noted evidence that KCM had been shielded from earlier litigation by political connections.⁹⁰

In order for a lack of funding to persuade a court against granting a stay, the absence of funding generally has to be such that the case could not be brought and justice not achieved; it is insufficient for there simply to be more funding in England. This can relate to the case being so complicated that it requires expert evidence or specialist legal advice.⁹¹ In contrast to *Vedanta*, in *Okpabi*, the High Court noted the presence of conditional fee arrangements and sufficient funding to pay for expert evidence in Nigeria, such that access to justice would not be denied by the case being heard in Nigeria rather than England.⁹²

⁸⁷ *Vedanta* (n 5) [85].

⁸⁸ Examples of these earlier cases include *Lubbe v Cape Plc* [2000] UKHL 41, [2000] 1 WLR 1545 and *Connelly v RTZ Corporation Plc* [1997] UKHL 30, [1997] 3 WLR 373.

⁸⁹ *Vedanta* (n 5) [89].

⁹⁰ *Lungowe* (n 68) [197].

⁹¹ *Connelly* (n 88) [31].

⁹² *Okpabi v Royal Dutch Shell Plc* [2017] EWHC 89 (TCC), [2017] 1 WLUK 495 [120]; such comments were obiter.

Further analysis of the Spiliada Test is provided in *Município De Mariana*. With regard to the first limb, the High Court had noted that Brazil was clearly the natural forum for claims against one of the two parent companies (which was not domiciled in England and so to which Article 4.1 did not apply). This was because: (1) the tort occurred in Brazil; (2) the governing law would be that of Brazil; (3) the Brazilian courts were practically more accessible for the majority of parties and witnesses, particularly given language considerations; and (4) the English courts could not rely on any pre-existing understanding of the case.⁹³ Regarding the second limb, the High Court was not persuaded that substantial justice could not be done in Brazil. They pointed out (among other objections) that redress may be available from other entities in Brazil, proceedings in England were unlikely to be quicker, and there was insufficient evidence that ‘imppecuniosity would be a major factor in stifling legitimate claims’ in Brazil, where legal aid was available and a compensation scheme was in place. Further, the claimants would not have to pay a 30% success fee to their solicitors, as they would in England.⁹⁴

However, the Court of Appeal took a different approach. It stressed that, regarding the first stage of the Spiliada Test, it was not sufficient to simply refer to a jurisdiction as a whole as the more appropriate forum ‘when there are different forms of proceedings in different courts, each of which raise their own questions of appropriateness and suitability’.⁹⁵ In particular, the court distinguished between collective proceedings in Brazil and non-collective proceedings. This was important when considering the application of stage two of the Spiliada Test: the court held that (for various practical reasons relating to the diverse nature of the claimants and the process for bringing such proceedings) there was sufficient evidence to show a real risk that new collective proceedings were not an available forum for the claimants and that non-collective proceedings were inefficient, costly, and would result in a high risk of inconsistent judgments; the claimants therefore succeeded at the second stage.⁹⁶ Interestingly, the Court of Appeal took a provisional view that the claimants would have succeeded at stage one as well had they raised the argument that the collective proceedings process in Brazil was insufficient as it

⁹³ *Município De Mariana* (n 72) [238].

⁹⁴ *ibid* [255], [258].

⁹⁵ *Município De Mariana* (n 4) [343].

⁹⁶ *ibid* [352].

was asymmetric: it would ‘determine the rights of the parties if, but only if, it is favourable to the claimants’ (and might also take a very long time to resolve).⁹⁷

In addition, the Court of Appeal found the High Court judge had made a number of errors; in particular, the Court of Appeal held that the correct test was not ‘whether the claimants would not obtain substantial justice’, but rather whether there was a ‘real risk of them not doing so’, and also that redress from other parties in Brazil should not be taken into account.⁹⁸

Before concluding on the issue of jurisdiction and what a return to common law is likely to mean for those involved in class action tourism cases, it is important to briefly consider a possible, though increasingly unlikely, alternative regime, that of the Lugano Convention.

E. Lugano Convention

The Lugano Convention is similar to the pre-Brexit position described above: it replicates the legal regime prior to Brussels Recast and similarly states that parties should be sued in their place of domicile. Further, Article 1(1) of Protocol 2 states that Lugano Convention parties should ‘pay due account’ to relevant EU case law, which would include *Owusu*.⁹⁹

The UK was a member of the Lugano Convention as an EU member state and under the EU-UK Withdrawal Agreement during the transition period. It then ceased to be a member and, on 8th April 2020, applied to accede to the Lugano Convention in its own right. Iceland, Norway, and Switzerland have consented to the UK’s membership. However, the Commission announced on 4th May 2021 that it recommended the European Parliament and Council reject the UK’s application, arguing that it compromises the internal market and relations with European Free Trade Association countries.¹⁰⁰ In June 2021, the

⁹⁷ *ibid* [349]-[351]. The court noted at [350] that: ‘Whilst delay is normally a stage two factor, it can in our view be relevant to stage one when the relevant foreign proceedings may not conclude in any binding resolution of any of the parties’ rights and obligations.’

⁹⁸ *ibid* [355], [356].

⁹⁹ Lugano Convention, Article 1(1), Protocol 2.

¹⁰⁰ Commission, ‘Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention’ (Communication) COM (2021) 222 final.

Commission announced that the ‘European Union is not in a position to give its consent’ to the UK’s membership.¹⁰¹ Given unanimous consent of Lugano Convention parties is required and parties must ‘endeavour to give their consent’ within one year of any request, UK accession now seems unlikely.¹⁰² Further developments should be monitored, however, and it appears that the UK is still interested in acceding.¹⁰³

Ostensibly, acceding to the Lugano Convention would turn back the clock and much of the analysis above about the pre-Brexit regime would apply to jurisdiction questions in class action tourism cases. However, ‘pay due account’ is relatively weak wording and no penalties occur if EU case law is not followed: the Swiss Federal Tribunal has often departed from such case law, for example.¹⁰⁴ Such case law has been frequently criticised as inappropriate for common law jurisdictions and English judges, frustrated at being bound by *Omusu* in the judgments above, may also depart from it.¹⁰⁵ If the UK were to accede to the Lugano Convention, future case developments would need to be considered for indications of whether English courts appeared likely to follow EU case law or deviate from it on jurisdiction questions. It seems not unlikely that they would choose not to follow *Omusu* strictly, and therefore continue with the use of the Spiliada Test when determining jurisdictional challenges.

¹⁰¹ Commission, ‘Concerning the application of the United Kingdom of Great Britain and Northern Ireland to accede the 2007 Lugano Convention’ (Note Verbale), 22 June 2021.

¹⁰² Lugano Convention, art 72.

¹⁰³ Michael Cross, ‘UK ‘trying to re-engage’ on Lugano convention’ (2022) *The Law Society Gazette*

<<https://www.lawgazette.co.uk/practice/uk-trying-to-re-engage-on-lugano-convention/5114052.article>> accessed 18 December 2022.

¹⁰⁴ Burkhard Hess, ‘The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit’ (2018) 2 *MPILux Research Paper Series* 6

<https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/WPS2_2018_Hess_The_Unsuitability_of_the_Lugano_Convention_2007_to_Serve_as_a_Bridge_between_the_UK_and_the_EU_after_Brexit.pdf> accessed 13 September 2022.

¹⁰⁵ *ibid*; Collins (n 77), para 1-023.

F. The future of jurisdictional challenges

Assuming that the UK will not join the Lugano Convention in the immediate future (although, as discussed, even if it did, English courts might depart from EU case law and so the following analysis would also still be applicable), it seems likely that class action tourism cases involving jurisdictional challenges will now proceed as follows: (1) claimants serve on the English-domiciled parent company; (2) claimants seek to serve out on the subsidiary via the ‘necessary or proper party’ gateway; (3) claimants must demonstrate they have a sufficiently arguable case against the parent company which may be assisted by the case law and legislative developments referenced above; (4) defendants may contest jurisdiction against the parent, without which the subsidiary claim cannot be brought; (5) defendants are likely to satisfy the first limb of the Spiliada Test; and (6) claimants will have to rely on access to justice issues to succeed on the Spiliada Test’s second limb. The Supreme Court in *Vedanta* noted that the question of access to justice was, ‘prior to *Owusu v Jackson*, applicable in the context of an application for a stay of English proceedings against a defendant served within the jurisdiction’, and it seems it shall be again.¹⁰⁶

Given the importance likely to be placed on access to justice, it is worth examining this in a little more detail. In addition to the points mentioned above, from *Vedanta* and *Municipio De Mariana*, the courts have held that evidence of the following may be relevant: (1) a lack of ‘developed procedures’ for handling group claims, which may exacerbate funding issues;¹⁰⁷ (2) a political or ethnic dimension to the claim which could result in violence, intimidation, and abandonment of the case;¹⁰⁸ and (3) judicial corruption such that the claim might be abandoned (for example, if witness anonymity was breached resulting in intimidation).¹⁰⁹ In non-class action tourism cases, other issues with foreign

¹⁰⁶ *Vedanta* (n 5) [88].

¹⁰⁷ *Lubbe* (n 88) [30].

¹⁰⁸ *AAA* (n 9) [168], [169], albeit such comments were obiter.

¹⁰⁹ *ibid.*

courts have included: (1) excessive delay;¹¹⁰ (2) a time bar;¹¹¹ and (3) lack of impartiality more broadly.¹¹²

While claimants may seek to evidence one or other of these factors in their particular case, defendants may seek to persuade the courts that another jurisdiction is the appropriate forum by presenting evidence showing that there are no issues around access to justice or taking actions to mitigate those issues. Defendants may: (1) submit to that jurisdiction;¹¹³ (2) provide evidence from foreign lawyers that they will represent the claimants;¹¹⁴ (3) try to facilitate the judicial process overseas in some way (KCM's 'obdurate' nature was flagged in *Vedanta* as a reason why justice might be unachievable in Zambia, particularly given funding issues);¹¹⁵ and (4) admit some issues, particularly those requiring expert evidence. Again, the lack of admissions in *Vedanta* was considered relevant in a jurisdiction where funding was limited.¹¹⁶

Given that jurisdiction against a parent company can now be contested more easily than under the Brussels Recast regime and that that contestation has an impact on challenges against a subsidiary too, it seems possible that, under common law, more cases will be struck out as a result of jurisdictional challenges. When evaluating the merits of different jurisdictional tests in the context of strikeouts, various factors could be relevant including the efficiency of the process, the predictability of the outcome, and issues of comity (i.e. recognition of and respect for another jurisdiction's judicial system).¹¹⁷ But the most important issue is surely that which is so frequently the focus of the second limb of the Spiliada Test: whether claimants with legitimate grievances are able to pursue their claims and seek justice. Ostensibly, the fact that what may be otherwise legitimate and substantive claims are more likely to be struck

¹¹⁰ *The Jalakrishna* [1983] 12 WLUK 20.

¹¹¹ *Spiliada* (n 85) 483, 484.

¹¹² *Al-Koronky v Time-Life Entertainment Group Ltd* [2006] EWCA Civ 1123, [2007] 1 Costs LR 57.

¹¹³ *Radhakrishna Hospitality Service Pte Ltd v EIH Ltd* [1999] 2 Lloyd's Rep 249.

¹¹⁴ *Lungowe* (n 68) [187], although such evidence was not considered compelling.

¹¹⁵ *Vedanta* (n 5) [89].

¹¹⁶ *ibid* [94].

¹¹⁷ Ardavan Arzandeh, 'Should the Spiliada Test Be Revised?' (2014) *Journal of Private International Law* 10(1), 89 <<https://doi.org/10.5235/17441048.10.1.89>> accessed 14 September 2022.

out under the *Spiliada* Test than under the Brussels Recast regime might be a cause for concern.

However, the new status quo is potentially more nuanced than at first glance: claims are only likely to be struck out where they can properly be brought in a jurisdiction that is a more appropriate forum than England. As discussed above, appropriateness includes questions of practical accessibility, language barriers between claimants and the court, and the relevant law to be interpreted. The question the court asks is whether there is cogent evidence of a real risk of the claimants not obtaining substantial justice in another jurisdiction. It does not seem unreasonable to conclude that, where there is not such evidence, the case is better heard — and it is better that justice be seen to be done — in that other jurisdiction, rather than in England. This may be to the dissatisfaction of claimants who are making use of English lawyers and litigation funders and who will instead need to rely on potentially less experienced local lawyers and reduced funding. However, at least in principle, claimants should only be prohibited from bringing their claims in England where there are sufficiently capable lawyers and legal systems and sufficient sources of funding in their own country and the bringing of cases in local jurisdictions may help in developing local jurisprudence, experience, and frameworks for the successful resolution of these sorts of cases.

Further, in comparison to the previous regime (or the regime under the Lugano Convention were the courts to choose to follow EU case law), where cases that could have been heard in the claimants' own jurisdiction are instead required to be heard in England (due to Article 4.1 of Brussels Recast) and where claims against related parties could be brought in both an overseas jurisdiction and in England (following *Vedanta*) the common law test is potentially more efficient and less open to charges of what has sometimes been termed 'judicial chauvinism': the practice of considering the English courts better placed to hear a case that would, in fact, be better heard in another jurisdiction.¹¹⁸

¹¹⁸ *ibid* 102.

III. CONCLUSION

Class action tourism cases are very fact dependent. However, outlined above are principles that should assist practitioners. Two crucial issues arise in these cases: whether courts are likely to find liability on the part of the parent company, and whether they consider they have jurisdiction to hear the case.

Recent case law suggests English courts are unwilling to strike out claims on the issue of parental liability where claimants can present an arguable case and have given guidance on what evidence they find persuasive. It will be vital to: (1) analyse a parent company's structures and policies to see if case law indicates the courts will consider them capable of giving rise to liability; (2) follow relevant cases, particularly if they go to trial, to see how the courts' thinking develops; and (3) be aware of how market practice and legislative developments could affect claimants' cases. This last point may be particularly crucial: the corporate liability and accountability arena appears to be changing rapidly. It seems likely that this will advantage class action tourism claimants, but how exactly legislation, regulations, and the resulting behaviour of companies will affect this area of litigation remains to be seen.

On jurisdiction, access to justice overseas will likely be the crucial issue for determining whether English courts will hear these cases. Practitioners will need to understand: (1) the relevant foreign justice system more broadly; (2) how that justice system might influence their case specifically (for example, whether expensive medical expert evidence is required where funding is limited); and (3) what companies could do to persuade courts that justice can be done (for example, submitting to that foreign jurisdiction).

It seems possible that more class action tourism cases will fail on jurisdictional grounds than have in recent years or would have had the UK not left the EU; however, those that do not fail may be more likely to demonstrate a duty of care on the part of the defendant parent company, or successfully avoid strike out on the basis of potential liability. This does not ensure that such cases will achieve success at trial or via settlement. However, it probably does make such success more likely in comparison to the situation before the key Supreme Court cases mentioned above and, crucially, in comparison to a counterfactual where companies were not obliged or encouraged to engage with ESG

responsibilities in the way that they increasingly are. This field of litigation is fast-moving, complex, and requires an approach that looks at both important developments in case law, but also legislative and regulatory changes, all of which are sure to have an impact on this increasingly prominent trend in coming years.