the "Buyer". That combination (of ROT clauses with physical delivery and the transfer of risk) will not necessarily create a non-statutory action for the price. The significance of that combination, as well as any other circumstances where the action lies outside s. 49, "must be left for determination on some future occasion" (at [57]).

The plain implication of Lord Mance's cautious approach is that some sellers who fall outside s. 49 may still find themselves unable to sue for a price which their contract tells them is due. In view of this uncertainty, the prudent ROT seller will specify a day certain for payment. Lord Mance also viewed with favour the possibility of a claim for damages for non-payment of the price. Although this would lack certain procedural advantages of claiming the price, it will surely feature in litigation resulting from the fresh uncertainty.

Certainty and freedom of contract, then, remain compromised, but this may be a fair price to pay for the speed with which the Supreme Court reached a sensible outcome.

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JURISDICTION OF THE ENGLISH COURTS OVER OVERSEAS HUMAN RIGHTS VIOLATIONS

IN *Lungowe v Vedanta Resources Plc* [2016] EWHC 975 (TCC), the High Court allowed a claim to be heard in England against parent company incorporated in England and its foreign subsidiary in relation to the overseas subsidiary's operations. The judge considered whether the claim against the English-domiciled defendant could be stayed on the basis of *forum non conveniens*, and whether jurisdiction could be established over its foreign subsidiary as a necessary and proper party to the case. The overall analysis of the judgment suggests that (1) the claims against the parent company in relation to the overseas operations of the foreign subsidiary can be heard in the English courts and (2) the existence of an arguable claim against the English-domiciled parent company also establishes jurisdiction of the English courts over the subsidiary even if the factual basis of the case occurs almost exclusively in the foreign state.

The claimants were 1,826 Zambian citizens, who commenced proceedings against Vedanta, an English-based mining corporation, and its indirect Zambian subsidiary, KCM. The claims alleged personal injury, damage to property, loss of income, and loss of amenity and enjoyment of land arising out of the operation in Zambia of the Nchanga Copper Mine by KCM.

The claimants argued that Vedanta breached the duty of care it owed to them to ensure that KCM's mining operations did not cause harm to the

environment or local communities. The allegations were based on evidence that the parent company exercised a high level of control and direction over the mining operations of its subsidiary and over the subsidiary's compliance with health, safety and environmental standards. In *Chandler v Cape plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111, the Court of Appeal recognised the possibility of parent company responsibility for injuries to its subsidiary's employee and set a test for the establishment of the parent company's duty of care. The claimants, therefore, argued that the English court had jurisdiction over Vedanta as a parent company "as of right" by virtue of Article 4 of the Brussels I Regulation Recast. In response, Vedanta claimed that the court should apply the *forum non conveniens* argument and stay proceedings in favour of the Zambian courts. Furthermore, the parent company submitted that the proceedings should be stayed as an abuse of the Regulation, since the claim against the first defendant was a "device" brought to ensure that the real claim against KCM was also litigated in England.

The judicial response to the arguments of the parties was straightforward and explicit. It was held that Article 4 provided clear grounds to sue Vedanta as an English-domiciled company in England. Coulson J. considered himself bound by *Owusu v Jackson* [2005] ECR I-1383, which prevents UK courts from declining jurisdiction on the basis of the *forum non conveniens* when the defendant is domiciled in the UK.

The judge also held that Vedanta did not clear the high hurdle of proving that the "sole object" of the proceedings was to oust the jurisdiction of another court or, alternatively, that the basis of the joinder was fraudulent. It was recognised that, although the claimants' argument against Vedanta was a challenging one, the pleadings set out a careful and detailed case on the breach of duty of care which was already supported by some evidence. As a result, it was established that, as long as the claim against the English-domiciled defendant satisfied a relatively low standard of a "real issue to be tried", it could not be labelled as a "device" and, consequently, as an abuse of EU law.

KCM also challenged the jurisdiction of the English court by claiming that the entire focus of the litigation was in Zambia, and the claim against Vedanta was "an illegitimate hook" to bring proceedings against the foreign company. Once again, the decision of the judge did not leave any ambiguity about the jurisdiction of an English court to hear the case about Zambian operations. It was first held that the claim against KCM undoubtedly had a real prospect of success. It was then established that the claim against Vedanta was arguable under both English and Zambian law. Furthermore, the judge ruled that the claims against both defendants were "closely bound together and their resolution would require only one investigation" (at [141]). Therefore, it was concluded that KCM was a necessary and proper party to the claim against Vedanta. Effectively, the reasoning of

the judge means that a challenging claim against the English-domiciled defendant, which may be difficult to prove on the merits and which is not subject to *forum non conveniens* control, is sufficient to establish the jurisdiction of the English court over the claim against a foreign defendant that has no connection with the territory of England.

Finally, the judge unconditionally established that England is the appropriate forum for bringing the claim against KCM in accordance with the test set out in *Spiliada Maritime Corporation v Cansulex Ltd.* [1987] A.C. 460 and *Connelly v RTZ* [1998] A.C. 854. The judge decided that the assessment of England as the proper forum for the claim against KCM should be considered in the light of the claims against Vedanta. Following this conclusion, and the earlier finding of the real issue to be tried between the claimants and Vedanta, it was held that England was an appropriate place to hear the claims against two legal entities of the "major international company" (at [163]). If a similar approach is adopted in cases against English-domiciled companies with foreign operations, it may be difficult for defendants to challenge the jurisdiction of the English courts to hear claims arising from the overseas operations of the subsidiaries.

Although it was unnecessary for the judge to consider the second limb of the *forum non conveniens* test, it was held, in obiter comments, that the claimants would not obtain access to justice in Zambia should the trial take place there. In particular, the judge took into account evidence that the Zambian legal system is not well developed; that the vast majority of the claimants would be unable to afford legal representation; that there was an insufficient number of local lawyers able to proceed with a mass tort action on such a scale; and that KCM would be likely to prolong the case. The judge exercised restraint in making any sort of policy judgment based on an assessment of the Zambian legal system, which is in line with the previous practice of the English courts. Coulson J. held that "criticism of the Zambian legal system" was not "the intention or purpose" of the judgment and, therefore, could not be regarded as "colonial condescension" (at [198]).

The decision clearly confirmed the mandatory application of Article 4 of Brussels I in claims against parent company. Despite extensive litigation on jurisdictional grounds of similar tort liability claims in England (see *Connelly v RTZ* [1998] A.C. 854; *Lubbe v Cape plc* [2000] 1 W.L.R. 1545), the decision in *Owusu* is binding. The unconditional ground of jurisdiction under the Brussels I Regulation Recast can be combined with the common law "necessary and proper party" gateway to jurisdiction against an overseas subsidiary. The doctrine of *forum non conveniens* appears to be greatly weakened as a protection of the overseas subsidiary. At the same time, the claimants' main purpose was the establishment of the jurisdiction over the acts, and consequently the liability, of the parent company as the nerve centre of the corporate group. In this respect, the jurisdiction of the court based on the duty of care combined with the acknowledgement of the viability of the argument

that Vedanta's liability should be based on its significant financial benefit from the Zambian operations, corresponds with the factual nature of transnational corporations. Any further acceptance by the English courts of the reasoning based on the economic relationship between parent companies and their subsidiaries may result in a shift from the conventional approaches to the allocation of responsibility within corporate groups.

Second, although, at this stage of the proceedings, the judge did not consider the case on the merits, there is nonetheless acceptance, reading between the lines, that the parent company may be held responsible for the human rights abuses committed against the members of the community at the place where the subsidiary runs its operations. The judge's reliance on the decision in *Chandler* allowed it to conclude that the claim against Vedanta was arguable in English law. The reasoning left no doubt that *Chandler*, which itself did not have any foreign element, should nevertheless be considered as an authority for the resolution of the tort liability cases involving foreign operations of the English-domiciled parent companies. However, a final determination of the parent company's liability for the overseas corporate abuses must await a future decision.

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TRANSFER OF JURISDICTION AND THE BEST INTERESTS OF THE CHILD

ARTICLE 8 of the Brussels IIa Regulation sets out the general rule regarding jurisdiction in intra-EU parental responsibility cases, namely that jurisdiction lies with the courts of the Member State of the habitual residence of the child. However, exceptionally, the court that has been seised of a case pursuant to Article 8 may not be the best placed to hear the case. To cater for such situations, the Regulation contains an innovative rule according to which a court that is seised of a case, and has jurisdiction on the substance, can transfer the case to a court of another Member State, if the latter is "better placed" to hear the case, and if the transfer is in the best interests of the child. Additionally, the transfer is subject to the condition that there is a "particular connection" between the child and the other Member State (e.g. the child is a national of that Member State). The "transfer of jurisdiction" rule, which is embodied in Article 15 of the Regulation, is at the heart of the Supreme Court decision in *Re N (Children) (Adoption: Jurisdiction) (AIRE Centre and others intervening)* [2016] UKSC 15; [2016] 2 W.L.R. 1103.

The decision concerned two young girls, aged two and four, who were born and lived all their lives in England. The girls, like their parents, were Hungarian nationals. In May 2013, the local authority placed the