Case No: HT-2015-000292

Neutral Citation Number: [2016] EWHC 975 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Rolls Building, Fetter Lane,

London, EC4A 1NL

Date: 27 May 2016

Before:

THE HON MR JUSTICE COULSON

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Between:

Dominic Liswaniso Lungowe & Others **Clai**

- and -

First Defe

(1) Vedanta Resources Plc

Second

(2) Konkola Copper Mines Plc **Defe**

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Richard Hermer QC, Marie Louise Kinsler and **Edward Craven**

(instructed by **Leigh Day**) for the **Claimants**

Charles Gibson QC, Professor Sir Alan Dashwood QC and **Geraint Webb QC**

(instructed by **Herbert Smith Freehills**) for the **First Defendant**

Charles Gibson QC, Geraint Webb QC and **Professor Adrian Briggs QC**

(instructed by **Herbert Smith**) for the **Second Defendant**

Hearing dates: 12, 13 and 14 April 2016

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Judgment

The Hon. Mr Justice Coulson :

PART I: GENERAL

1. INTRODUCTION

1.
The claimants are 1,826 Zambian citizens who are residents of four communities (Shimulala, Hellen, Kakosa and Hippo Pool) in the Chingola region of Zambia. On 31 July 2015, they commenced these proceedings alleging personal injury, damage to property, loss of income and loss of amenity and

enjoyment of land arising out of alleged pollution and environmental damage caused by the Nchanga copper mine ("the mine") from 2005 to the present day.

2.
The second defendant ("KCM") is a public limited company incorporated in Zambia. It owns and operates the mine. The first defendant ("Vedanta") is a holding company for a diverse group of base metal and mining companies, including KCM. I am told that KCM is the most important copper mining investment within the Vedanta group.

3.
On 19 August 2016, Akenhead J granted the claimants permission on paper to serve the Claim Form and the Particulars of Claim out of the jurisdiction on KCM.

4.
On 15 September 2015, Vedanta applied for:

(a)
A declaration that the court does not have jurisdiction to try these claims, or alternatively, that the court should not exercise any jurisdiction which it may have to try these claims, pursuant to CPR Part 11(a) and/or (b);

(b)
A stay of proceedings pursuant to CPR Part 11(6)(d) and/or CPR 3.1(2)(f) and/or pursuant to the court's inherent jurisdiction until further notice;

(c)
Such further or consequential relief as the court deems fit; and

(d)
Costs.

5.
On 5 October 2015, KCM applied for:

(a)
A declaration that the court does not have jurisdiction to try these claims, or alternatively, that the court should not exercise any jurisdiction which it may have to try these claims (alternatively, specific claims), pursuant to CPR Part 11(a) and/or (b);

(b)
An order setting aside the claim form, the service of the claim form and the order of Akenhead J dated 19 August 2015, giving the claimants permission to serve the claim form on KCM out of the jurisdiction, alternatively, a stay of the claims and/or such further or consequential relief as the court deems fit;

(c)
Such further or consequential relief, as the court deems fit; and

(d)
Costs.

6.

Unhappily, the central issue raised by these twin applications, namely where these claims should be tried, assumed all the trappings of a State trial. There were 19 full lever arch files containing evidence and exhibits, and a further 5 lever arch files containing well over 100 authorities. Live disputes between the parties ranged from detailed arguments as to the circumstances in which a parent company might owe a duty of care to those affected by the acts and omissions of its subsidiaries, to the dearth of private lawyers in Zambia and who is to blame for the failure of other environmental litigation in Zambia. Despite all of that, I was and remain of the view that the issues raised on the applications brought by the defendants are relatively straightforward and lead to what are, I hope, unsurprising conclusions.

7.
The applications were heard over three days in mid-April 2016. The first full draft of this Judgment was prepared in the four days immediately thereafter, after which I went on circuit until the end of May. As I explained to the parties at the outset of the hearing, the logistical difficulty that I faced was that I could not take the 24 lever arch files on circuit, which meant in consequence that the final 'polishing' stage in the production of this Judgment was delayed for longer than I would have wished.

8.
This Judgment comes in four parts. Part 1 (**Sections 1-6** inclusive) deals with general matters. Part II (**Sections 7-11** inclusive) deals with the application by Vedanta. Part III (**Sections 12-18** inclusive) deals with the applications by KCM. Part IV (**Section 19**) sets out my conclusions.

2. BACKGROUND FACTS

2.1
The Parties

9.
There are currently 1,826 claimants. This number may change because there has already been a dispute between Leigh Day, and another firm of solicitors, Hausfeld, as to who was representing those allegedly affected by pollution from the mine. It appears that Hausfeld are assessing the viability of potential new claims involving over 1,000 additional claimants. There is a distinct possibility, therefore, that the number of claimants may increase significantly.

10.
The claimants live in the four villages in the Chingola district noted in paragraph 1. They are situated to the northwest of the mine. The majority of them are subsistence farmers who rely on the land and the local waterways to sustain basic agrarian livelihoods. They live along the Mushishima and Kakosa streams and the Kafue River, into which those streams flow. Their income is likely to be below the average income in Zambia, which is one of the world's poorest countries. It is unlikely that many of them will have travelled outside this part of Zambia, known as the Copperbelt region.

11.
Beyond those general matters, it is not possible to be more specific about the claimants because, beyond the list of names, dates of birth and areas of residence, and a number of short witness statements from a few of them dealing with general matters, no other information has been provided about the individual claimants. Specifically, there are no details about their injuries, their land, or their alleged losses.

12.

The mine commenced operation in 1937, when it was wholly owned by the Anglo-American Corporation Group, at the time of the British Protectorate of Northern Rhodesia. That country was granted independence and became Zambia in 1964. In 1970 the mine was part-nationalised, with 51% owned by State-controlled companies.

13.
Thirty years later, in April 2000, KCM was incorporated in Zambia as a public limited company for the purpose of privatising the mine. It was 65% owned by KCM Holdings SA (an Anglo-American subsidiary), and 35% by ZCCM-Investment Holdings Plc, a State-owned company ("ZCCM"). In 2002, Anglo-American Plc withdrew from KCM. In 2004, Vedanta Resources Holdings Limited ("VRHL"), a subsidiary of Vedanta (the first defendant), acquired a 51% interest in KCM, the remaining 49% being held by ZCCM. In February 2008 VRHL increased its shareholdings, via call options, to 79.42%. The remaining 20.58% is owned by the Zambian State through ZCCM.

14.
KCM operates the mine pursuant to statutory authority in the form of a mining licence. Only a Zambian domiciled company can be the holder of a mining licence. In addition, KCM hold a number of discharge licences which, subject to various conditions, permit KCM to make certain discharges from the mine into local waterways.

15.
Vedanta is an extremely wealthy holding company: there are references in the papers to it being worth around £37 billion. It has 19 employees, of which eight are directors, with the others in corporate or administrative support roles. By contrast, the Vedanta group employs 82,000 people worldwide through its subsidiary companies. Those are the operating companies, like KCM, involved in all kinds of mining and manufacture, as well as oil, gas and power generation.

2.2
The Nchanga Copper Mine

16.
The Nchanga mine actually consists of two separate mines: an 11km open pit mine and a deep underground mine. The mine operates in demanding conditions given the high water table and the high annual rainfall. KCM also operate a third copper mine in Zambia which is not the subject of this litigation. KCM employ 16,000 people in Zambia, the vast majority of them at Nchanga. KCM is the largest private employer in Zambia.

17.
The Google satellite images not only show the two parts of the Nchanga copper mine, but they also show the waterways in the area of the mine and in particular the Kafue River, into which the subsidiary waterways flow. It is this river and these waterways which are at the heart of the claimants' claim in these proceedings.

2.3
Particular Criticisms of KCM

18.
At the start of his written skeleton argument, Mr Hermer QC, on behalf of the claimants, gathered together a collection of criticisms of KCM made by three Commercial Court judges in an unrelated case, **U & M Mining Zambia Ltd v Konkola Copper Mines Plc** [2014] EWHC 2146 (Comm); [2014]

EWHC 2374 (Comm); and [2014] EWHC 3250 (Comm). In summary, Eder, Cooke and Teare JJ all found that, in that case, KCM had repeatedly acted in a dishonest and unjustified manner. Those findings are in uncharacteristically strong terms. The collective view of the judges was summarised by Teare J when he said of KCM that they were:

"…an entity which has employees willing to give untrue evidence, to cause unnecessary harm, to be obstructive of the arbitration process and to take untenable points with a view to delaying enforcement…a party willing to do all it can to prevent the other party from enforcing its legal rights."

19.
It was noted that, in the underlying arbitration in that case, the arbitration panel had rejected the evidence of Mr Pratap, KCM's business controller and principal witness, as dishonest; and there was also a finding of dishonesty against Mr Ndulo, the senior legal counsel employed by KCM. This is of direct relevance to these applications because Mr Ndulo has provided statements for the purposes of the present applications. In addition, there was a revealing statement in those proceedings by the executive director of the mine who said that, although KCM acknowledged that they had failed to pay sums that were due to the claimants in that case, they "would hold on to the money to the end of the dispute, which it would fight bitterly, no matter how long it took, including in Zambia where proceedings would take many years."

20.
Although this material might be regarded as mere mud-slinging, of the type that is regrettably all too common in high-value commercial litigation, I do not think that it can be brushed off quite as easily as that. These are serious findings of dishonesty by eminent Commercial Court judges. They inevitably mean that this court will have to consider very carefully the credibility to be attached to the evidence adduced on behalf of KCM, particularly the statements of Mr Ndulo.

21.
There is another element of the findings in the Commercial Court which is of relevance to the issues which I have to decide. This concerns KCM's financial position. It appears that, in the dispute with U & M Mining, there was detailed evidence as to KCM's financial position, doubtless in the context of their refusal to pay the sums that had been awarded against them. There was a strong suggestion that, by reference to their accounts, they might be in significant financial difficulties.

22.
This is a relevant issue in the present case, because it is said that one reason for pursuing Vedanta in these proceedings is that KCM may not ultimately be good for the money. There is evidence adduced by the claimants about KCM's uncertain financial position, some of it going back 2 or 3 years. I address that in greater detail below. There are, however, no up-to-date accounts.

23.
At the hearing, I did not regard that as entirely satisfactory because, as I pointed out to Mr Hermer, the financial position of large corporate entities can change from month to month, so the court will generally pay particular regard to up-to-date financial information. But the subsequent letter from Leigh Day dated 16 May 2016 makes clear that they have searched for KCM's accounts in Zambia, to very little avail. They found financial statements for 2003 and 2008, and annual returns for certain years which do not record accounts information. Annual accounts in accordance with the Zambian Companies Act have not been filed.

24.

Accordingly, because of the criticisms of KCM's accounts in the Commercial Court case, the evidence that has been filed here as to their uncertain financial position (addressed in greater detail below); and what appears to be the failure to file annual accounts, I conclude that there is a real risk that, without Vedanta's support, they may have insufficient resources to meet the claims. This is a topic to which I return in paragraphs 80-82 below.

3. THE 'COMMON PARTS' OF THE PLEADED CLAIMS

25.
The Particulars of Claim run to 64 pages. On the face of it, it is an extremely detailed document. The element that is missing is that part of the claim which would ordinarily identify the individual claimants; say whether or not they have suffered personal injury as a result of the pollution and if so, the nature and extent thereof; or indicate whether they have suffered injury to their land and if so, the nature of their land and the nature and extent of the injury. Whilst these might be regarded as matters of detail, anyone who has experience of GLOs will know that it is within that detail that the devil resides. It is a noteworthy omission from the proceedings at this stage, particularly given that the claims purport to date back to 2005. But there may be a good reason for it. I address that issue further at paragraphs 100-105 below.

26.
The first, lengthy section of the Particulars of Claim is general, in that it relates to both Vedanta and KCM. The pleading stresses, at paragraphs 5-7, the claimants' reliance on the waterways as "their primary source of clean water for drinking, bathing, cooking, cleaning and other domestic and recreational purposes." It is alleged that the waterways irrigate crops and sustain livestock (paragraph 6) and are an abundant source of fresh fish. It is said that in consequence the waterways are "of critical importance to the claimants' livelihoods and their physical, economic and social wellbeing" (paragraph 7).

27.
Paragraphs 8-27 of the Particulars of Claim deal with both the mine and the refining operation in the district, and the processing and disposal of tailings and other effluent. References are made to the licence granted to KCM.

28.
Thereafter, starting at paragraph 25, there are a series of detailed allegations dealing with the discharges of harmful effluent into the waterways and the local environment. It is alleged that both defendants knew of the frequent discharges of harmful effluent, and reliance is placed on the result of a particular inspection in 2006 (and the documents it generated) in which acidic material found its way into the Kafue River from the KCM operations. This incident in turn gave rise to the **Nyasulu** litigation in Zambia, to which I refer in paragraphs 191-197 below. Strong findings were made against KCM by the Zambian High Court in that case which are repeated in the Particulars of Claim at paragraph 38.

29.
The Particulars of Claim also sets out, from paragraph 39 onwards, other events from 2010 dealing with further pollution issues, and references are made to other documents, including a report by the Auditor General in 2014, in which significant criticisms were made of KCM's mining operation (paragraphs 47-77). This section of the Particulars of Claim concludes at paragraph 46 with a pleading of the harmful direct consequences of the pollution.

30.
There is then a lengthy section of the Particulars of Claim dealing with the applicable law (which is the law of Zambia, a point on which there is no dispute between the parties) and the relevant causes of action under Zambian law. Those are what are called 'common law causes of action' (tortious liability) and statutory causes of action by reference to particular obligations under the Zambian statutory code for environmental management.

4. THE PLEADED CLAIMS AGAINST VEDANTA

31.
The claim against Vedanta is set out in detail between paragraphs 78 and 94 of the Particulars of Claim. The primary way in which the case is put is in negligence. Paragraph 79 alleges that Vedanta's duty of care arose as a result of their assumption of responsibility "for ensuring that [KCM]'s mining operations do not cause harm to the environment or local communities, as evidenced by the very high level of control and direction that [Vedanta] exercise at all material times over the mining operations of [KCM] and its compliance with applicable health, safety and environmental standards."

32.
Then, at paragraph 80, there is an express plea of a relationship of proximity between Vedanta and the claimants. It is said that, in those circumstances, the imposition of a duty of care is fair, just and reasonable in the light of four specific factors. These are that i) the businesses of Vedanta and KCM are in a relevant respect the same; ii) that Vedanta knew or ought reasonably to have known that KCM's operations were unsafe and were discharging harmful effluent into the waterways; iii) that Vedanta had superior expertise, knowledge and resources; and iv) that Vedanta knew or ought to have known that KCM would rely on that superior expertise knowledge and resources in respect of health, safety and environmental protection.

33.
These four indicia of proximity are taken directly from the judgment of Arden LJ in **Chandler v Cape** [2012] EWCA Civ. 525; [2012] WLR 3111. It is Vedanta's case that, on a proper analysis, the tortious claim advanced by reference to **Chandler v Cape** is either unarguable or is so weak that the court should take that into account when exercising its discretion against allowing the claimants to serve out of the jurisdiction.

34.
Having set out the duty of care, the Particulars of Claim, starting at paragraph 83, then provides particulars, by reference to documents in the public domain, of Vedanta's control of KCM. A number of specific examples are provided in respect of each of the four elements of proximity to which I have previously referred. Then, at paragraph 88, the Particulars of Negligence are set out.

35.
From paragraph 90 onwards, the alternative claim against Vedanta is identified by reference to four statutory provisions. These are all based on Vedanta's alleged direction and control over the operations of KCM to which I have previously referred. In contrast to the allegations of duty and breach, this part of the Particulars of Claim is extremely short.

5. THE CLAIMS AGAINST KCM

36.

The general parts of the Particulars of Claim, which I have summarised at **Section 3** above, are of course equally applicable to the claim against KCM.

37.
KCM's alleged liability to the claimants is identified in paragraphs 95-111 of the Particulars of Claim. This pleads causes of action in negligence, nuisance, **Rylands v Fletcher**, trespass, and liability under Zambian statute law. Although there are some references back to previous parts of the pleading, it is fair to say that, with the exception of the width of the duty and the particulars of breach of that duty, this part of the Particulars of Claim is much shorter than the corresponding part setting out the claims against Vedanta. Given that KCM were operating the mine throughout the relevant period, whilst on any view Vedanta's involvement was at one remove, this discrepancy is surprising.

38.
It should also be noted that, as the owners and operators of the mine, KCM are said to be "strictly liable" to the claimants under a number of the statutory provisions, set out in the Particulars of Claim at paragraph 106 onwards. This is important because, in my judgment, the existence of such strict liability claims against KCM would ordinarily be the focus of the claimants' claims.

6. THE LEGAL BACKGROUND TO THE APPLICATIONS

39.
I address the relevant law in **Part II** of this Judgment (to the extent that it relates to Vedanta's applications) and **Part III** (to the extent that it relates to KCM's applications). However, it is sensible to set out in this first part of the Judgment one or two of the important elements of the legal landscape against which both these applications must be considered.

40.
In **VTB Capital Plc v Nutritek International Corp** [2013] 2 AC 337, Lord Neuberger said:

"…hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument. It is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost."

As I have indicated above, this case is a paradigm example of what Lord Neuberger was warning against. Furthermore, if the parties were prepared to put this amount of effort into what is ultimately a procedural hearing, then the court is entitled to ask itself how long, involved and expensive any substantial trial might be, wherever it is fought.

41.
Moreover that question – the 'where' issue - ought to be relatively straightforward. As Lord Mance said in the **VTB** case, the court has to stand back and ask the practical question where the fundamental focus of the litigation is to be found. The appropriate starting point for deciding on appropriate forum is the place of commission of the tort. In the present case that was Zambia. Furthermore, on the issue as to whether the fact that there is a claim against Vedanta should make any difference to that conclusion, I note that Lloyd LJ (as he then was) said in **Golden Ocean Assurance Ltd and World Mariner Shipping SA v Martin (the Goldean Mariner)** [1990] 2 Lloyds Rep 215:

"It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction."

42.
The problem that has arisen, both in this case, and in other cases of similar type, is that much has changed since 1990. Here, the claimants have a claim against one defendant (Vedanta) who is domiciled in the United Kingdom. The claimants therefore say that they are entitled as of right to pursue Vedanta in the English courts. They maintain that there can be no question of those proceedings being stayed, as a result of the clear rule in **Owusu v Jackson** [2005] QB 801. Thus the claimants say that, with proceedings on foot in the United Kingdom which cannot be stayed, the claim against the foreign defendant (KCM) should also be heard in the United Kingdom so as to avoid a duplication of expense and to remove any doubts as to whether justice could be obtained in Zambia. In this way, the principles noted by Lord Mance in **VTB** and by Lloyd LJ in **Golden Ocean** never really arise.

43.
Mr Hermer called this the "direction of travel" that can be seen in the more recent authorities. It is perhaps best encapsulated at paragraph 12-033 of Dicey, Morris and Collins on the Conflict of Laws (15th Edition), a work under the general editorship of Lord Collins. At paragraph 12-033, the editors note the classic exposition of the forum non conveniens test in **Spiliada** by Lord Goff, but go on to say:

"Lord Goff could not have foreseen, however, the subsequent distortion which would be brought about by the decision of the European Court in **Owusu v Jackson**. The direct effect of that case is that where proceedings in a civil or commercial matter are brought against a defendant who is domiciled in the United Kingdom, the court has no power to stay those proceedings on the ground of forum non conveniens. Its indirect effect is felt in a case in which there are multiple defendants, some of whom are not domiciled in a Member State and to whom the plea of forum non conveniens remains open: it is inevitable that the ability of those co-defendants to obtain a stay (or to resist service out of the jurisdiction) by pointing to the courts of a non-Member State which would otherwise represent the forum conveniens, will be reduced, for to grant jurisdictional relief to some but not to others will fragment what ought to be conducted as a single trial…There is no doubt, however, that the **Owusu** factor will have made things worse for a defendant who wishes to rely on the principle of forum non conveniens when a co-defendant cannot."

44.
Furthermore, it may be said that this 'distortion' is now compounded by the use being made by foreign claimants of the decision of the Court of Appeal in **Chandler v Cape**. Since that decision opens up the possibility of arguing that a parent company has a freestanding liability in tort, even though the relevant operating company was the subsidiary, it has already been noted that this could have a direct impact on jurisdiction arguments. In his thoughtful article in the Cambridge Law Journal at [2012] 71(3) CLJ 478, Dr Andrew Sanger said of **Chandler v Cape**:

"The decision is also important to those involved in corporate transnational tort litigation. Pursuant to recent EU legislation, UK courts have jurisdiction in civil actions alleging tortious activity committed abroad by a corporation domiciled in the UK…English courts have previously found that common law claims can, in principle, proceed against UK parent corporations for torts committed by their subsidiaries abroad (see **Connelly v RTZ** [1998] AC 854 and **Lubbe v Cape** [2000] 1WLR 1545). Following **Chandler**, a case could be made that a UK-domiciled parent company owes a duty of care to the employees of a foreign subsidiary."

It is the combination of **Owusu v Jackson** on the one hand, and **Chandler v Cape** on the other, that underpinned the vast majority of Mr Hermer's submissions. In essence, although he was too polite to say so directly, his submission was that this court had no option but to refuse both these applications and to accept jurisdiction to deal with these proceedings as they are presently constituted.

45.
In **Erste Group Bank AG (London) v JSC 'VMZ Red October'** [2015] EWCA Civ. 379 (which I shall hereafter call **Red October**) the Court of Appeal endeavoured to address an aspect of this problem and to restate the principles in **VTB** and **Golden Ocean**. They said that the tests were more nuanced than had previously been acknowledged. It is unsurprising, therefore, that the defendants in this case rely heavily on **Red October**. But that was a case on very different facts and did not involve (except tangentially) a consideration of the position of a defendant who, as a result of what is called in the textbooks the **Owusu** effect, was not in a position to stay the United Kingdom proceedings against it.

46.
With those questions and issues in the background, I then turn to analyse the applications made by Vedanta and KCM.

PART II: THE APPLICATIONS MADE BY VEDANTA

7. OVERVIEW

47.
The parties' disagreements even extended to the order in which they dealt with these applications. The defendants dealt with KCM's application first, doubtless because they felt that it was an inherently stronger application which should be considered first, keeping any consideration of the position as against Vedanta to a minimum. On the other hand, since the claimants' case was that, as a matter of law, the Vedanta claim could not be stayed, and because they said that the existence of that claim had a significant effect on KCM's application, they argued that the Vedanta application should be dealt with first.

48.
I have concluded that the Vedanta application should be dealt with first. Not only was it the first in time, and not only is Vedanta the first defendant, but I consider that it would be confusing and potentially misleading to deal with the KCM application before concluding what should happen to the claim against Vedanta. That said, I have considered all of the applications in the round and I believe that, as set out below, the sequence in which I have addressed them has made no difference to their outcome.

49.
As noted above, the claimants' case on the Vedanta applications is very straightforward. They say that Article 4 of the Recast Brussels Regulation provides a clear and unqualified right to sue a United Kingdom domiciled company in the United Kingdom. They say that Article 4 allows for no discretion or qualification to that simple proposition. They rely on the decision of the European Court of Justice in **Owusu v Jackson,** which makes it plain that the doctrine of forum non conveniens has no part to play under Article 4, and that the Brussels Convention precludes a court of a contracting State from declining the jurisdiction conferred on it by Article 4 on the ground that a court of a non-contracting State would be a more appropriate forum.

50.

The claimants go on to rely upon a raft of subsequent United Kingdom authorities in which the **Owusu** effect has been followed and applied. They point to the fact that, in the one area where this principle was doubted, namely where there were pending proceedings in another Member State, any uncertainty has been resolved by subsequent Regulations. They also reject out of hand the suggestion that, in some way, the fact that a forum non conveniens argument is not available to Vedanta is an abuse of EU law. Accordingly, they say, the court is simply not entitled to stay these proceedings. In addition they argue that, even if the court was tempted to, it would be wrong in principle to impose a stay for case management reasons, because that would be achieving by the back door that which **Owusu** expressly prohibits at the front.

51.
Vedanta submit that **Owusu** is a case on its particular and straightforward facts, and can have no applicability to the very different facts that apply here. In any event they point to the reasoning in **Owusu,** which they say is plainly and obviously flawed and should not be followed. They seek at the very least a reference to the European Court of Justice. In the alternative, they argue that Article 4, which is expressly said to provide protection to defendants like them, is being abused by the claimants, because they are using the existence of the claim against Vedanta as a device in order to ensure that the real claim, against KCM, is litigated in the United Kingdom rather than in Zambia.

52.
In addition, Vedanta refer to and rely upon KCM's submissions that there is either no real issue between Vedanta and the claimants or, if there is, the claim against Vedanta is so weak that this should be reflected in the exercise of the court's discretion in allowing KCM's application. In those circumstances, Vedanta say that, if the court is persuaded by either of those submissions, then that would also justify a stay of the claim against Vedanta. In that context, it is perhaps important to note that, because Vedanta have not submitted to the jurisdiction, they have not made any application to strike out the claim against them.

8. THE LAW

53.
Article 4 of the Recast Brussels Regulation provides that:

"Subject to the Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

This is the successor to the earlier Article 2 and is the same terms. It is common ground that none of the exceptions within the Regulation apply to the claimants' claim against Vedanta.

54.
Owusu v Jackson is authority for the proposition that forum non conveniens arguments are irrelevant to the claim against Vedanta, given the terms of what is now Article 4. As a result of this answer to the first question posed by the Court of Appeal in that case, the ECJ declined to answer the second question, which asked whether the prohibition applied "in all circumstances or only in some and if so which?" The ECJ noted at paragraph 37 that it was common ground that no exception on the basis of the forum non conveniens doctrine was provided for by the authors of the Brussels Convention, and that respect for the principle of legal certainty was one of the objectives of the Convention and "would not be fully guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the forum non conveniens doctrine" (paragraph 38).

55.
The heart of the ruling can be found between paragraphs 41-46 as follows:

“41. Application of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention.

42. The legal protection of persons established in the Community would also be undermined. First, a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he could be sued. Second, where a plea is raised on the basis that a foreign court is a more appropriate forum to try the action, it is for the claimant to establish that he will not be able to obtain justice before that foreign court or, if the court seised decides to allow the plea, that the foreign court has in fact no jurisdiction to try the action or that the claimant does not, in practice, have access to effective justice before that court, irrespective of the cost entailed by the bringing of a fresh action before a court of another state and the prolongation of the procedural time limits.

...

44. The defendants in the main proceedings emphasise the negative consequences which would result in practice from the obligation the English courts would then be under to try this case, inter alia as regards the expense of the proceedings, the possibility of recovering their costs in England if the claimant's action is dismissed, the logistical difficulties resulting from the geographical distance, the need to assess the merits of the case according to Jamaican standards, the enforceability in Jamaica of a default judgment and the impossibility of enforcing cross-claims against the other defendants.

45. In that regard, genuine as those difficulties may be, suffice it to observe that such considerations, which are precisely those which may be taken into account when forum non conveniens is considered, are not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in article 2 of the Brussels Convention, for the reasons set out above.

46. In the light of all the foregoing considerations, the answer to the first question must be that the Brussels Convention precludes a court of a contracting state from declining the jurisdiction conferred on it by article 2 of that Convention on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other contracting state is in issue or the proceedings have no connecting factors to any other contracting state.”

I note in passing that the AG’s opinion, on which the ECJ judgment was based, contained very similar reasoning. It referred to at least two cases (**Connelly v RTZ** [1998] AC 854 and **Lubbe v Cape** [2000]1 WLR 1545) which bear some similarity to the present dispute, and which I address in more detail in **Part III** of this Judgment below.

56.
It has been repeatedly held in subsequent decisions in the United Kingdom that the decision in **Owusu v Jackson** prevents any consideration of the forum non conveniens principle when the defendant, or one of the defendants, is domiciled in the UK. It is unnecessary to set them all out. A representative sample of those authorities, each of which is binding on me, is as follows:

(a)

In **Global Multimedia International Ltd v Ara Media Services** [2006] EWHC 3612 (Ch) Sir Andrew Morritt C noted that several of the defendants were domiciled in England. As a result he said:

"Even if it were otherwise desirable, this court could not stay the proceedings against them (See Article 2 of the Judgments Regulation and **Owusu v Jackson** [2005] Q.B. 801)."

(b)
In Attorney General of Zambia v Meer Care & Desai (A Firm) [2006] 1 CLC 436 Sir Anthony Clarke MR said:

"…a number of the defendants, including the first, second, fifth, eighth and twelfth defendants, are domiciled in a state which is a party to the Conventions the terms of which are now set out in Council Regulation EC 44/2001, which has the force of law in England. The effect of the decision of the European Court of Justice in **Owusu v Jackson** (Case C-281/02) [2005] 1 CLC 246 is that the English court could not grant a stay of proceedings against those defendants in favour of a court in a state which is not a party to a relevant convention, including Zambia. In any event, none of the defendants other than the appellants applied for a stay."

(c)
In **UBS AG v HSH Nordbank** [2009] 2 Lloyds Rep 272, Lawrence Collins LJ (as he then was) said:

"103. The prevailing view is that there is no scope for the application of forum conveniens to remove a case from a court which has jurisdiction under the Regulation, even as regards a defendant who is not domiciled in a Member State…"

(d)
In **A v A (Children: Habitual Residence)** [2014] AC 1, Baroness Hale summarised the position in these terms:

"31. In **Owusu v Jackson** (Case C-281/02) [2005] QB 801 , the Court of Justice of the European Communities held that the rule in article 2 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Measures 1968, which required that "persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that state", meant that the courts of that state had to assume jurisdiction, even though there was a third country which also had jurisdiction and even though that country was, on the face of it, the more appropriate forum in which to bring the action. Thus the English court was not only empowered but obliged to assert and exercise jurisdiction rather than leave the parties to the jurisdiction of a state (Jamaica) which was not party to the Convention."

57.
There was more doubt as to whether this inflexible approach also applied where there were parallel proceedings in a non-EU state. At one point it appeared that Vedanta were arguing, by analogy with those cases, that the rule in **Owusu v Jackson** did not apply to this case. However this analogy has not been pursued by Vedanta so the cases on the topic, including **JCN v JCN** [2010] EWHC 843 (Fam); [2011] FLR 826, **Ferrexpo v Gilson Investments** [2012] EWHC 721; [2012] CLC 645 and **Plaza BV v Law Debenture Trust Corp** [2015] EWHC 43 (Ch) do not arise for consideration here. In any event, the position in relation to parallel proceedings has now been addressed directly in Articles 33 and 34 of the Recast Regulation. In those circumstances, the parallel proceedings argument can no longer arise here in any guise.

58.

An argument which Vedanta do continue to make concerns the suggestion that these proceedings against them amount to an abuse of EU law. The authorities on the topic make plain the high hurdle that has to be cleared before a court can be confident that the proceedings are indeed an abuse. Thus:

(a)
In **Freeport Plc v Arnoldsson** [2008] QB 634, an English defendant asserted that the claim against its Swedish subsidiary had been included with the sole object of ensuring that the English company was brought before a Swedish court. The complaint arose in the context of Article 6, now Article 8 of the Recast Regulation, and the issue was whether the claims were "so closely connected that it was expedient to hear and determine them together". Even under that Article, which on its face allowed considerably more judicial discretion than is the case with Article 4, the ECJ ruled that:

"…Article 6(1) applies where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled."

In other words, the English company needed to show that the sole object of the claim against the Swedish subsidiary was to bring the English company before the Swedish court.

(b)
In **CDC Hydrogen Peroxide SA v Akzo Nobel NB and Others** [2015] EU: C: 2015: 335; [2015] QB 906, the issue was whether the claimants could proceed against non-domiciled defendants once the claim against the 'anchor' defendant was not proceeding. The court concluded that it could, as long as there had not been an abuse or a 'fraudulent design' as between the applicant and the domiciled defendant. At paragraph 29 of their judgment they concluded that "the court seized of the case can find that the rule of jurisdiction laid down in [Article 6] has potentially been circumvented only where there is firm evidence to support the conclusion that the applicant artificially fulfilled, or prolonged the fulfilment of, that provision's applicability."

Again therefore this is, on any view, a very high threshold, a view supported by the Advocate General's opinion in the same case, which said at paragraph 86:

"…the court seized is not obliged to examine systematically whether the extended jurisdiction deriving from [Article 6] resulted from an abuse of rights, although it may nevertheless do so if there is sufficient evidence that the applicant availing itself of the extended jurisdiction has so conducted itself as to distort the true purpose of that rule of jurisdiction."

9. THE MERITS OF THE CLAIMANTS' CLAIMS AGAINST VEDANTA

59.
On one view, the merits of the claimants' claim against Vedanta are irrelevant to Vedanta's application for a stay. However, both Vedanta and KCM say that the claim against Vedanta is a device, designed simply to ensure that all the claims are brought in the United Kingdom. They also say that the claims themselves are hopeless. As a result, Vedanta argue that the claimants' claims against them are not viable and will never realistically come to trial. Accordingly, in order to deal with these applications on a cogent basis, and to consider them in the round, it seems to me that I should note my conclusions on these issues at the outset.

60.

In **Part III** of this Judgment, at **Section 15**, I deal with whether or not the claimants' claims against Vedanta raise a real issue to be tried or whether it can properly be regarded as a claim that is bound to fail. That is one of the ingredients that I must address in the KCM application. For the reasons set out in those paragraphs, I have concluded that the claimants' claims against Vedanta raise a real issue to be tried.

61.
KCM's alternative submission was that, even if the claimants' claim against them could be said to demonstrate a real issue to be tried, the claims were undeniably weak, which they said was relevant to the court's discretion when deciding whether or not to set aside Akenhead J's order. It was forcefully urged on me that this case was very different to **Chandler v Cape**, and that, realistically, it was unlikely (or very unlikely) to succeed.

62.
I again deal with this argument in **Part III** of this Judgment at paragraphs 119-121 below. For the reasons set out there, I emphasise that, in considering these applications, the court should not embark on a mini-trial and must be mindful of the fact that the claims are in their very early stages. Although I note that establishing the existence of a duty in the circumstances presently pleaded may be something of an uphill task, because the case is not obviously on all fours with **Chandler v Cape**, I consider that the pleading sets out a careful and detailed case which is already supported by at least some evidence. I therefore decline to say that the claims are weak or are very unlikely to succeed.

63.
Finally there is the assertion that the claim against Vedanta is a device. It is, I think, difficult to say that any claim which raises a real issue to be tried is, at the same time, a device. And for the reasons set out in paragraphs 76-82 below, I conclude that, although the strategic assistance that the claims against Vedanta might provide in relation to the jurisdiction arguments raised by KCM's application is one reason for the claim against Vedanta, it is not the only one.

64.
In the light of the principles set out in **Section 8** above, and the foregoing summary of my views as to the merits of the claimants' claim against Vedanta, I now go on to deal with Vedanta's applications in fairly short order.

10. VEDANTA'S APPLICATION FOR A STAY

10.1
A Stay on Forum Non Conveniens Grounds

65.
In my judgment, there is no basis on which this court could stay the claim against Vedanta on forum non conveniens grounds. I am bound to reach that conclusion by **Owusu** and the authorities noted in paragraph 56 above.

66.
On behalf of Vedanta, Mr Webb QC argued that **Owusu** was a case on very different facts and that the ECJ did not intend to provide a 'one size fits all' solution. He noted that **Owusu** was a unitary claim arising out of one incident, whilst this is a group action with over 1,800 claimants and with potentially many more to be added. They had claims in tort arising from multiple events in Southern Africa which raised a raft of difficulties that simply were not considered in **Owusu**.

67.
Whilst I agree that the facts of this case are very different to the facts of **Owusu**, I do not accept that that makes any difference to the binding nature of the authority. It is plain that the ECJ had in mind various different factual scenarios when reaching their conclusion, and I have already noted that the Advocate General's opinion included references to both **Connolly v RTZ** and **Lubbe v Cape**, which were group actions with a number of close similarities to the present case. Furthermore, the logistical difficulties which the ECJ noted in paragraph 44 of their judgment are not dissimilar to the logistical difficulties here, although of course in this case they are magnified many times over. And whether the defendants like it or not, it has to be said that paragraph 45 of the judgment makes it plain that the ECJ did intend (as it so often does) to provide a 'one size fits all' answer. Their critics might say that that is the problem with the ECJ, but that is hardly a matter for me.

68.
In support of the proposition that the ECJ in **Owusu** may have deliberately chosen to keep the point open in respect of other factual circumstances, Mr Webb QC relied on the fact that they did not answer the second question posed. But I do not see any magic in that. The ECJ almost always refuses to answer questions if they appear to be hypothetical. In view of their answer to the first question, the ECJ did not believe that it needed to answer the second. Whilst it may have been helpful if they had done, the fact that it chose not to do so, cannot be regarded as undermining the blanket nature of the solution proposed. As Barling J noted in **Catalyst Investment Group Ltd v Lewisohn** [2010] Ch 218, the court should not read anything into the refusal to answer the second question.

69.
Finally on this question for a stay, Mr Webb argued that it was not a decision to be followed because its reasoning was obviously wrong. In particular he pointed to paragraph 41, which stressed that a defendant would be better placed to conduct his defence before the courts of his domicile and therefore, if forum non conveniens applied, he would not be able reasonably to foresee in which other court he could be sued. Mr Webb submitted that that was a complete misunderstanding of the principle of forum non conveniens because it is the defendant who is relying on the doctrine in order to argue that the case should not be heard in the courts of his domicile. Accordingly, although the decision was justified by the ECJ on the grounds of certainty for a defendant, it ignored the simple proposition that it is actually the defendant who is seeking the trial in another jurisdiction.

70.
In my view, there is force in Mr Webb's submission that the ECJ's reasoning is suspect. Whilst the principle of certainty is understood, reliance upon it here appears to ignore the fact that, in these cases, it is the defendant himself who would prefer not to be sued in the courts of his domicile. In one sense, a rule justified by reference to certainty for a defendant (and it must be remembered that Article 4 is said to provide protection to a defendant) has been transmuted into a rule providing certainty for a claimant. This is a reading confirmed by the EU Commission Staff Working document of 14 July 2005, to which Mr Hermer took me, and which seemed to boast openly of the protection provided to a claimant by Article 4.

71.
But the mere fact that the reasoning in **Owusu** might be said to be capable of sustained criticism does not make the decision any the less binding on me. The result in **Owusu**, and the fact that it has been followed in domestic decisions which are also binding on me (paragraph 56 above) mean that I am bound to follow it.

72.
For those reasons, therefore, Vedanta's application for a stay on the grounds of forum non conveniens must fail.

10.2
Abuse of EU Law

73.
Vedanta's alternative ground is that I should stay these proceedings on the basis that they amount to an abuse of EU law. The passage to which I have already referred from Dicey, Morris and Collins (see paragraph 43 above), having made the point about the **Owusu** effect, goes on to say:

"A court will therefore need to be astute to detect and expose abusive claims brought against defendants domiciled in a Member State but which may have been brought only in order to rely on the **Owusu v Jackson** factor in relation to others."

No authority is cited in supported of this proposition, and no clue is given as to the test to be applied when a court is 'astutely' looking for 'abuse' claims. The best guidance is, I think, the authorities at paragraph 58 above.

74.
The first point to make is that those authorities provide a high hurdle for a defendant in Vedanta's position to clear at an interlocutory stage. Vedanta would need to show that joining them to these proceedings was an abuse of EU law, and (even under the old Article 6), that means proving that the sole object was to oust the jurisdiction of another court, or alternatively that the basis of the joinder was fraudulent. If such a high test was applicable under the old Article 6, where there was at least an element of judicial discretion, then it must follow that an equally high test must apply to a claim under Article 4 of the Recast Regulation.

75.
Notwithstanding the height of this bar, Vedanta repeatedly submitted that the claim against them was a device, designed simply to act as a "hook" to allow the claimants to pursue KCM in this jurisdiction. Whilst they did not label this as fraudulent, they did suggest that it was artificial: a claim advanced, not on its merits, but because of the consequences it would bring about.

76.
I am sure that the fact that Vedanta are domiciled in the United Kingdom is one of the principal reasons why they have been pursued in these proceedings. I am therefore sure that the claimants (or more accurately their legal advisors) have much in mind the potentially beneficial spin-off that arises from it, in just the way that Dr Sanger anticipated in his article (paragraph 44 above).

77.
But I cannot say that that is the sole reason for issuing proceedings against Vedanta. As noted above, on the face of the pleading, there is a real issue to be tried between the claimants and Vedanta and that, whilst establishing their claims may not be straightforward, they are quite entitled to try and bring themselves within the class of liability recognised in **Caparo v Dickman** and **Chandler v Cape**. I cannot see how a claim that raises a real issue can also be labelled a device.

78.
In addition, there is some evidence that the claimants wish to pursue Vedanta because they are seen as the real architects of the environmental pollution in this part of Zambia. The argument is that,

since it is Vedanta who are making millions of pounds out of the mine, it is Vedanta who should be called to account. I acknowledge that this argument has some force, and provides a further reason why I cannot label the claim against Vedanta as a device.

79.
There is a related (and possibly more important) point about corporate structure. Even though Vedanta, following the order of Akenhead J, have agreed to submit to the courts of Zambia, they are not technically bound by any judgment of those courts. Thus I would be wrong to ignore the possibility that, if the litigation was conducted in Zambia, Vedanta/KCM could seek to strike it out, or if they lost at trial, Vedanta might put KCM into liquidation in order to avoid paying out to the claimants. The history of the **U&M** case (paragraphs 18-24 above) demonstrates that these are possibilities which cannot be ignored.

80.
Finally, there is the separate question of KCM's financial position, to which I have already referred at paragraphs 21-24 above. There are no relevant accounts. And the evidence in the public domain, summarised in Mr Day's fifth witness statement at paragraphs 121-126, indicates that KCM were in 2014 running at a significant loss. This evidence includes ministerial statements about the threat of insolvency, bankruptcy or receivership facing KCM and the existence of at least one debt of $30million which went unpaid.

81.
Furthermore if there were any doubt about it, the findings of Eder J in **Konkola Copper Mines Plc v U&M Mining Zambia Ltd** [2014] EWHC 2146 (Comm.); [2015] 1 CLC 314, firmly support the suggestion that there is a risk that KCM may not be able to honour their debts as they fall due. Whilst I accept at once that Mr Day's evidence about KCM's financial position was not at the forefront of the claimants' original application to serve out, and has been proffered late in the day, it would be wrong for the court simply to ignore it. The evidence strongly suggests that KCM may not be good for the money, so a claim against the much wealthier parent company is justified on practical grounds too.

82.
Accordingly, it cannot be said that the sole purpose of the claim against Vedanta is to act as a hook for the claim against KCM. That may very well be one of its principal purposes, but I cannot ignore the fact that there is a real issue between the claimants and Vedanta and there are legitimate concerns about Vedanta's conduct and KCM's financial position. Neither can it be said that the claim is somehow a fraudulent use of Vedanta's domicile. For those reasons, therefore, I do not stay these proceedings on the basis that the claim against Vedanta is an abuse of EU law.

10.3
A Stay on Case Management Grounds

83.
There was a good deal of argument about whether or not a court could stay proceedings, such as those against Vedanta, on case management grounds. The claimants argued that, in the light of **Owusu**, such a stay was impossible because otherwise it would be achieving what the ECJ said was illegitimate. By contrast, Vedanta relied on the decision of Blackburne J in **Pacific International Sports Club v Surkis** [009] EWHC 1839 (Ch) to say that the court still retained its normal case management powers and that, in the appropriate case, a stay could be granted. They said that, in the present case, a stay should be granted because the claim against Vedanta was not viable and that, if

there was no claim against KCM, the court could realistically conclude that there would never be a trial of the claim against Vedanta.

84.
In my view, in an appropriate case, and notwithstanding **Owusu**, the court must be able to exercise its case management powers to grant a stay. The court remains the master of its own process and procedure, and it would be a very odd result if the court was obliged to do something that was contrary to good and sensible case management. I consider that that is all that Blackburne J was saying at paragraphs 112 and 114 of his judgment in **Pacific International**.

85.
Whilst it may be difficult in practice to identify the "rare and compelling circumstances" (Lord Bingham in **Reichhold Norway ASA v Goldman Sachs International** [2000] 1 WLR 173), in which a domiciled defendant could obtain a stay against a claimant in these sorts of circumstances, I do not need to let that academic question detain me because, even assuming that the court has the power, it would be wholly inappropriate to exercise it here. I have already concluded that there is a real issue between the claimants and Vedanta. I have already concluded that the purpose of those proceedings is not solely to act as a hook to bring in KCM. In those circumstances, I cannot conclude that the claim against Vedanta is not 'viable'. Nor can I conclude that it is unrealistic to suppose that there would ever be a trial of the claimants' claims against Vedanta. The claimants' solicitors have expressed the clear intention to continue with that claim. Although that is simply evidence of a future intention, it does not seem to me that, on the material before me, I could reach any conclusion to the contrary.

86.
In those circumstances, there is no basis on which I could or should stay these proceedings on case management grounds. Indeed, my case management instincts are precisely the same as those of Lord Bingham in **Lubbe**, where he talked about the possibility of hearing a preliminary issue as to the existence of the duty of care allegedly owed by the parent company. In my view, that is precisely the case management direction that I would want to make in this case. Even if I could, I would not want to stay the entire claim against Vedanta.

10.4
Summary

87.
It follows from the preceding paragraphs that there is no basis on which I could or should stay any part of the claim against Vedanta. Since the separate application for a declaration as to jurisdiction is, as Mr Webb confirmed, simply a mirror of the application for a stay, there is no need for me to deal with that separately.

88.
At one point, there was a suggestion that, even if I did not stay the entirety of the proceedings against Vedanta, I should stay specific elements of it. Particular criticism was made of the claim for an injunction. However, I do not consider that it is appropriate at this stage to stay any part of the claim against Vedanta. I acknowledge the difficulties with the present pleading of the claim for an injunction but there are reasons for that, with which I deal at paragraphs 103-105 below.

11. THE PROPOSED REFERENCE TO THE ECJ

89.

Vedanta's alternative case was that, if I was concerned that the facts of this case were so different to the facts in **Owusu** that it may not be binding on me, I should refer a question or questions to the ECJ to seek clarification.

90.
In my view, this option does not arise. A question can only be referred to the ECJ where a decision on that question is "necessary to enable [the court] to give judgment". In circumstances where the correct interpretation of EU law is clear, there is no scope for a reference to be made: see **Srl CILFIT v Ministry of Health** [1982] ECR 3415. As one would expect, that is particularly the case where an issue of EU law has already been the subject of a judgment by the ECJ: see **Da Costa en Schaake NV v Nederlandse Belastingadministratie** [1963] ECR 31.

91.
Owusu could not be clearer in its result. There is no scope for doubt as to the mandatory application of Article 4. Moreover, there is United Kingdom authority binding on me to the same effect. There is therefore no question which it is necessary for me to answer in order to enable me to give judgment.

92.
For this reason I decline Vedanta's alternative application that I refer questions to the ECJ.

PART III: THE APPLICATIONS MADE BY KCM

12. OVERVIEW

93.
KCM submit that the entire focus of this case is on Zambia. That is where the alleged torts were committed; that is where the damage occurred; that is where all the claimants live; that is where KCM are themselves domiciled; that is the law that applies. Accordingly they say, on straightforward forum non conveniens grounds, the order permitting service out of the jurisdiction should be set aside. They submit that it makes no difference that there is a claim against Vedanta in the UK but, to the extent that it does or might matter, they maintain that the claim is an illegitimate hook being used to permit claims to be brought here which would otherwise not be heard in the United Kingdom. Further and in any event they say that, the claimants' alternative argument – that even if the United Kingdom is not the appropriate place for the trial, the claimants would not obtain justice in Zambia – is wrong on the evidence.

94.
The claimants say that, because there is a real issue between themselves and Vedanta, which they intend to pursue to trial in the United Kingdom, it is reasonable for this court to try that issue in the United Kingdom, so that is therefore the appropriate place for their claims against KCM. If they are wrong about that they rely on access to justice issues, and what they say is the impossibility of trying these claims in Zambia. Although Mr Hermer accepts that the mere fact of the Vedanta claim in the United Kingdom does not automatically lead to the conclusion that service out should not be set aside, he said that it "weighed very heavily" in favour of such a conclusion. Accordingly, the claimants' arguments in this case are precisely those foreshadowed in Dicey, Morris and Collins (paragraph 43 above) and Dr Sanger's article in the Cambridge Law Journal (paragraph 44 above).

13. THE RELEVANT STATUTORY AND PROCEDURAL PROVISIONS

95.

The relevant gateway relied on by the claimants is set out at paragraph 3.1 of Practice Direction 6B. The relevant part provides:

"3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –

(3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –

(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

In the authorities this is regularly referred to as the "necessary or proper party" gateway.

96.
Even if a claimant can bring itself within the gateway noted above, the court still retains an overall discretion. That is expressed in CPR 6.37(3) in these terms:

"The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim."

97.
Accordingly, the parties are agreed on the appropriate questions for the court to answer to deal with KCM's applications. I have sequenced them as follows:

(a)
Step 1: Does the claimants' claim against KCM have a real prospect of success?

(b)
Step 2: If so, is there is a real issue between the claimants and Vedanta?

(c)
Step 3: Is it reasonable for the court to try that issue?

(d)
Step 4: Is KCM a necessary or proper party to the claim against Vedanta?

(e)
Step 5: Is England the proper place in which to bring the claim?

Sections 14-18 below deal, one by one, with these five steps.

14. STEP 1: DOES THE CLAIMANTS' CLAIM AGAINST KCM HAVE A REAL PROSPECT OF SUCCESS?

98.
At paragraph 71 of his judgment in **AK Investment CJSC v Kyrgyz Mobil Tel Ltd and Others (Known as Altimo)** [2011] 4 All ER 1027 Lord Collins identified the test in the following terms:

"First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice

in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. **Carvill America Inc v Camperdown UK Ltd** [2005] EWCA Civ. 645, [2005] 2 Lloyd's Rep 457, at [24].”

In my view, this “relatively low threshold” (**Cherney v Deripaska** [2008] EWHC 1530 (Comm)) is well-understood and does not need further elaboration. It is unnecessary to paraphrase the test, for example by reference to a notional application to strike out, as Professor Briggs does in Private International Law in English Courts (OUP 2014) p.350, paragraph 4.439.

99.
Subject to two linked points, which I deal with in paragraphs 100-105 below, I am in no doubt that the claim against KCM has a real prospect of success. That is principally because:

(a)
KCM are responsible for the operation of the mine.

(b)
There have been, as a matter of record, discharges of toxic effluent from the mine into the relevant waterways.

(c)
Under at least some of the relevant statutory provisions, KCM are strictly liable for the consequences of those discharges.

(d)
There is no attempt, in the evidence served on behalf of KCM, to challenge the underlying basis of the claimants’ claim against KCM.

In those circumstances, I consider that the claimants’ claim against KCM have a real prospect of success.

100.
The first caveat is an issue to which I have already referred, namely the absence of any proper pleading of the alleged consequences (physical or financial) to the claimants of the discharges. There are no particulars provided of the personal injury and/or damage to land suffered by the claimants. Although there are some witness statements from a few of the claimants dealing with their alleged injuries as result of consuming the polluted water, there is nothing to say that these are in any way representative. And as to the alleged interests in land, the documents which have been put in evidence are entirely generic. In my view, this aspect of the claim against KCM will need to be looked at extremely quickly because it is a critical element of the claims being brought.

101.
However, it does not seem to me that the absence of this material should lead me to conclude that, after all, the claims do not have a real prospect of success. That is partly because I accept, in getting together a claim like this, that sort of information might lag behind the preparation of the general pleading, which is based on information in the public domain and is therefore much easier to ascertain. But it is also a reflection of the history of these applications.

102.
The preliminary hearings in this matter were managed by Fraser J. He said that it made “perfect sense” for the claimants not to serve individual particulars until after the jurisdictional challenge had

been resolved. At the CMC, those acting for KCM agreed and made plain that the defendants did not object to the absence of those materials. In those circumstances, it does not seem to me to be legitimate for the court to reach any conclusions adverse to the claimants based on the absence of those particulars.

103.
In the skeleton served on behalf of KCM, at paragraphs 39-43, KCM criticise the absence of a proper pleading of the claim for injunctive relief. It is said that "there is no detailed pleading as to the alleged rights of landownership or occupation of the individual claimants" and no evidence in support of the assertion that 80% of the claimants have an interest in land. I agree with KCM that the current Particulars of Claim is not a proper pleading of a claim for an injunction and is presently not in accordance with CPR 16 PD 7.1. Amongst other things, there is not even a proper identification of the relevant land.

104.
But again it would be improper for me to conclude that there was not a real issue concerning the claim for the injunction because of these deficiencies in the pleadings. Again that is based in part on the logistics required for a claim of this sort, and in part because of what has happened so far during the interlocutory stages of this case, and the agreement that individual particulars were not currently required. Depending on the outcome of these applications, I take the view that remedying the deficiencies will be the claimants' priority.

105.
The other point that KCM raised about the injunction claim was that this was untenable because it would require an unacceptable degree of supervision in a foreign land: see **SSL International Plc v TTK LIG Ltd** [2011] EWCA Civ 1170; [2012] 1 WLR 1842. There may be some force in that argument, but I consider that it is better dealt with after the full pleadings have been provided and the precise nature of the injunction claim has been ascertained.

15. STEP 2: IS THERE A REAL ISSUE BETWEEN THE CLAIMANTS AND VEDANTA?

15.1
The Law

106.
This next step is the first part of the 'necessary and proper person' gateway. By contrast to the straightforward position as between the claimants and KCM (the owners and operators of the mine) the position as between the claimants and Vedanta (the parent holding company) is rather more complex. Since it was KCM's case, for the purposes of their application to set aside, that the claims against Vedanta were hopeless, it is necessary for the court to reach a view on this issue. I do so by considering the position first in English law before going on to consider briefly the evidence in respect of Zambian law.

107.
The focus of KCM's attack was on the notion that Vedanta owed a duty of care in common law to the claimants. The parties were agreed that the starting point is **Caparo Industries Plc v Dickman** [1990] 2 AC 605 and its three ingredients of foreseeability, proximity and reasonableness. The question is always to consider whether, on the facts of any particular case, the three ingredients have been made out. It was KCM's case that, because Vedanta were simply a holding company who were

not operating the mine, the existence of a duty of care was not arguable in law. On the authorities, I reject that submission.

108.
The first case in which it was held that a parent company might arguably owe a duty of care to the employees of subsidiaries was **Ngcobo and others v Thor Chemicals Holdings Ltd** (November 1996, per Maurice Kay J, unreported). The judge refused an application to strike out the claim against the parent company, noting that "the fact that the law does not impose liabilities upon companies in respect of the acts or omissions of other companies in the same group simply by reason of their common membership of the same group does not mean that circumstances cannot arise where in more than one company in the same group each incurs liabilities in respect of damage caused to a particular plaintiff." He said that the court had to look at the evidence in a particular case to see whether there was a potential for liability attaching to more than one company in the group. He identified a range of factual matters (including the Memorandum of Association of the holding company, the common directors and so forth), to conclude that it was arguable that a claim existed against the parent company.

109.
In **Connelly v RTZ Corporation Plc** [1998] AC 854, there was a claim by employees of a subsidiary against the parent. The main issue concerned access to justice in South Africa. The judge at first instance described the situation said to give rise to the duty of care as an unusual one, but went on to say that, if the pleading was proved, then so too were the three elements of proximity, foreseeability and reasonableness arising from **Caparo**.

110.
Both **Ngcobo** and **Connelly** were claims by former employees of the subsidiary company, being considered at an interlocutory stage. **Lubbe and others v Cape Plc** [2000] 1 WLR 1545 was another decision on an interlocutory basis, although this time the House of Lords was dealing with a claim against a parent company which involved both employees of the subsidiary, and those living close to the factories where the asbestos was being produced. The issue reformulated during the first Court of Appeal hearing in that case presupposed that the claimants would be able to prove that the parent company "exercised de facto control over the operations of a (foreign) subsidiary and knew, through its directors, that those operations involved risks to the health of workers and persons in the vicinity of the factory".

111.
Again the issue concerned access to justice. As to the underlying claim itself, Lord Bingham did not appear to have any difficulty in understanding the legal ingredients of the claim against the parent company:

"The issues in the present cases fall into two segments. The first segment concerns the responsibility of the defendant as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries. Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence."

112.
In **Chandler v Cape Plc** [2012] EWCA Civ. 525; [2012] 1 WLR 3111, the Court of Appeal upheld the first instance judge who had concluded, after a trial, that the claim in negligence by the employees of a subsidiary against the parent company had been made out. Again the personal injury was based on exposure to asbestos. Arden LJ rejected the defendants' submission that, in determining whether there had been an assumption of responsibility, the court was restricted to matters which might be described as "not being normal incidents of the relationship between a parent and subsidiary company". Arden LJ stressed that the way in which groups of companies operated was very varied and that sometimes a subsidiary was run purely as a division of a parent company, even thought the separate legal personality of the subsidiary was retained and respected. She said it was not possible to say in all cases what was or was not a 'normal incident' of the parent/subsidiary relationship.

113.
The Court of Appeal concluded that, on the evidence, the threefold **Caparo** test had been made out. At paragraph 80 of her judgment, Arden LJ said:

"80. In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues."

114.
In **Thompson v The Renwick Group Plc** [2014] EWCA Civ. 635, the Court of Appeal concluded that, on the facts of that case, there was no duty. The claim had been based on the fact that the parent company had assumed a duty of care towards employees of the subsidiary for health and safety matters by virtue of that parent company having appointed an individual as director of the subsidiary with responsibility for health and safety matters. The Court of Appeal had no doubt that this one act did not establish the necessary duty. When giving judgment, Tomlinson LJ identified the various factors which demonstrated how far removed from **Chandler v Cape** the case before the court was. None of the particular factors set out in paragraph 80 of Arden LJ's judgment was found to be present.

15.2
Analysis

115.
As a result of the cases set out above, it seems to me that the following principles can be identified:

(a)
Every claim of this kind requires the claimants to satisfy the three part test in **Caparo v Dickman**.

(b)

Depending on the facts, it is arguable that a claim in negligence against a parent company arising out of the operations of its subsidiary might give rise to liability: **Chandler v Cape**.

(c)
For obvious reasons, such a claim is more likely to succeed if advanced by former employees (**Ngcobo**, **Connelly v RTZ**, **Chandler v Cape**). However, depending on the facts, claims made by residents, rather than former employees, are still arguable (**Lubbe**).

For the avoidance of doubt, I expressly reject the submission that was apparently being made on behalf of KCM that the decision in **Chandler v Cape** is explicable only because it is dealing with asbestos. There is no part of the judgment in that case that can be read as supporting any such submission.

116.
Four factors were identified by Arden LJ in **Chandler v Cape** as indicating the existence of a duty. They were the fact the companies were operating the same businesses; that the parent had superior or specialist knowledge compared to the subsidiary; that the parent had knowledge as to the subsidiary's systems of work; and that the parent knew that the subsidiary was relying on it to protect the claimants.

117.
KCM say that none of these four factors apply here. In particular they argue that Vedanta are simply a holding company with very few staff and no mining expertise, whilst KCM is licensed to and operates the mine. They therefore maintain that they are not in the same business. They deny that Vedanta had any superior knowledge to KCM, in particular because they were not an operating company. They say that Vedanta had no knowledge of KCM's systems of work and that Vedanta had no knowledge that KCM was relying on it to protect the claimants, because it was KCM who possessed the relevant expertise. All of this comes in response to the claimants' pleading of a detailed case (at paragraphs 80-86 of the Particulars of Claim) in which details or examples are given as to the existence in this case of each of the four indicia identified by Arden LJ.

118.
It is not appropriate for the court to embark on any sort of mini-trial of these issues, particularly as the process of disclosure has not started, let alone been concluded: see Carr J in **Sabbagh v Khoursy and others** [2014] EWHC 3233 (Comm). In my view there is no reason to depart from the views expressed in each of the authorities noted in **Section 15.1** above, to the effect that the claimants' claim against the parent company is arguable and that the existence or otherwise of a duty of care ought to be a relatively straightforward matter, capable of resolution largely on the basis of the documents held by Vedanta.

119.
In the light of that view, it is unnecessary for me to identify in any detail the evidence in which the claimants rely in support of their case that Vedanta, as the parent company, owed a relevant duty of care. But it is right to note, at least in outline, some of the material to which Mr Hermer referred because this does support the view that, at this stage, the claim is arguable. That material included:

(a)
The Vedanta report entitled "Embedding Sustainability". This document stresses that the oversight of all Vedanta's subsidiaries rests with the Board of Vedanta itself [1] . The report also expressly refers to problems with discharges into water. That section of the report makes an express reference to the

particular problem at the mine in Zambia, and states that “we have a governance framework to ensure that surface and ground water do not get contaminated by our operatons.”

(b)
The management agreement between Vedanta and KCM covers a number of services being provided by Vedanta which may have some relevance to the claim, including project development and management.

(c)
The decision of the Irish High Court in **Elmes v Vedanta Lisheen Mining Ltd and Vedanta Resources Plc** [2014] IEHC 73, in which there was evidence that important roles were played by employees, not of the subsidiary company itself, but of Vedanta or another company within the group.

(d)
Perhaps most significant of all, the witness statement of Davies Kakengela, a former employee of KCM who gives direct evidence as to Vedanta’s control over KCM (see in particular paragraphs 13-20).

120.
In addition, I would not be willing to make a finding adverse to the claimants at this stage, given that at least some of the relevant evidence filed by KCM comes from Mr Ndulo, whose credibility is the subject of paragraphs 19 and 20 of this Judgment.

121.
On behalf of KCM, and despite these difficulties, Mr Gibson was anxious for the court to express a view as to the strength or weakness of the claim against Vedanta because, he said, even if the court concluded that the claim just about passed the summary judgment test, it was still a very weak claim in English law, which was a relevant factor in the exercise of the court’s discretion. Having concluded that there is a real issue between the claimants and Vedanta, and that there is at least some support for the claim on the material before me, I am unenthusiastic about expressing any further view on the merits. But given that KCM seek to place some reliance on such a view, I can summarise that shortly in these terms:

(a)
The claim is arguable in English law and will turn on the facts and, in particular, the documents evidencing the nature, scope and extent of Vedanta’s control.

(b)
On the face of it, the claim might be thought to be some way removed from the facts in **Chandler v Cape** where, amongst other things, it was the parent company who had set up the subsidiary to manufacture the asbestos in the first place. For that reason alone, the claimants may face something of an uphill task in establishing the four indicia referable to **Chandler v Cape**.

(c)
But the basis of claim pleaded at paragraph 80 of the Particulars of Claim represents a thoughtful, and detailed, attempt to get the claimants within the scope of the duty found to exist in **Chandler v Cape**, by reference to the four indicia. Furthermore, the evidence outlined at paragraph 119 above, particularly the evidence of Mr Kakengela, suggests that there is material available to support the pleaded basis of liability.

(d)

I respectfully agree with Lord Bingham in **Lubbe v Cape** that the resolution of the existence or otherwise of the Vedanta duty of care (what he called the “first segment” of the case) should be capable of relatively swift resolution.

122.
It is then necessary for me to consider the position in Zambian law. I am told that English common law is of significant weight in the Zambian legal system but that it could not be said that every case from the United Kingdom would necessarily be followed in Zambian law.

123.
I have an enormous amount of evidence on the issue of whether, in Zambian law, the sort of duty identified in **Chandler v Cape** would be imposed on Vedanta. Former Chief Justice Sakala says that no such duty would be imposed and he gives detailed reasons for that conclusion. On the other hand, Mr Mwenye SC, a former Attorney-General and Solicitor-General of Zambia, is of the view that (save for a claim by reference to one particular statute) the duty of care pleaded by the claimants has a realistic prospect of success.

124.
I agree with Mr Hermer that, in the light of this clear dispute between the Zambian law experts, there is little that the court can do at this stage, other than to say that it is obviously arguable that Zambian law would impose the relevant duty. I could only reach the opposite conclusion if I concluded that Mr Mwenye SC was advancing a position which all of the remaining evidence showed was untenable. I cannot do that. Thus, having concluded that the claim is arguable in English law, I reach the same conclusion in respect of Zambian law.

125.
In the light of the fact that the claim at common law is arguable, it is probably unnecessary for me to spend any time on the alternative claims against Vedanta based on statute. I have already noted that the statutory claims which have been pleaded by the claimants have not all been supported by their expert, so amendments will be necessary. But Mr Mwenye SC supports the remainder of the statutory claims, at least to the extent that they have a realistic prospect of success. Again, therefore, it seems to me that I cannot conclude that the position of the claimants’ expert is untenable or unreasonable.

126.
Accordingly, in my view, there is a real issue between the claimants and Vedanta, both at common law and under statute. Beyond the observations set out in paragraph 121 above, it is not appropriate for me to comment further.

15.3
The Canada Trust Gloss

127.
The parties were in agreement that, throughout the KCM application, the burden remained on the claimants to establish the necessary elements: see **Canada Trust v Stolzenburg (No. 2)** [1998] 1 WLR 547. In that case there was a suggestion that the claimants had to demonstrate that they had ‘much the better’ of the argument, which is sometimes referred to as ‘the **Canada Trust** gloss’. There was a dispute between the parties as to the application of this element, particularly in Step 2. Did this mean that the claimants had to show that they had ‘much the better of the argument’ in showing a real issue between themselves and Vedanta and, if so, was this trespassing again on the merits of the underlying claims?

128.
As I have already said, I am very mindful of the dangers of engaging in a mini-trial on the merits of the case. All the recent authorities warn against so doing: see, by way of example only, the decision of Carr J in **Sabbagh**. I have expressed the view that the claim is arguable and not fanciful; that it may be something of an uphill task but that there is already material to support it; and that these views are in any event subject to disclosure and the evidence at trial. On the narrow issue, given the authorities at **Section 15.1** above which suggest at least some support for the claimants' claim, I would find (if required to) that the claimants had 'much the better of the argument' as to whether or not there was a real issue between themselves and Vedanta.

16. STEP 3: IS IT REASONABLE FOR THE COURT TO TRY THAT ISSUE?

16.1
The Law

129.
Whilst there can be no doubt that the question as to whether it was reasonable for the court to try the real issue that exists in this case (between the claimants and Vedanta) has always been part of the proper person gateway, it was not until the Court of Appeal decision in **Red October** that it was given any real or separate prominence. Indeed, it was not a topic analysed by Lord Collins in **Altimo,** save for the discussion between paragraphs 76 and 79, where he concluded that the motive for suing a defendant domiciled in the United Kingdom was a factor in the exercise in the discretion of the court (Step 5, set out in **Section 18** below), and not an issue that arose in any consideration of the gateway itself.

130.
The facts of **Red October** were complex. D1 and D2 were bankrupt but domiciled in the United Kingdom. The other defendants were not. It was said that the claim against D1 and D2 was a device so as to bring in the other defendants and that the claimants had already submitted to the jurisdiction of the Russian courts in respect of the claims against D1 and D2. At paragraph 38, Gloster LJ, giving the judgment of the court, said about the gateway:

"Thus a claimant has to demonstrate that both threshold requirements are met. At the first stage under paragraph 3.1(3)(a), the court has to examine the nature of the claim which arises against the anchor defendants in isolation; that is to say on the assumption that there will be no additional joinder of the foreign defendants. The court has to be satisfied that not only is there "a real issue" between the claimant and the anchor defendants, but also that it is an issue "which it is reasonable for the court to try"."

131.
Although, at paragraph 42, the court said that **Altimo** was not to be regarded as even persuasive authority for the proposition that the court was precluded from considering wider issues of reasonableness at stage one of the process under paragraph 3.1(3)(a) of PD 6B, they record in the next paragraph that a claimant's motive in bringing proceedings against the anchor defendants was not relevant to the question of whether the threshold criteria had been satisfied: they reiterated that it was a factor which was only for consideration under the wider discretionary head which, as I have said, is Step 5 and dealt with at **Section 18** below.

132.

As to the question of whether it was reasonable for the court to try the issue, the Court of Appeal considered at paragraph 48 that this was “a much more finely nuanced, soft-edged, question than the stark questions which the [first instance] judge seems to have posed and decided. We emphasise in this context the use of the word ‘try’. The question is directed not at whether it is reasonable or proper from the perspective of the particular claimant to issue or bring proceedings, but rather whether it is reasonable for the English court to ‘try the issue’, whether in summary judgment proceedings or otherwise.”

133.
On the facts, the Court of Appeal concluded that there was no real issue between the claimant banks and D1 and D2, that it was, in essence, a device. They therefore found that there was no utility whatsoever in the English court trying those claims. At paragraph 79 they described the claims against D1 and D2 as “pointless and wasteful litigation” and in those circumstances, they refused to give permission to serve out of the jurisdiction.

16.2
Analysis

134.
Ironically, the principal issue on which the parties addressed me under this Step 3 was the question of motive (i.e. the claimants’ motive for bringing the proceedings against Vedanta), the one topic that is plainly irrelevant to any consideration of this part of the test: (see Lord Collins in **Altimo** and the Court of Appeal in **Red October**). Questions of motive, as well as questions of the appropriate forum for the claims against KCM, are dealt with under CPR Part 6.37 and therefore in **Section 18** below.

135.
What is then left for Step 3? Although the Court of Appeal in **Red October** gave particular prominence to this part of the test, their approach has to be seen in the context of their conclusion that there was no real issue between the banks and D1 and D2: that it was unreasonable for the court to be asked to try that “pointless and wasteful litigation”. In the present case, I have of course reached the opposite conclusion: that there is a real issue between the claimants and Vedanta. Accordingly, I would conclude that, on the face of it, it is reasonable for this court to try that issue against Vedanta.

136.
There is of course another factor here which did not exist in **Red October** and which, in my view, means that the court is almost bound to conclude that it is reasonable to try the claim against Vedanta here in the UK. In **Red October**, there was an agreement that the bank’s claims against D1 and D2 would be brought in the United Kingdom. But that of course was a commercial agreement between the parties which was not binding on the English court. In the present case, for the reasons analysed in **PART II** of this Judgment, the claim against Vedanta proceeds here as a matter of United Kingdom and European law.

137.
Even prior to **Owusu** a claim of this sort passed through the relevant gateway: see **Connelly v RTZ** and **Lubbe v Cape**. I agree with Mr Hermer that, following the decision in **Owusu**, the position must now be regarded as a fortiori. The decision in **Red October** does not affect that conclusion, because this critical point did not arise there. Accordingly, in my judgment, there is a real issue between the claimants and Vedanta and it is reasonable for the court to try that issue.

17. STEP 4: IS KCM A NECESSARY OR PROPER PARTY TO THE CLAIM AGAINST VEDANTA?

17.1

The Law

138.
In **Altimo**, Lord Collins said at paragraph 87:

"Third, the question whether D2 is a proper party is answered by asking: "Supposing both parties had been within the jurisdiction would they both have been proper parties to the action?": **Massey v Heynes & Co** (1888) 21 QBD 330 at 338, per Lord Esher MR. D2 will be a proper party if the claims against D1 and D2 involve one investigation: **Massey v Heynes & Co** at 338, per Lindley LJ; applied in **Petroleo Brasiliero SA v Mellitus Shipping Inc (The Baltic Flame)** [2001] EWCA Civ 418, [2001] 1 Lloyd's Rep 203, at [33] and in **Carvill America Inc v Camperdown UK Ltd** [2005] EWCA Civ 645, [2005] 2 Lloyd's Rep 457, at [48], where Clarke LJ also used, or approved, in this connection the expressions "closely bound up" and "a common thread": at [46], [49]."

139.
In **Sabbagh** Carr J said at paragraph 96:

"The "necessary or proper party" test is at least as broad as the court's power to add or substitute a party under CPR 19.2 (2) (see **United Film Distribution Ltd v Chhabria** [2001] EWCA Civ 416 at paragraphs 36 to 38 and **Altimo Holdings v Krygyz Mobil Tel Ltd** [2011] UKPC 7 at paragraph 87.) For present purposes, it is therefore sufficient for Sana to show that there is a serious issue involving [the foreign defendant] which is connected to the matters in dispute in the proceedings, and it is desirable to add [the foreign defendant] so that the court can resolve that issue."

140.
It is also a relevant factor, when considering this test, that the presence of more than one defendant allowed the claimant to choose against which of those defendants it would enforce the judgment, and that was a matter of potential advantage to the claimant: see **Magnesium Elektron Ltd v Molycorp Chemicals and Oxides (Europe) Ltd** [2015] EWHC 3596 (Pat).

17.2

Analysis

141.
On the face of it, I consider that the claimants have made out this ingredient of the test. The claims against Vedanta and KCM are closely bound together and their resolution would require only one investigation. Indeed, the claims are based on precisely the same facts and many of the same legal principles. It is anticipated that the causation and loss arguments would also be precisely the same against each defendant. Thus, if KCM were within the jurisdiction, it would plainly be a proper party to the proceedings.

142.
There is also the point that the claims against KCM might be regarded as stronger than the claims against Vedanta, because of the existence of potential strict liability claims under the relevant statutory regime. On that basis there is therefore a real advantage to the claimants to joining KCM to the litigation.

143.

Within the witness evidence filed on behalf of KCM, there is a suggestion that the necessary or proper party test has not been made out because the claim against Vedanta is a device, and/or based upon misuse of Article 4 of the Recast Regulation. This evidence is proffered to support the proposition that KCM is the only proper defendant in respect of these claims.

144.
I agree with Mr Hermer that these submissions are simply not open to KCM on this aspect of the test. The relevant gateway does not require that the claim against the foreign defendant is, in some way, an inferior or lesser claim than the claim already in existence against the party domiciled in the United Kingdom: indeed common sense suggests that it will often be the other way round.

145.
Furthermore, I do not regard it as helpful for present purposes to become embroiled in a debate about whether one or other of these defendants could be described as the major or the minor party or the principal or secondary defendant. That arose in **OJSC VTB Bank v Parline Ltd** [2013] EWHC 3538 (Comm) and was not regarded as a helpful or meaningful distinction (see paragraph 11). I respectfully agree with that.

146.
In my view, both Vedanta and KCM can be regarded as broadly equivalent defendants. The claim against KCM is the more obvious one because they own and operate the mine and because they have a potential strict liability for the discharges. On the other hand, although the claims against Vedanta may not be as strong, there is no doubt that they have the necessary financial standing to pay out any damages that are recovered. No other distinctions are required for present purposes.

147.
For all those reasons, therefore, I conclude that KCM are a necessary or proper party to the claim against Vedanta.

18. STEP 5: IS ENGLAND THE PROPER PLACE IN WHICH TO BRING THE CLAIM?

18.1
The Law

148.
CPR 6.37(3) gives the court an overriding discretion: “the court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.” The principles governing the exercise of discretion are those set out by Lord Goff in **The Spiliada** [1986] 3 All ER 843 at 854-861. As Lord Collins put it at paragraph 88 of **Altimo**:

“…the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice…”

149.
This involves two separate issues. The first is whether England is the appropriate place to try the claimants’ claims against KCM. If it is not, because the court concludes that Zambia is the appropriate place, the court must then go on to consider whether or not the claimants would obtain access to justice in Zambia because, if they would not, the court should exercise its discretion in favour of trying the case in England in any event. This second stage was identified by Lord Goff in **Connelly v RTZ** (quoting with approval the judgment of Sir Thomas Bingham MR in the Court of Appeal):

“But faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment, the interests of justice would tend to weigh, and weigh strongly, in favour of that forum in which the plaintiff could assert his rights.”

150.
Accordingly, I deal with those two stages in turn below, dividing the first into two separate parts.

18.2
Is England the Appropriate Place (Ignoring the Claim Against Vedanta)?

151.
It is, I think, helpful to start the analysis of whether or not England is the appropriate place to try the claims against KCM by, in the first instance, putting the claims against Vedanta to one side. The claimants want to serve these proceedings on KCM out of the jurisdiction. Can they show, regardless of the separate claim against Vedanta, that England is the appropriate place for those proceedings?

152.
In my view, absent any consideration of the claim against Vedanta, it is plain and obvious that England is not the appropriate forum for these claims and that Zambia is obviously the appropriate forum for these claims. The test, as emphasised in **Red October**, is to ask “the practical question, where the fundamental focus of the litigation [is] to be found”. That chimes with Lord Mance’s comment in **VTB Capital** that the starting point for deciding the appropriate forum is the place of the commission of the tort (paragraph 41 above).

153.
In my view, the following factors point overwhelmingly to the conclusion that the fundamental focus of the litigation is Zambia:

(a)
The claimants are all Zambian citizens, resident in Zambia.

(b)
The claims involve personal injury or damage to land. The injuries were suffered in Zambia and the land that was damaged is also in Zambia.

(c)
The alleged discharges into the waterways occurred in Zambia so the place of the commission of the alleged tort is Zambia.

(d)
The mine is owned and operated by KCM, a Zambian company. They operated the mine pursuant to the terms of a detailed Zambian licence. The proper regulation of the mine will be considered by reference to Zambian statutes and regulations and the acts or omissions of the Zambian regulatory authorities.

(e)
The applicable law is Zambian law.

154.
If those general matters were not enough, there are also a raft of logistical matters which further support the conclusion that Zambia is the appropriate place for the trial. These include the fact that:

(a)
The claimants will have to give evidence. Given both the financial and logistical limitations, that will be much easier at a district court in Zambia.

(b)
The claimants all speak Bemba and will therefore require interpreters.

(c)
KCM's witnesses of fact are all based in Zambia. They are the plant managers and those operating the mine.

(d)
All the documents are based in Zambia and many of them are unlikely to be in English.

(e)
All the regulatory and testing records and reports are based in Zambia, as are ZEMA, one of the relevant regulatory bodies.

155.
The claimants had no real answer to these points. The best they could do was to argue that some of these logistical difficulties might be mitigated (by the use of video evidence and the like). I am inclined to agree with Mr Gibson that, whilst some of those mitigating measures might exist, that is irrelevant to the question as to where the fundamental focus of this litigation lies. Furthermore, contrary to Mr Hermer's submission, I consider that the mere fact that KCM and other Zambian entities have themselves litigated in the United Kingdom rather than Zambia in the past (**KCM Plc v Coromin Ltd** [2006] EWHC 1093 (Comm); **A-G of Zambia v Meer Care and Desai (a firm)** [2008] EWCA Civ. 1007) is irrelevant to the issue as to the appropriate forum for these proceedings.

156.
Accordingly, absent any consideration of the position vis à vis Vedanta, it seems to me that the obvious answer to the first question the court has to consider under Step 5, is that England is not the appropriate place to try the claims against KCM. Does the existence of a claim against Vedanta change that?

18.3
Is England the Appropriate Place (Taking Into Account the Claim Against Vedanta)?

(a)
The Law

157.
The general approach has always been that, if the necessary or proper party gateway has been satisfied, then that will weigh heavily in favour of the court exercising its discretion in favour of granting leave to serve out of the jurisdiction: see **The Eras Eil Actions** [1992] 1 Lloyds Law Rep 570 and **The Baltic Flame** [2001] 2 Lloyds Law Rep 203.

158.
The cases where the exercise of the court's discretion has been considered in the light of a parallel claim against a domiciled defendant are addressed briefly as follows:

(a)
In **Credit Agricole Indosuez v Unicof Ltd and Others** [2003] EWHC 2676 (Comm), Cooke J said:

“Although the burden is on a claimant to show, when seeking leave to serve out of the jurisdiction, that England is the appropriate forum where the case can most suitably be tried for the interests of all the parties and the ends of justice, the fact of continuing proceedings in England against other defendants on the same or closely allied issues virtually concludes the question, since all courts recognise the undesirability of duplication of proceedings and the lis alibi pendens cases make this clear.”

(b)
In **BNP Parabas v Ahab Co X19 and Others** [2011] EWHC 1081 (Comm) Burton J found on the facts that there was “nothing to be said in favour of England at all, except the existence of this one claim in which it is said that the third party is a necessary or proper party, but which could plainly be litigated on its own without the involvement of the third party, and whose outcome could then be followed up by an indemnity claim if appropriate.” He concluded that the existence on one third party claim did not displace the conclusion that Saudi Arabia was the appropriate forum.

(c)
In **OJSC VTB Bank v Parline Ltd**, Leggatt J said:

“However, the context is that the claim against the second defendant is not a freestanding claim, and it has to be considered in circumstances where the claimant has chosen to bring, and is entitled to bring, claims against the first and third defendants in England, which it says it anyway wishes to pursue, regardless of whether the second defendant is brought into these proceedings or not. What therefore has to be considered, as Mr Alexander on behalf of the claimant submits, is not whether England or Russia is the more suitable forum for the claim against the second defendant, other things being equal, but whether it is appropriate to have proceedings against the second defendant in Russia in circumstances where proceedings involving identical or virtually identical facts, all the same transactions, witnesses and documents, will anyway be taking place in England. The real question, in other words, is whether the factors which connect the claim against the second defendant with Russia carry weight in circumstances where to require the claim to be pursued in Russia would result in duplication of cost and the risk of inconsistent judgments - the same factors which make the second defendant a necessary or proper party.”

159.
In addition, I have already referred to the passage in Dicey, Morris and Collins in which the editors anticipate precisely the issue that arises before this court.

(b)
Analysis

160.
I have set out in **Section 18.2** above my conclusions based on the assumption that the claim against KCM is a freestanding claim. But I agree with Leggatt J in **OJSC** that, in reality, the question of the appropriate forum has to be considered in the light of the claims against the UK domiciled company, in this case Vedanta. So, in those circumstances, in the absence of an exceptional reason the other way, does the existence of the claims against Vedanta “virtually conclude” the issue as to forum (as per Cooke J)?

161.
On the face of it, it does. There were two particular points upon which KCM relied in order to say that the mere fact that there was an existing claim against Vedanta should not alter the court’s conclusion that England is the appropriate forum. Those were the submissions that (a) the claim against Vedanta

was a device; and (b) the court should not have regard to the assertions that the claimants will continue the claim against Vedanta in any event.

162.
As to the first point, I accept that, if I concluded that the claim against Vedanta was a device, a hook designed simply to bring in KCM, then that would be a strong reason discounting the arguments in favour of England being the most appropriate jurisdiction. That was precisely what Leggatt J said at paragraph 7 of his judgment in **OJSC**. But just as he was unable to reach that conclusion there, so I am unable to reach that conclusion here.

163.
I have already found that there is a real issue to be tried between the claimants and Vedanta. And, although I am quite prepared to accept that the question of jurisdiction was one of the motives for joining Vedanta in the first place, it was not the only motive (see paragraphs 76-82 above). The existence of an arguable claim against a major international company, in circumstances where it has made considerable profits from the mine whilst its operating subsidiary may have financial difficulties, means that it is quite impossible for the court to conclude that the claim against Vedanta is a device. The sort of disreputable motive attributed to the claimants by the Court of Appeal in **Red October** does not arise here.

164.
The second submission, that the court should not accept the assertions in the claimants' evidence that they would pursue the claim against Vedanta in any event, is equally problematic. The suggestion appeared to be that the court should call the claimants' bluff; if service out against KCM was set aside, would the claim really continue against Vedanta alone?

165.
I do not consider that it is appropriate for the court to be asked to act in the way suggested. It is not really a question of evidence at all. The claimants have indicated their present intention of pursuing Vedanta. That may or may not eventuate: who knows? But at the moment, that is their intention. It does not seem to me that the court can second guess it. And if the court concludes that the claim in question raises a real issue (as I have done), then it is inappropriate at this interlocutory stage for the court to investigate further – even if it could – what may happen in the future.

166.
Although a Group Litigation Order ("GLO") has not been made in this case, Mr Webb argued, by reference to the decision **Austin and Others v Miller Argent (South Wales) Ltd** [2011] EWCA Civ. 928 that I should usefully ask the same question as a court will ask when considering making a GLO, namely whether there is a serious intention to proceed. For the reasons that I have given, I consider that, on the evidence, I can only conclude that the claimants seriously intend to proceed with these claims against Vedanta.

167.
It may be that Cooke J slightly over-stated it when he said that the existence of a claim in England against one defendant "virtually concludes" the question of appropriate forum. But it is plainly a highly significant factor and, in the present case, I can see no sensible alternative but to reach the same conclusion as he did in **Credit Agricole** and Leggatt J did in **OJSC**.

168.

For these reasons, therefore, I conclude that, principally because of the existence of the ongoing proceedings between the claimants and Vedanta, England is the appropriate place to try the claims against KCM. The alternative – two trials on opposite sides of the world on precisely the same facts and events – is unthinkable. Contrary to Mr Gibson's often-used phrase (taken from Blackburne J in **Pacific International**) in the present case, the tail is not wagging the dog.

18.4
Access to Justice in Zambia

(a)
Introduction

169.
In the light of my conclusion that England is the appropriate forum, it is, strictly speaking, unnecessary for me to deal with this second limb of the discretion test. However, since I have read a great deal of evidence on this topic, and since I was addressed on it by both parties at length, it seems appropriate for me to express my views. For the reasons set out below, I have concluded that there is clear and cogent evidence that the claimants would not obtain access to justice in Zambia, and that I should exercise my discretion in favour of allowing the service out on KCM to remain in place.

170.
As I have already said, there was a good deal of evidence on this topic. Much of it invited different conclusions on particular issues. I also have to consider the relevant authorities.

(b)
Authorities

171.
In my view, there are three important authorities on this topic. The first is **Altimo**, the second is **Lubbe v Cape**, and the third is **Pacific International**, both at first instance and in the Court of Appeal [2010] EWCA 753.

172.
In **Altimo**, in setting out the relevant test, Lord Collins said:

"95. The better view is that, depending on the circumstances as a whole, the burden can be satisfied by showing that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption. Of course, if it can be shown that justice 'will not' be obtained that will weigh more heavily in the exercise of the discretion in the light of all other circumstances."

That was a case concerned with potential corruption in another jurisdiction.

173.
Lubbe v Cape was about claims for personal injury rising out of asbestos contamination in South Africa. The House of Lords concluded that justice would not be available to the claimants in South Africa for funding reasons. In his analysis Lord Bingham concluded:

(a)
That the proceedings could only be handled efficiently, cost-effectively and expeditiously on a group basis;

(b)
There was no convincing evidence to suggest that legal aid might be available in South Africa to fund potentially protracted and expensive litigation.

(c)
“The clear, strong and unchallenged view of the attorneys who provided statements to the plaintiffs was that no firm of South African attorneys with expertise in this field had the means or would undertake the risk of conducting these proceedings on a contingency fee basis.”

(d)
“In the special and unusual circumstances of these proceedings, lack of the means, in South Africa, to prosecute these claims to a conclusion provides a compelling ground, at the second stage of the **Spiliada** test, for refusing to stay the proceedings here.”

174.
In **Pacific International**, at paragraphs 31-38, Blackburne J set out the legal principles applicable to this sort of dispute: “Allegations as to why the appropriate forum should be displaced must amount to an allegation that the forum is or will be unavailable for the trial of the claim. This must be clearly demonstrated against an objective standard and supported by positive and cogent evidence”. The Court of Appeal agreed.

c)
Analysis

175.
Mr Hermer is, I think, entitled to draw comparisons between South Africa, where the available funding arrangements were such as to lead the House of Lords in **Lubbe v Cape** to conclude that the claimants would not have access to justice there, and Zambia, where the claimants in the present case reside. South Africa is the largest economy in southern Africa. It is a country where CFAs are lawful. In addition it has one of the most developed legal systems in the world. Yet despite all of that, the House of Lords concluded that the claimants would not obtain access to justice there.

176.
The general evidence in that case about South Africa contrasts starkly with the evidence here about Zambia, which is one of the world’s poorest countries. CFAs are not lawful there. And on any view the legal system in Zambia is not well developed: indeed, in 2012 Zambia was the subject of a report by the Bureau for Institutional Reform and Democracy which highlighted the dearth of lawyers in Zambia, and the consequences for its citizens.

177.
In my view, the following factors, when taken together, amount to cogent evidence that, if these claimants pursued KCM in Zambia, they would not obtain justice.

178.
First, the claimants have been described as being considerably below the average income earners in Zambia. Given that Zambia is one of the world’s poorest countries, where the vast majority live at subsistence levels, I can conclude that the vast majority of the claimants would not be able to afford any legal representation.

179.

Secondly, in consequence of the claimants' poverty, the only way in which they could ordinarily bring these claims is by way of a CFA. But it is common ground that CFAs are not available in Zambia; indeed they are unlawful.

180.
Thirdly, I find that there is no realistic prospect of legal aid for these claims. The evidence of Mr Anderson Ngulube, the Director of the Legal Aid Board of Zambia, makes this plain. The defendants, who originally suggested that legal aid would be available, backtracked, and the highest they could put it at the hearing was that there was the possibility that the claimants could obtain exceptional funding. But that evidence (from Mr Abraham Mwansa SC) emerged late and was not the subject of any detailed explanation. In any event all Mr Mwansa SC was saying was that an application could be made. He could not say what the outcome of any application for exceptional funding might be.

181.
Mr Ngulube, who should know, said that even exceptional funding would only amount to around $352 per case (which is nowhere near enough here). He is emphatic in his view that the Legal Aid Board would not have the capacity or funding to commence an action in a large environmental claim on behalf of 1,800 claimants. Accordingly, I conclude that, on the evidence, there is no prospect of legal aid.

182.
Fourthly, in the absence of both CFAs and legal aid, the only remaining theoretical funding possibility that would allow these claimants to bring these claims in Zambia is for the lawyers to take on the claimants as their clients on the payment of a small up-front fee; to pay for all of the disbursements, including expert evidence, out of their own pockets; and then to recover their costs when the claims were successful.

183.
I acknowledge that the defendants have adduced evidence to support the proposition that funding on this basis would be possible. These statements include those from Mr Abraham Mwansa SC, the Solicitor General; Professor Mvunga; and a practicing lawyer, Sugzo Dzekedzeke. But their comments are qualified. They discuss this as a theoretical possibility; they do not address how this ad-hoc method of funding could work in a case of this size and complexity. There is nothing which, in my view, addresses the likely level of costs and expenses that would be incurred in this case.

184.
I consider that the reality of the proposed funding of this litigation can be seen in the following two illustrative extracts from the evidence:

(a)
Mrs Fostina Musonda, one of the claimants, said:

"I have never tried to get a lawyer to represent us against KCM. I do not have any money and I know that lawyers cost money so I would not be able to fund a claim. Even if I did have the money I have no idea how to get a lawyer, how the procedure starts or I look for one. It is not an option for people like us. I have never had a lawyer before for anything in my life and I have never heard of anyone in the community having a lawyer nor have my family. We are poor people here and in Zambia having a lawyer is for the rich only."

(b)

Brigadier Siachitema, a Zambian lawyer currently based in South Africa said:

“50. Even when people came to me who had previously been represented by private law firms on a pro bono basis, it is notable that all of them had still been asked to pay a deposit for their own disbursements such as court filing, printing and registry searches.

51. Clients came to me due to the fact that they could not pay this deposit. None of the clients I represented since 2008 had the ability to pay the deposit required by lawyers to open their cases. In fact, the majority would not even be able to pay just a consultation fee. I have advised hundreds of clients with good arguable cases that were unfortunately time barred because they had not previously been able to find funding for legal representation.

52. Given that in my experience private practice lawyers charge for all dispersements including court filing fees, it is extremely unlikely that a law firm would be willing to pay for disbursements such as water sampling and environmental and medical reports.

53. In my experience, groups of impecunious people struggle to raise enough funds for private practices lawyers through contributions. Also such contribution can deepen in equality among the group because they have different income levels or make different sacrifices. I met with two groups of such people in November last year to try and understand the problems they face. In one case of forced displacement, the 35 plaintiffs sold their goats while one widow sold her cow but still could not raise enough money. In the other claim a group of defendants raised the initial deposit through contributions but failed to pay a further deposit to their lawyer and it was not enough to keep the case going.”

185.
Considering the evidence as a whole, I conclude that it is fanciful to suggest that the ad hoc method of funding could work in this case. This is complex and expensive litigation involving over 1,800 claims. Detailed evidence is going to be necessary in respect of personal injuries, land ownership and damage to land; and expert evidence as to pollution, causation and medical consequences. On the evidence before the court, it is quite unrealistic to suppose that the lawyers would fund such large and potentially complex claims, essentially out of their own pockets, for the many years that litigation might take to resolve.

186.
Fifthly, I consider that, on the evidence, it has not been shown that there are private lawyers with the relevant experience who are willing and able to take on the claimants’ claims in Zambia. This may be a reflection of the general dearth of lawyers to which I have previously referred: the 2012 report noted in paragraph 176 above identified just four lawyers in the entirety of the Chingola town where these claimants live.

187.
It was not until very recently that KCM were able to identify a lawyer who said that he would represent some or all of the claimants. The principal lawyer now identified is Mr Musenga Musukwa. But Mr Hermer is right to say that the failure to identify any lawyer willing to consider the case until now is telling, as is Mr Musukwa’s apparent lack of expertise in this field. He is a sole practitioner and not a senior counsel. It is simply not explained how he could undertake this case. It is not unfair to say that, when it is boiled down to its essence, all Mr Musukwa’s evidence came to is that he was “extremely keen to take their case” although, even then, he only commits himself to funding “the initial gathering of instructions from a sample of plaintiffs and preliminary enquiries as to merits.”

188.
Mr Suzgo Dzekedzeke is another witness who Mr Gibson put forward as being a lawyer prepared to act for the claimants in this case. But his is a very qualified statement, making plain that he would only be willing to act for the claimants once he had made an assessment on the merits of their case (which he is at pains to point out he has not done). Thus there is no commitment on his part to act at all.

189.
The defendants have sought to meet the concerns about the dearth of lawyers in Zambia, and the fact that many of them practice in very small firms, by indicating that the relevant firms could “team up” together. But there is no compelling evidence that firms regularly do “team up” in the way envisaged, and no evidence at all that they would be prepared to do so in this case.

190.
Sixthly, it is also relevant to consider the track record in Zambia of litigation of this kind. My attention was drawn to a number of sets of past proceedings or potential proceedings. They are set out in the evidence of Edward Lange of Southern Africa Resource Watch at paragraph 13. Nothing came of them because the relevant communities did not have the resources to fund legal representation.

191.
Then there have been other sets of proceedings which were funded in some way but which led to failure for some or all of the claimants for reasons which appear, at least in the eyes of this English judge, to be rather baffling. Thus:

(a)
In **Benson Shamilimo and 41 Others v Nitrogen Chemicals of Zambia Ltd** 2007/HP/0725 a claim for personal injury was brought following allegations that the claimants were exposed to radiation. Negligence was found but the claims failed because the claimants had failed to prove a connection between their illnesses (which were proved) and the exposure to radiation (which was also proved). It appears from the evidence of Mr Steven Lungu, another Zambian lawyer, that the absence of any evidence of causation “could have been addressed by an expert if one could have been funded”.

(b)
In **Nyasulu and 2,000 Others v KCM** 2007/HP/1286, there was litigation about the discharge of effluent in 2006 into the Mushishima stream and thereby into the Kafue River. In other words, this was a very similar claim to the ones now made by these claimants. In a robust judgment delivered in 2011, Mr Justice Musonda made a number of critical findings against KCM and ordered them to pay 4 million Kwacha to each claimant. Although, 4 years later, the Supreme Court upheld his ruling on liability, they found that the judge had been wrong to award damages to each of the claimants because only twelve medical report forms were admitted into evidence. In consequence, the Supreme Court said that only the twelve claimants who had submitted the medical report forms could recover. The remaining 1,989 claimants were not entitled to any damages at all. The Supreme Court appeared to blame the High Court Judge for this “serious misdirection”.

192.
For completeness, I should also refer to the case of **Sinkala and Others v KCM**, another environmental claim begun in Zambia in 2007. There a settlement on behalf of 52 claimants was reached and KCM’s general attitude and approach was described by the District Agricultural Co-Ordinator as “collaborative”. However there was and remains a dispute – which I cannot resolve on the papers – that many of the claimants did not receive their share of the settlement sum.

193.
When taken together, these three cases hardly provide comfort for the claimants, or support the idea that these sorts of claims could be properly litigated in Zambia. The fact that both the **Shamilino** and the **Nyasulu** litigation ended so disastrously points the other way. Mr Siku Nkombalume, one of the 12 claimants who was supposed to have medical records in **Nyasulu**, describes a long, chaotic, and ultimately fruitless experience. In addition, the evidence of Mr Shepande, who took over the conduct of the claimants' case in **Nyasulu** at a late stage, could not be more telling. In his witness statement he says that it was his first environmental case and he took it on "primarily because the claim was almost at an end and I was hopeful that I would be paid in full at the end of the case".

194.
The defendants adduced some evidence (from Chief Justice Sakala and Professor Mvunga, amongst others) to the effect that group litigation and/or environmental litigation could be handled relatively easily in Zambia. There may have been other cases in which the environmental claims were handled more successfully than those noted above. But the fact of the matter is that the particular cases which have been drawn to my attention could not give an aspiring litigant in a group action dealing with environmental issues any confidence that these cases would be appropriately managed and resolved.

195.
There is one final factor which I cannot ignore in reaching my conclusions as to access to justice. That concerns the position of KCM and their likely attitude to this litigation. I have already indicated the material on which the claimants rely in asking me to reach adverse conclusions about KCM's likely attitude to any litigation. I have little doubt that, based on their previous track record, KCM will prove obdurate opponents in the courts in Zambia. That will add enormously to the time and therefore the cost (which, on this assumption, is being borne by the lawyers). Delays to claims of this sort have clearly been something of a problem in Zambia, as the stately progress of the **Nyasulu** litigation makes clear, and the evidence is that KCM will be likely to prolong the case if at all possible.

196.
The defendants have put in evidence from a number of eminent lawyers in Zambia to the effect that there have been a number of recent reforms in the Zambian justice system which have improved the system generally, and have in particular reduced delays. I have no reason to doubt that general evidence. But what matters here are the likely delays caused by complex litigation of this kind, coupled with the involvement of KCM, a company with, in the past at any rate, an avowed policy of delaying so as to avoid making due payments.

197.
There is another aspect of KCM's likely stance which is material. I cannot discount the findings of Mr Justice Musonda in the **Nyasulu** litigation that KCM "was shielded from criminal prosecution by political connections and financial influence". That is an alarming finding. If in the past KCM have been shielded by political connections and financial influence in Zambia, as the judge found that they were, then that must be another factor relevant to the concerns that I have about the claimants obtaining access to justice in Zambia.

198.
Finally, on this topic, I would like to add this. I am conscious that some of the foregoing paragraphs could be seen as a criticism of the Zambian legal system. I might even be accused of colonial condescension. But that is not the intention or purpose of this part of the Judgment. I am not being asked to review the Zambian legal system. I simply have to reach a conclusion on a specific issue,

based on the evidence before me. And it seems to me that, doing my best to assess that evidence, I am bound to conclude, for the reasons set out in paragraphs 175-197 above, that the claimants would almost certainly not get access to justice if these claims were pursued in Zambia. Thus, if I am wrong about the United Kingdom being the appropriate forum, then I consider that the second part of the test on discretion leads to the same result.

PART IV: CONCLUSIONS

199.
For the reasons set out in **PART II** of this Judgment, Vedanta's applications are dismissed. For the reasons set out in **PART III** of this Judgment, KCM's applications are dismissed.

200.
I will deal with all consequential matters at a time convenient to the parties when I am back in the TCC in June 2016.

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[1] "We recognise the level of control and sphere of influence the Group has over these operations… we understand that our commitment to corporate sustainability requires constant monitoring and diligence and our framework also gives us the tools to achieve this".