Hilary Term

[2019] UKSC 20

On appeal from: [2017] EWCA Civ 1528

JUDGMENT

Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)

before

Lady Hale, President

Lord Wilson

Lord Hodge

Lady Black

Lord Briggs

JUDGMENT GIVEN ON

10 April 2019

Heard on 15 and 16 January 2019

Appellants	Respondents
Charles Gibson QC	Richard Hermer QC
Geraint Webb QC	Marie Louise Kinsler QC
Ognjen Miletic	Robert Weir QC
Christopher Adams	Edward Craven
(Instructed by Herbert Smith Freehills LLP)	(Instructed by Leigh Day)

Interveners (
2)
Tim Otty
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Interveners:-

(1) The International Commission of Jurists (written submissions only)

(2) The Corporate Responsibility (CORE) Coalition Ltd (written submissions only)

(3) Attorney General of Zambia (written submissions only)

LORD BRIGGS: (with whom Lady Hale, Lord Wilson, Lord Hodge and Lady Black agree)

Introduction

1.
This litigation arises from alleged toxic emissions from the Nchanga Copper Mine in the Chingola District of Zambia. The claimants, who are the respondents to this appeal, are a group currently consisting of some 1,826 Zambian citizens who live in four communities within the Chingola District. They are, by any standards, very poor members of rural farming communities served by watercourses which provide their only source of water for drinking (by themselves and their livestock) and irrigation for their crops. They say that both their health and their farming activities have been damaged by repeated discharges of toxic matter from the Nchanga Copper Mine into those watercourses, from 2005 to date.

2.
The Nchanga Copper Mine ("the Mine") consists, in part, of an open-cast mine, said to be the second largest in the world, and in part of a deep mine. Its immediate owner is the second defendant Konkola Copper Mines plc ("KCM"), which is a public company incorporated in Zambia. KCM is the largest private employer in Zambia, employing some 16,000 people, mainly at the Mine. The first defendant Vedanta Resources plc ("Vedanta") is the ultimate parent company of KCM. It is the parent of a multinational group, listed on the London Stock Exchange, with interests in minerals, power, oil and gas in four continents. Vedanta is incorporated and domiciled in the United Kingdom. Although Vedanta claims only to have 19 employees of its own, eight of whom are its directors, the Vedanta Group employs some 82,000 people worldwide. KCM is not a 100% subsidiary of Vedanta, since the Zambian government has a significant minority stake, but materials published by Vedanta state that its ultimate control of KCM is not thereby to be regarded as any less than it would be if wholly owned.

3.
The claims against both defendants are pleaded in common law negligence and breach of statutory duty. Those causes of action are pursued against KCM on the basis that it is the operator of the Mine. As against Vedanta, the same causes of action are said to arise by reason of the "very high level of control and direction that the first defendant exercised at all material times over the mining operations of the second defendant and its compliance with applicable health, safety and environmental standards": (Particulars of Claim, para 79).

4.
This appeal is all (and only) about jurisdiction; that is, the jurisdiction of the courts of England and Wales to determine those claims against both defendants. As against Vedanta, the claimants rely upon article 4 of the Recast Brussels Regulation (Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters). As against KCM the

claimants rely upon what may loosely be called the “necessary or proper party” gateway of the English procedural code for permitting service of proceedings out of the jurisdiction, now to be found mainly in para 3.1 of CPR Practice Direction 6B.

5.
The procedural background to this appeal is, in outline, as follows. The claimants issued the Claim Form in July 2015. Vedanta was served within the jurisdiction. Service was effected on KCM out of the jurisdiction pursuant to permission obtained on a without-notice application on 19 August 2015. Both Vedanta and KCM applied to challenge jurisdiction, in September and October 2015 respectively. Their applications were heard together, over three days in April 2016, by Coulson J, who delivered a comprehensive reserved judgment dismissing them on 27 May 2016 [2016] EWHC 975 (TCC). The defendants’ appeals were heard over two days in July 2017 and dismissed, again in a comprehensive reserved judgment, in October 2017 [2018] 1 WLR 3575. The defendants’ further appeals to this court were heard, again over two full days, in January 2019.

Proportionality

6.
It is necessary to say something at the outset about the disproportionate way in which these jurisdiction issues have been litigated. In Spiliada Maritime Corpn v Cansulex Ltd (“the Spiliada”) [1987] AC 460, 465, Lord Templeman said this, about what was, even then, the disproportionate manner in which jurisdiction challenges were litigated:

“In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial Court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere.”

That dictum is, in my mind equally applicable to all the judges in what are now the Business and Property Courts of England and Wales, including, as in this case, the Technology and Construction Court.

7.
That requirement for proportionality, and for respect to be given to first instance decisions on jurisdiction, has been repeated, perhaps in less colourful terms, in numerous subsequent cases. In VTB Capital plc v Nutritek International Corpn [2013] 2 AC 337, Lord Neuberger of Abbotsbury said this, at paras 82 to 83:

“82. The first point is that 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. There is also a real danger that, if the hearing is an expensive and time-consuming exercise, it will be used by a richer party to wear down a poorer party, or by a party with a weak case to prevent, or at least to discourage, a party with a strong case from enforcing its rights.

83. Quite apart from this, it is simply disproportionate for parties to incur costs, often running to hundreds of thousands of pounds each, and to spend many days in court, on such a hearing. The essentially relevant factors should, in the main at any rate, be capable of being identified relatively simply and, in many respects, uncontroversially. There is little point in going into much detail: when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial."

8.
At para 84 Lord Neuberger cited dicta to the same effect by Waller LJ in Cherney v Deripaska (No 2) [2010] 2 All ER (Comm) 456, para 7, in which he concluded that it "would have been better for both parties and better use of court time if they had expended their money and their energy on fighting the merits of the claim".

9.
Jurisdiction challenges frequently raise questions about whether the claim against one or more of the defendants raises a triable issue. As it is now common ground, this broadly replicates the summary judgment test. Issues of this kind are, regardless whether contained within jurisdiction disputes, subject to a similar requirement for proportionality, the avoidance of mini-trials and the exercise of judicial restraint, in particular in complex cases, as was emphasised in the following well known passage from the speech of Lord Hope of Craighead in Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2003] 2 AC 1:

"94. For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?

95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman [[2001] 1 All ER 91], at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.

96. In Wenlock v Moloney [1965] 1 WLR 1238 the plaintiff's claim of damages for conspiracy was struck out after a four day hearing on affidavits and documents. Danckwerts LJ said of the inherent power of the court to strike out, at p 1244B-C:

'this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a

cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.'"

10.
The extent to which these well-known warnings have been ignored in this litigation can be measured by the following statistics about the materials placed before this court. The parties' two written cases (ignoring annexes) ran to 294 pages. The electronic bundles included 8,945 pages. No less than 142 authorities were deployed, spread over 13 bundles, in relation to an appeal which, on final analysis, involved only one difficult point of law.

11.
A particular reason for the requirement to exercise proportionality in jurisdiction disputes of this kind is that, in most cases, they involve a contest between two competing jurisdictions in either of which the parties could obtain substantial justice. The exception, an issue whether substantial justice is obtainable in one of the competing jurisdictions, may require a deeper level of scrutiny, not least because a conclusion that a foreign jurisdiction would not provide substantial justice risks offending international comity. Such a finding requires cogent evidence, which may properly be subjected to anxious scrutiny. Nonetheless, the fact that such an issue arises in a particular case (as in this appeal) is no excuse for ignoring the requirement for proportionality in relation to all the other issues.

12.
Judicial restraint is of particular importance in relation to jurisdiction disputes which, wholly exceptionally, reach this court, in particular in cases such as the present, where the Court of Appeal has already concurred with the fact-finding and evaluative analysis of the first instance judge. The essential business of this court is to deal with issues of law, rather than fact-finding or the re-exercise of discretion. The pursuit of detailed matters of factual (or evaluative) analysis in this court is therefore inappropriate, both because it is likely to involve a needless and useless misapplication of the parties' time and resources, and because it distracts this court from its proper focus upon real issues of law.

13.
Nor is it permissible to dress up what is in reality a factual dispute as if it were, or involved, a misdirection in law by the first instance judge. As will appear, a telling example in the present case is the appellants' assertion that Coulson J applied an insufficiently rigorous or detailed analysis of the claimants' pleaded case against Vedanta, for the purpose of deciding whether it disclosed a real issue to be tried. Within every jurisdiction dispute, or embedded question whether there is a triable issue, the first instance judge faces a typical quandary: how to balance the requirement for proportionality against the need to ensure that resources are not wasted on an unnecessary trial. The choice, at how deep a level of detail to conduct that analysis and then in how much detail to express conclusions in a judgment, are matters for the experienced first instance judge, with which an appellate court should be slow to interfere.

14.
The fact that it has been necessary, despite frequent judicial pronouncements to the same effect, yet again to emphasise the requirements of proportionality in relation to jurisdiction appeals, suggests that, unless condign costs consequences are made to fall upon litigants, and even their professional

advisors, who ignore these requirements, this court will find itself in the unenviable position of beating its head against a brick wall.

The issues on this appeal

15.
Although technically there are two appeals, one by each of the defendants, they are closely interrelated and the proceedings before this court are best understood as a single appeal. The issues, and the interrelationship between them, can most easily be summarised by reference to the structure applicable to the establishment of jurisdiction in claims against defendants one of which is domiciled within, and the other without, the jurisdiction of the English court. The defendant domiciled here will be referred to as “the anchor defendant”. The defendant domiciled abroad will be referred to as “the foreign defendant”. The essential structure is common ground and may therefore be briefly summarised.

16.
Jurisdiction against the anchor defendant derives directly from article 4.1 of the Recast Brussels Regulation, which provides that:

“Subject to this Regulation, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state.”

That basic provision is designed not only for the protection of EU domiciliaries, but also to enable a claimant to know, with reasonable certainty, where he may sue. In Owusu v Jackson (Case C-281/02) [2005] QB 801 the Court of Justice held, contrary to earlier English jurisprudence, that this conferred a right on any claimant (regardless of their domicile) to sue an English domiciled defendant in England, free from jurisdictional challenge upon forum non conveniens grounds, even where the competing candidates for jurisdiction were England (part of a member state) and some other non-member state such as, here, Zambia. The decision related to article 2 of the earlier Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, which was in identical terms to the present Recast Brussels Regulation.

17.
This does not, of course, prevent any defendant from seeking to have a claim struck out as an abuse of process or as disclosing no reasonable cause of action, or from seeking reverse summary judgment upon the basis that the claim discloses no triable issue against that defendant. Vedanta has not pursued a strike-out or summary judgment application of that kind, but both it and KCM assert that the claimants’ pleaded case and supporting evidence disclose no real triable issue against Vedanta, because Vedanta cannot be shown to have done anything in relation to the operation of the Mine sufficient either to give rise to a common law duty of care in favour of the claimants, or a statutory liability as a participant in breaches of Zambian environmental protection, mining and public health legislation. Vedanta was, it is said, merely an indirect owner of KCM, and no more than that.

18.
Secondly, Vedanta maintains that, even if the pleaded claim discloses a triable issue against it, nonetheless the claim should be stayed as an abuse of EU law, because the claimants are using a claim against Vedanta in England purely as a vehicle for attracting English jurisdiction against their real target defendant, KCM, by means of the necessary or proper party gateway.

19.

Both these submissions were rejected by the judge, and by the Court of Appeal, but are pursued here, with the requisite permission of this court. Further, the appellants submit that the issue as to abuse of EU law deserves a reference to the Court of Justice.

20.
The claimants' invocation of English jurisdiction as against KCM depends, as already noted, upon the necessary or proper party gateway. This forms a long-established part of English private international law which, pursuant to article 6.1 of the Recast Brussels Regulation, is determinative of the jurisdiction of the English courts against a defendant, like KCM, not domiciled in a member state. The necessary or proper party gateway long ante-dates the Civil Procedure Rules but is now enshrined in Part 6 Practice Direction B para 3.1 as follows:

"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."

The express terms of the Practice Direction set out only part of what a claimant relying upon the necessary or proper party gateway must show. It is common ground that, by reference to those terms and well-settled authority, the claimant must demonstrate as follows:

i)
that the claims against the anchor defendant involve a real issue to be tried;

ii)
if so, that it is reasonable for the court to try that issue;

iii)
that the foreign defendant is a necessary or proper party to the claims against the anchor defendant;

iv)
that the claims against the foreign defendant have a real prospect of success;

v)
that, either, England is the proper place in which to bring the combined claims or that there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place, or the convenient or natural forum.

21.
As already noted, the question whether the claims disclose a real triable issue against Vedanta is a main issue on this appeal. It is however accepted that, if the claimants surmount this hurdle, it would be reasonable for the English court to try that issue, and that KCM would be at least a proper party to the claims against Vedanta. It is also (now) common ground that the claims against KCM have a real prospect of success.

22.
Both the judge and the Court of Appeal found in the claimants' favour on real issue and proper place. In addition, they both found that, even if Zambia would otherwise have been the proper place in which to bring the claims, there was a real risk that the claimants would not obtain substantial justice in the Zambian jurisdiction. Those questions remain in issue on this appeal. In the remainder of this judgment, the issues will be addressed in the following order:

i)
Abuse of EU law.

ii)
Real issue as against Vedanta.

iii)
Proper place.

iv)
Substantial justice.

Abuse of EU law

23.
The essence of the appellants' case under this heading may be summarised as follows. First, it is an abuse of EU law to use article 4 of the Recast Brussels Regulation as a means of enabling claimants to establish jurisdiction against an anchor defendant for the collateral purpose of attracting a member state's international jurisdiction against foreign defendants, who are the real targets of the claim. It is said that, whereas article 4 is designed to protect defendants domiciled within the EU, this abuse exposes to litigation domiciled parent companies who would not, apart from their status as anchor defendants, otherwise be sued at all.

24.
The judge's response was to acknowledge that there might be an abuse if the pursuit of the anchor defendant had been for the sole purpose of attracting jurisdiction as against the foreign defendant, but not otherwise. He found, on the facts, that although the prospect of attracting jurisdiction against KCM was a substantial reason why the claimants sued Vedanta in England, it was not their only reason. They had a bona fide claim, disclosing a real issue for trial, against Vedanta and a desire to obtain judgment against Vedanta rather than merely against KCM, because of a perception, supported by some evidence, that KCM might prove to be of doubtful solvency.

25.
Faced with those findings of fact as to the claimants' motivation, the appellants pursue this ground of appeal upon the basis that the judge's application of a "sole purpose" test for abuse of EU law was too narrow or, at least, not acte clair, thereby necessitating a reference to the Court of Justice.

26.
For the purposes of analysis, the abuse of EU law claim needs to be approached upon the assumption, but without at this stage deciding, that the claim discloses a real triable issue as against Vedanta. If it does not, then Vedanta falls away as an anchor defendant, and the necessary or proper party gateway, as against KCM, closes. Furthermore, as will appear, I consider that the judge's conclusion that the claim discloses a real triable issue as against Vedanta cannot be overturned in this court.

27.
Nor can the judge's conclusion that Vedanta was not sued by the claimants in England for the sole purpose of attracting English jurisdiction over KCM be challenged on this appeal. His conclusion that Vedanta was sued in England for the genuine purpose of obtaining damages, albeit that attracting English jurisdiction over KCM was an important contributor to that decision, was a finding of fact. Although arrived at by a necessarily summary process which did not permit cross-examination of the claimants' witness evidence as to motive, it was well supported by evidence that the claimants risked finding, after obtaining judgment against KCM, that it was unable to pay the judgment debt. The judge's findings of fact on this issue were endorsed by the Court of Appeal (at para 38 per Simon LJ). They were final findings, in the sense that those factual issues will not be revisited at any later stage in the proceedings. It is contrary to the practice of this court to re-open concurrent factual findings made in both the courts below. To be fair, counsel for each of the appellants made no significant effort to do so.

28.
I therefore approach the legal analysis of this abuse of EU law issue on the basis that:

a)
the claimants have pleaded a real triable issue against Vedanta;

b)
the claimants genuinely desire to obtain judgment for damages against Vedanta; but,

c)
one of the principal reasons (although not the sole reason) why the claimants sued Vedanta in England was so as to be able, by the use of article 4 and the necessary or proper party gateway in conjunction, to sue KCM in England as well.

29.
On that factual basis, I am satisfied, to the extent that the point is acte clair, that the EU principle of abuse of law does not avail the appellants. The starting point is the need to recognise that, following Owusu v Jackson, what is now article 4.1 lays down the primary rule regulating the jurisdiction of each member state to entertain claims against persons domiciled in that state. The Recast Brussels Regulation itself (like its predecessors) contains a number of express provisions which derogate from that primary rule. As exceptions to it, they are all to be narrowly construed. If, therefore, the Recast Brussels Regulation also contains (as it probably does) an implied exception from the otherwise automatic and mandatory effect of article 4, based upon abuse of EU law, then that is also an exception which is to be narrowly construed.

30.
The centrality of article 4, as the basis of member states' jurisdiction over their own domiciliaries, is laid down not only in Owusu v Jackson itself, but in a series of later authorities, and fully recognised by academic writers, even those who, prior to Owusu v Jackson, had taken the opposite view where the relevant competition between jurisdictions lay between a member state and a non-member state. Decisions of the Court of Justice which have re-emphasised the centrality of article 4, and the need to construe any exceptions or derogations from it restrictively, include Melzer v MF Global UK Ltd (Case C-228/11) [2013] QB 1112, at paras 23 to 24 of the judgment. Dicta in the English courts to the same effect include, in this court, A v A (Children: Habitual Residence) [2014] AC 1, per Lady Hale at para 31 and, more recently, AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft mbH [2018] AC 439, per Lord Hodge at para 13. Distinguished academics

who are (now) of the same view include Professor Adrian Briggs who in Private International Law in English Courts (2014), at para 4.362, concludes that, since Owusu, “the ship has now sailed” and in Civil Jurisdiction and Judgments, 6th ed (2015), at para 2.304, that “the answer is clear, and debate has moved on”. Of the same view are (now) the editors of Dicey, Morris & Collins on Conflict of Laws, 15th ed (2012), at para 12-020.

31.
There are a small number of cases in the Court of Justice where either the Court or the Advocate General has addressed specifically the question of abuse of law in the context of the Recast Brussels Regulation and its predecessors. They mainly concern the alleged abusive use of article 8.1 (formerly article 6.1) as a means of circumventing article 4 (formerly article 2). Article 8.1 contains provision (in a much more mechanical form than the English forum conveniens doctrine) for a limited departure from article 4, by providing that:

“A person domiciled in a member state may also be sued:

1)
Where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings; …”

It is therefore a limited form of necessary or proper party gateway out of the strictures of article 4. When read with the enabling words of article 5, it gives the claimant a choice to sue an EU domiciled defendant in a member state other than that of its domicile in order to avoid the risk of irreconcilable judgments. It is of no direct relevance in the present case because there is no co-defendant to the claim against Vedanta domiciled in another member state. Since article 8.1 is itself to be restrictively interpreted because it derogates from the primary rule of jurisdiction in article 4, it might be thought that the Court of Justice would liberally apply an abuse of law principle where it perceived that article 8 was being misused as a means of circumventing article 4. Nonetheless the cases show that abuse of EU law has been restrictively interpreted, even in that context.

32.
In Freeport plc v Arnoldsson (Case C-98/06) [2008] QB 634 the claimant sought to use article 6.1 of the Judgments Regulation (EC) No 44/2001 (the predecessor of article 8.1) as a means of invoking the jurisdiction of the Swedish courts over a claim against an English company, because a Swedish company was a co-defendant. One of the objections raised by the English defendant was that the claimant was making an abusive use of article 6.1, by joining the Swedish company as a vehicle for that purpose, so as to disable the primary rule (then in article 2) requiring the English company to be sued in England. At para 66 of his opinion, Advocate General Mengozzi said that in order to disapply article 6.1 it would be necessary to show not merely that the claimant had joined the Swedish defendant for the “sole object of removing one of those defendants from the courts of his own domicile” but also that it would be necessary to show, not merely fraudulent or wrongful intent, but “that the action bought against the defendant domiciled in the forum member state appears to be unfounded … manifestly unfounded in all respects - to the point of proving to be contrived - or devoid of any real interest for the claimant”.

33.
Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV (Evonik Degussa GmbH intervening) (Case C-352/13) [2015] QB 906 was another case about an alleged abuse of article 6.1 in an international cartel case against defendants domiciled in a number of member states. It was said

that the claimants had deliberately delayed settlement of a claim against a German defendant for the purpose of attracting the jurisdiction of the German courts against co-defendants domiciled in other member states, thereby committing an abuse of article 6.1. Advocate General Jääskinen advised, at para 84 of his opinion, that:

“In accordance with the court’s consistent case law, ‘the rule [on jurisdiction laid down in article 6(1) of the Brussels I Regulation] cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the member state in which that defendant is domiciled’ (my emphasis).”

34.
In its judgment, the Court of Justice expressly affirmed that opinion in para 27, adding at para 33 that in the context of cartel cases nothing short of collusion between the claimant and the anchor defendant would be sufficient to engage the abuse of law principle.

35.
Those decisions of the Court of Justice show that, even before the Freeport case, there was an established line of authority which limited the use of the abuse of EU law principle as a means of circumventing article 6 (now article 8) to cases where the ability to sue a defendant otherwise than in the member state of its domicile was the sole purpose of the joinder of the anchor defendant. Even though there appears to be no authority directly upon abuse of EU law in relation to article 4 itself (or its predecessors), the need to construe any express or implied derogation from article 4 restrictively would appear to make the position a fortiori in relation to article 4, as indeed the judge himself held.

36.
But the matter does not stop there. Such jurisprudence as there is about abuse of EU law in relation to jurisdiction suggests that the abuse of law doctrine is limited to the collusive invocation of one EU principle so as improperly to subvert another. In the present case the position is quite different. The complaint is that article 4 is being used as a means of circumventing or misusing the English national regime for the identification of its international jurisdiction over persons not domiciled in any member state: ie the forum conveniens jurisprudence and, specifically, the necessary or proper party gateway.

37.
This complaint forms a central theme in the appellants’ submissions not only about abuse of EU law, but also about the necessary or proper party gateway itself. It is worth close examination at this stage because, to the extent that it is well founded, it raises the question whether the remedy (if any) for its adverse consequences is to be found in EU law or in the English private international law traditionally called the forum conveniens doctrine.

38.
Prior to Owusu v Jackson (although, as is now recognised, illegitimately once the UK had become a member state) the English courts took a two-handed approach to any attempt to use the ability to serve an anchor defendant (domiciled in England) as of right, coupled with invocation of the necessary or proper party gateway as the basis for obtaining permission to serve a foreign defendant out of the jurisdiction in cases where, leaving aside the risk of irreconcilable judgments, the natural forum was the jurisdiction where the foreign defendant was domiciled. With one hand, the court could refuse (or set aside) permission to serve the foreign defendant out of the jurisdiction. With the other hand the court could stay the proceedings against the anchor defendant, in both cases on the basis that the foreign jurisdiction was the forum conveniens (or using the CPR English equivalent, the “proper place”) for the conduct of the litigation as a whole. By dealing with the claims against both

defendants, the English court thereby neatly avoided the risk of irreconcilable judgments or multiplicity of proceedings.

39.
Following Owusu v Jackson the English court has one hand tied behind its back. No more can it stay the proceedings against the anchor defendant on forum conveniens grounds. This is the precise ratio of Owusu v Jackson, and the Court of Justice was fully aware of the difficulties which that conclusion would be likely to cause in the traditional exercise of the English court's forum conveniens jurisprudence in such cases. The result is, in a case (such as the present) where the English court is persuaded that, whatever happens to the claim against the foreign defendant, the claimants will in fact continue in England against the anchor defendant, the risk of irreconcilable judgments becomes a formidable, often insuperable, obstacle to the identification of any jurisdiction other than England as the forum conveniens. Thus not only is one of the court's hands tied behind its back, but the other is, in many cases, effectively paralysed. In the context of group litigation about environmental harm, the appellants say that it has the almost inevitable effect that, providing a minimum level of triable issue can be identified against an English incorporated parent, then litigation about environmental harm all around the world can be carried on in England, wherever the immediate cause of the damage arises from the operations of one of that group's overseas subsidiaries.

40.
Two consequences flow from that analysis. The first is that, leaving aside those cases where the claimant has no genuine intention to seek a remedy against the anchor defendant, the fact that article 4 fetters and paralyses the English forum conveniens jurisprudence in this way in a necessary or proper party case cannot itself be said to be an abuse of EU law, in a context where those difficulties were expressly recognised by the Court of Justice when providing that forum conveniens arguments could not be used by way of derogation from what is now article 4. The second is that to allow those very real concerns to serve as the basis for an assertion of abuse of EU law would be to erect a forum conveniens argument as the basis for a derogation from article 4, which is the very thing that the Court of Justice held in Owusu v Jackson to be impermissible. In my view, if there is a remedy for this undoubted problem, it lies in an appropriate adjustment of the English forum conveniens jurisprudence, not so as to permit the English court to stay the proceedings against the anchor defendant, if genuinely pursued for a real remedy, but rather to temper the rigour of the need to avoid irreconcilable judgments which has, thus far, served to disable the English court from concluding that any jurisdiction other than its own is the forum conveniens or proper place for the litigation of the claim against the foreign defendant. As will appear, I consider that there is a solution to this difficulty along those lines, where the anchor defendant is prepared to submit to the jurisdiction of the domicile of the foreign defendant in a case where, as here, the foreign jurisdiction would plainly be the proper place, leaving aside the risk of irreconcilable judgments.

41.
For those reasons I would resolve the abuse of EU law issue in favour of the claimants, without any need for a reference to the Court of Justice.

Real issue to be tried as against Vedanta

42.
The single task of the judge under this heading was to decide whether the claim against Vedanta could be disposed of, and rejected, summarily, without the need for a trial. This is because, although Vedanta made no reverse summary judgment application of its own, the assertion by a foreign

defendant seeking to set aside permission to serve outside the jurisdiction under the necessary or proper party gateway that the claim against the anchor defendant discloses no real issue to be tried involves, as is now agreed, a summary judgment test: see Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804, per Lord Collins of Mapesbury at para 82. That was a case about the civil procedure rules of the Isle of Man but the Judicial Committee of the Privy Council treated those provisions as in substance no different in their effect from those in the English Civil Procedure Rules: see para 67.

43.
Summary judgment disputes arise typically, and real triable issue jurisdiction disputes arise invariably, at a very early stage in the proceedings. In the context of a jurisdiction challenge the court will, typically, have only the claimant's pleadings. Proportionality effectively prohibits cross-examination and neither party will have had the benefit of disclosure of the opposing party's documents, albeit that in exceptional circumstances a direction for limited specific disclosure may be given: see Rome v Punjab National Bank (No 1) [1989] 2 All ER 136, per Hirst J, para 141 and Flatela Vava v Anglo American South Africa Ltd [2012] EWHC 1969 (QB). No order for limited disclosure was sought or made in the present case.

44.
The extent to which the absence of disclosure of defendants' documents may impede claimants in demonstrating a triable issue depends of course upon what are said to be the defects in its case. In the present case the critical question is whether Vedanta sufficiently intervened in the management of the Mine owned by its subsidiary KCM to have incurred, itself (rather than by vicarious liability), a common law duty of care to the claimants or, (on the claimants' expert evidence), a fault-based liability under the Zambian environmental, mining and public health legislation in connection with the escapes of toxic materials from the Mine alleged to have caused the relevant harm. The level of intervention in the management of the Mine requisite to give rise to a duty of care upon Vedanta to persons living, farming and working in the vicinity is (as is agreed) a matter of Zambian law, but the question whether that level of intervention occurred in the present case is a pure question of fact. I make no apology for having suggested during argument that it is blindingly obvious that the proof of that particular pudding would depend heavily upon the contents of documents internal to each of the defendant companies, and upon correspondence and other documents passing between them, currently unavailable to the claimants, but in due course disclosable.

45.
This poses a familiar dilemma for judges dealing with applications for summary judgment. On the one hand, the claimant cannot simply say, like Mr Micawber, that some gaping hole in its case may be remedied by something which may turn up on disclosure. The claimant must demonstrate that it has a case which is unsuitable to be determined adversely to it without a trial. On the other, the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue: see Tesco Stores Ltd v Mastercard Inc [2015] EWHC 1145, per Asplin J at para 73.

46.
The main thrust of the appellants' case under this heading was that a conclusion that Vedanta had incurred a duty of care to the claimants would involve a novel and controversial extension of the boundaries of the tort of negligence, beyond any established category, calling for a cautious incremental approach by analogy with established categories, which therefore required a detailed investigation of the claimants' case, which neither the judge nor the Court of Appeal carried out.

47.
It was submitted therefore that this court needed to carry out that detailed analysis. For that purpose Mr Charles Gibson QC for KCM undertook, mainly in writing, a thorough review of the appellants' published documents describing their relationship, and Mr Richard Hermer QC for the claimants responded in kind, albeit to some extent under protest that this was not an exercise which this court ought to undertake.

48.
It might be thought that an assertion that the claim against Vedanta raised a novel and controversial issue in the common law of negligence made it inherently unsuitable for summary determination. It is well settled that difficult issues of law of that kind are best resolved once all the facts have been ascertained at a trial, rather than upon the necessarily abbreviated and hypothetical basis of pleadings or assumed facts.

49.
The appellants' submission that this case involves the assertion of a new category of common law negligence liability arises from the fact that, although the claimants chose to plead their case by seeking to fit its alleged facts within a series of four indicia given by the Court of Appeal in Chandler v Cape plc [2012] 1 WLR 3111, it was submitted that this was by no means a Chandler type of case. It may, like the claim in the Chandler case, loosely be categorised as a claim that a parent company has incurred a common law duty of care to persons (in this case neighbours rather than employees) harmed by the activities of one of its subsidiaries. But the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence. Direct or indirect ownership by one company of all or a majority of the shares of another company (which is the irreducible essence of a parent/subsidiary relationship) may enable the parent to take control of the management of the operations of the business or of land owned by the subsidiary, but it does not impose any duty upon the parent to do so, whether owed to the subsidiary or, a fortiori, to anyone else. Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary. All that the existence of a parent subsidiary relationship demonstrates is that the parent had such an opportunity.

50.
Mr Gibson and Mr Hermer were eventually ad idem in commending to the court the pithy and in my view correct summary of this point by Sales LJ in AAA v Unilever plc [2018] EWCA Civ 1532, para 36:

"There is no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-à-vis persons affected by those activities. Parent and subsidiary are separate legal persons, each with responsibility for their own separate activities. A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case. The legal principles are the same as would apply in relation to the question whether any third party (such as a consultant giving advice to the subsidiary) was subject to a duty of care in tort owed to a claimant dealing with the subsidiary. Helpful guidance as to relevant considerations was given in Chandler v Cape plc; but that case did not lay down a separate test, distinct from general principle, for the imposition of a duty of care in relation to a parent company."

He continued, at para 37:

“Although the legal principles are the same, it may be that on the facts of a particular case a parent company, having greater scope to intervene in the affairs of its subsidiary than another third party might have, has taken action of a kind which is capable of meeting the relevant test for imposition of a duty of care in respect of the parent.”

He proceeded then to provide typical examples, which included this case, which had already by then been decided by the Court of Appeal.

51.
Sales LJ thought that cases where the parent might incur a duty of care to third parties harmed by the activities of the subsidiary would usually fall into two basic types: (i) Where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of or jointly with the subsidiary’s own management; (ii) Where the parent has given relevant advice to the subsidiary about how it should manage a particular risk. For my part, I would be reluctant to seek to shoehorn all cases of the parent’s liability into specific categories of that kind, helpful though they will no doubt often be for the purposes of analysis. There is no limit to the models of management and control which may be put in place within a multinational group of companies. At one end, the parent may be no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries. At the other extreme, the parent may carry out a thoroughgoing vertical reorganisation of the group’s businesses so that they are, in management terms, carried on as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant, until the onset of insolvency, as happened within the Lehman Brothers group.

52.
Mr Gibson sought to extract from the Unilever case and from HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell plc [2018] EWCA Civ 191; [2018] Bus LR 1022, a general principle that a parent could never incur a duty of care in respect of the activities of a particular subsidiary merely by laying down group-wide policies and guidelines, and expecting the management of each subsidiary to comply with them. This is, he submitted, all that the evidence thus far deployed in the present case demonstrated about the Vedanta Group. Again, I am not persuaded that there is any such reliable limiting principle. Group guidelines about minimising the environmental impact of inherently dangerous activities, such as mining, may be shown to contain systemic errors which, when implemented as of course by a particular subsidiary, then cause harm to third parties. In the Chandler case, the subsidiary inherited (by taking over a business formerly carried on by the parent) a system for the manufacture of asbestos which created an inherently unsafe system of work for its employees, because it was carried on in factory buildings with open sides, from which harmful asbestos dust could, and did, escape. As a result, and after a full trial, the parent was found to have incurred a duty of care to the employees of its subsidiary, and the result would surely have been the same if the dust had escaped to neighbouring land where third parties worked, lived or enjoyed recreation. It is difficult to see why the parent’s responsibility would have been diminished if the unsafe system of work, namely the manufacture of asbestos in open-sided factories, had formed part of a group-wide policy and had been applied by asbestos manufacturing subsidiaries around the world.

53.
Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published

materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.

54.
Once it is recognised that, for these purposes, there is nothing special or conclusive about the bare parent/subsidiary relationship, it is apparent that the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all. They may easily be traced back as far as the decision of the House of Lords in Dorset Yacht Co Ltd v Home Office [1970] AC 1004, in which the negligent discharge by the Home Office of its responsibility to supervise Borstal boys working on Brownsea Island in Poole Harbour led to seven of them escaping and causing serious damage to moored yachts in the vicinity, including one owned by the plaintiff.

55.
The essence of the claimants' case against Vedanta is that it exercised a sufficiently high level of supervision and control of the activities at the Mine, with sufficient knowledge of the propensity of those activities to cause toxic escapes into surrounding watercourses, as to incur a duty of care to the claimants. In the lengthy Particulars of Claim (in which this allegation of duty of care, together with its particulars, occupied 13 pages) the claimants make copious reference, including quoted highlights, to material published by Vedanta in which it asserted its responsibility for the establishment of appropriate group-wide environmental control and sustainability standards, for their implementation throughout the group by training, and for their monitoring and enforcement. The claimants have exhibited the underlying published materials to witness statements, and relied, in addition, upon a management services agreement between Vedanta and KCM and a witness statement of a Mr Kakengela, a middle manager of KCM who gave evidence about changes in the mode of management of the Mine after KCM became part of the Vedanta Group.

56.
The judge's approach to this issue may be summarised as follows. First, he accepted that it was arguable that the Zambian courts would identify the relevant principles of Zambian common law in accordance with those established in England. It is now common ground that he was entitled on the evidence to do so. Secondly, he accepted the invitation of counsel on both sides to treat Caparo Industries plc v Dickman [1990] 2 AC 605, and its three ingredients of foreseeability, proximity and reasonableness, as the starting point. This assumed, contrary to my view, that he was dealing with a novel category of common law negligence liability, but he can hardly be criticised for having done so in the light of the parties' joint invitation. Thirdly he was guided by the claimants' own pleaded case to focus upon the question whether the indicia in the Chandler case were satisfied. In my view, and that of the Court of Appeal in this case, the Chandler indicia are no more than particular examples of circumstances in which a duty of care may affect a parent. They were so described by Arden LJ when setting them out in the Chandler case. Although this if anything imposed an unnecessary straitjacket, both upon the claimants and the judge, it did not lead to the identification of a wider basis in law for the recognition of the relevant parental duty of care than that which, in my view, the law actually provides, by reference to basic principle.

57.
Next, the judge reminded himself, correctly in my view, that the answer to the question whether Vedanta incurred a duty of care to the claimants was likely to depend upon a careful examination of materials produced only on disclosure, and in particular upon documents held by Vedanta: see para 118. He cautioned himself against embarking on any sort of mini-trial. At para 119 he said this:

“In the light of that view, it is unnecessary for me to identify in any detail the evidence [on] which the claimants rely in support of their case that Vedanta, as the parent company, owed a relevant duty of care.”

58.
He then identified in four short sub-paragraphs the particular material which supported his view that the claimants’ case was arguable. They included part of the published material, namely a report entitled “Embedding Sustainability” which, he said, stressed that the oversight of all Vedanta’s subsidiaries rested with the board of Vedanta itself, made particular reference to problems with discharges into water and to the particular problems arising at the Mine. He relied upon the management services agreement between Vedanta and KCM to which I have referred, upon a decision of the Irish High Court about the group (Elmes v Vedanta Lisheen Mining Ltd [2014] IEHC 73) and upon the witness statement of Mr Kakengela. He concluded by recognising the need for a cautious approach to the relevant evidence filed by KCM’s principal witness Mr Ndulo, whose credibility he said had been subject to serious adverse comment (including a finding of dishonesty) by a Commercial Court judge in an earlier case: see U & M Mining Zambia Ltd v Konkola Copper Mines plc (No 3) [2014] EWHC 3250 (Comm).

59.
For its part the Court of Appeal followed a broadly similar course, while reminding itself that the Chandler indicia were no more than examples, and making a slightly different selection from the voluminous evidence of those parts of Vedanta’s published statements indicative at least of an arguable case for having undertaken a sufficiently close intervention into the operation of the Mine to attract the requisite duty of care.

60.
In my view the appellants’ primary submission under this heading, that the judge and the Court of Appeal failed to apply sufficient rigour to their analysis of the claimants’ pleadings and evidence on this question, fails in limine. This was not a case of the assertion, for the first time, of a novel and controversial new category of case for the recognition of a common law duty of care, and it therefore required no added level of rigorous analysis beyond that appropriate to any summary judgment application in a relatively complex case. Nor does the judge’s judgment disclose any lack of appropriate rigour. The question as to triable issue as against Vedanta was one of a significantly larger number of contentious issues than those which have survived in this court. The reason which the judge gave for the relative brevity of his analysis of the underlying materials in para 119 of his judgment said nothing about the depth and rigour of his own review of those materials. He was merely seeking to explain why, in what was necessarily a long and detailed judgment, having formed a clear view that the case against Vedanta was arguable, it was unnecessary to burden his judgment with a lengthy and detailed description of his own analysis. For the reasons I have already given, his legal analysis may have departed slightly from the ideal, but only in respects in which either he followed the parties’ joint invitation, or by imposing a straitjacket derived from the Chandler case which, if anything, increased rather than reduced the claimants’ burden in demonstrating a triable issue. But in that respect those imperfections were largely cleared up by the Court of Appeal which, rightly in my view, recognised that they did not undermine the judge’s conclusion.

61.
This court has, again, been taken at length through the relevant underlying materials. For my part, if conducting the analysis afresh, I might have been less persuaded than were either the judge or the Court of Appeal by the management services agreement between the appellants, or by the evidence of

Mr Kakengela. But I regard the published materials in which Vedanta may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the Mine, and not merely to have laid down but also implemented those standards by training, monitoring and enforcement, as sufficient on their own to show that it is well arguable that a sufficient level of intervention by Vedanta in the conduct of operations at the Mine may be demonstrable at trial, after full disclosure of the relevant internal documents of Vedanta and KCM, and of communications passing between them.

62.
It matters not whether this court would have reached the same view as did the judge about triable issue. It is sufficient that, for the reasons which I have given, there was material upon which the judge could properly do so, and that his assessment was not vitiated by any error of law.

Breach of statutory duty by Vedanta

63.
The claimants plead that, regardless whether Vedanta owed any common law duty of care to them, its intervention in the operation of the Mine caused it to commit breaches of duties imposed by Zambian statutes, even though KCM was the sole licensed operator of the Mine. They are the Mines and Minerals Development Act 2008, the Environmental Management Act 2011 and the Environmental Protection and Pollution Control Act 1990. Generally speaking they impose strict liability on KCM but, according to the opinion of the claimants' Zambian law expert, they also impose a fault-based liability on a wider range of persons. For example, section 4 of the Environmental Management Act 2011 enables the court to compel "the person responsible for any environmental degradation" to restore the environment to its status quo ante and to provide compensation to any victim for the harm caused.

64.
In paras 91 and following of the Particulars of Claim the same facts are repeated as are relied upon for the assertion of a common law duty of care against Vedanta by the repeated use of this rubric:

"In the light of the matters pleaded above and the First Defendant's direction and control over the operations of the Second Defendant …"

65.
I must admit having some difficulty with the concept of a fault-based liability which does not depend upon the existence of a prior legal duty to take care. Nonetheless, it is reasonably clear from the claimants' Zambian law expert's evidence (which for the purposes of testing an arguable case it is agreed must be accepted, although vigorously challenged) that substantially the same inquiry as to the extent of Vedanta's intervention in the operation of the Mine is required for the purpose of establishing breach by it of statutory duty, as is required for the identification of a common law duty of care to the claimants. It follows that no useful purpose is served by a minute examination of issues about that statutory duty. Furthermore, once it is concluded that there is no basis for going behind the judge's conclusion that the claimants had an arguable case in common law against Vedanta, the question whether or not the claimants have an arguable statutory claim as well can make no difference to the outcome of this appeal. For much the same reasons, both the judge and the Court of Appeal dealt with the statutory basis of claim with commendable brevity.

Is England the proper place in which to bring the claim against KCM?

66.
I have found this to be the most difficult issue in this appeal. It does raise an important question of law. CPR 6.37(3) provides that:

“The court will not give permission [to serve the claim form out of the jurisdiction] unless satisfied that England and Wales is the proper place in which to bring the claim.” (my emphasis)

The italicised phrase is the latest of a series of attempts by English lawyers to label a long-standing concept. It has previously been labelled forum conveniens and appropriate forum, but the changes in language have more to do with the Civil Procedure Rules’ requirement to abjure Latin, and to express procedural rules and concepts in plain English, than with any intention to change the underlying meaning in any way. The best known fleshed-out description of the concept is to be found in Lord Goff of Chieveley’s famous speech in the Spiliada case, summarised much more recently by Lord Collins in the Altimo case at para 88 as follows:

“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; …”

That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred.

67.
Thus far, the search for these connecting factors gives rise to no difficult issues of principle, even though they may not all point in the same direction. The problems thrown up by this appeal all arise from the combination of two factors. The first is that the “case” involves multiple defendants domiciled in different jurisdictions. The second is that, following Owusu v Jackson, the court is disabled from the exercise of its traditional common law power to stay the proceedings against the domiciled anchor defendant by reason of article 4: see paras 23 to 41 above.

68.
There can be no doubt that, when Lord Goff originally formulated the concept quoted above, he would have regarded the phrase “in which the case can be suitably tried for the interest of all the parties” as referring to the case as a whole, and therefore as including the anchor defendant among the parties. Although the persuasive burden was reversed, as between permission to serve out against the foreign defendant and the stay of proceedings against the anchor defendant, the court was addressing a single piece of multi-defendant litigation and seeking to decide where it should, as a whole, be tried. The concept behind the phrases “the forum” and “the proper place” is that the court is looking for a single jurisdiction in which the claims against all the defendants may most suitably be tried. The Altimo case also involved multiple defendants. Although it was decided after Owusu v Jackson, it concerned the international jurisdiction of the courts of the Isle of Man, so that the particular problems thrown up by this appeal did not arise.

69.
An unspoken assumption behind that formulation of the concept of forum conveniens or proper place, may have been (prior to Owusu v Jackson) that a jurisdiction in which the claim simply could not be

tried against some of the multiple defendants could not qualify as the proper place, because the consequence of trial there against only some of the defendants would risk multiplicity of proceedings about the same issues, and inconsistent judgments. But the cases in which this risk has been expressly addressed tend to show that it is only one factor, albeit a very important factor indeed, in the evaluative task of identifying the proper place. For example, in Société Commerciale de Réassurance v Eras International Ltd (The Eras Eil Actions) [1992] 1 Lloyd's Rep 570, Mustill LJ said this, at p 591:

"... in practice the factors which make the party served a necessary or proper party ... will also weigh heavily in favour of granting leave to make the foreigner a party, although they will not be conclusive."

70.
In cases where the court has found that, in practice, the claimants will in any event continue against the anchor defendant in England, the avoidance of irreconcilable judgments has frequently been found to be decisive in favour of England as the proper place, even in cases where all the other connecting factors appeared to favour a foreign jurisdiction: see eg OJSC VTB Bank v Parline Ltd [2013] EWHC 3538 (Comm), per Leggatt J at para 16.

71.
That is a fair description of the judge's reasoning in the present case. Having found that, looking at the matter as between the claimants and KCM, all the connecting factors pointed towards Zambia, the judge concluded that, factoring in the closely related claim against Vedanta, which he found as a matter of fact that the claimants were likely to pursue in England in any event, the risk of irreconcilable judgments arising from separate proceedings in different jurisdictions against each defendant was decisive in identifying England as the proper place: see paras 160 to 168. He said that:

"The alternative - two trials on opposite sides of the world on precisely the same facts and events - is unthinkable."

72.
It is obvious from his analysis (assuming that substantial justice could be obtained in Zambia) that, had the English court retained its jurisdiction to stay the proceedings as against Vedanta, as it was thought it did prior to Owusu v Jackson, the judge would have done so, and thereby ensured that the case was brought to trial against both defendants in Zambia.

73.
The appellants submitted that the judge's approach took insufficient account of the fact that the language of CPR 6.37(3) requires the court to be satisfied that England and Wales is the proper place in which to bring "the claim", rather than the proper place for trial of the case as a whole. By "the claim" it was submitted that the rule meant only the claim against the foreign defendant. It is evident that, if the judge had confined himself to that analysis, he would have set aside service against KCM, subject to the substantial justice issue. The appellants contrasted the wording of the predecessor rule, RSC Order 11 rule 4(2) which provided that:

"No such permission shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order." (my emphasis)

74.

I have not been persuaded that this change of language from “the case” to “the claim” was intended to effect any change in the previously clearly stated requirement for the court to consider the proper place for the case as a whole. In particular, the phrase “the claim” is used in CPR Practice Direction 6B paragraph 3.1(3) in a way which suggests that the foreign defendant must be “a necessary or proper party to that claim”, which is the claim which has been or will be served on the anchor defendant.

75.
I have however been much more troubled by the absence of any particular focus by the judge upon the fact that, in this case, the anchor defendant, Vedanta, had by the time of the hearing offered to submit to the jurisdiction of the Zambian courts, so that the whole case could be tried there. This did not, of course, prevent the claimants from continuing against Vedanta in England, nor could it give rise to any basis for displacing article 4 as conferring a right to do so upon the claimants. But it does lead to this consequence, namely that the reason why the parallel pursuit of a claim in England against Vedanta and in Zambia against KCM would give rise to a risk of irreconcilable judgments is because the claimants have chosen to exercise that right to continue against Vedanta in England, rather than because Zambia is not an available forum for the pursuit of the claim against both defendants. In this case it is the claimants rather than the defendants who claim that the risk of irreconcilable judgments would be prejudicial to them. Why (it may be asked) should that risk be a decisive factor in the identification of the proper place, when it is a factor which the claimants, having a choice, have brought upon themselves?

76.
Although this is not a question which the judge addressed in terms, he plainly regarded the OJSC VTB Bank case as in substance indistinguishable from this case, and there is to be found an analysis of that very question by Leggatt J, at paras 8 to 10:

“8. The two other arguments on which Mr Moverley Smith places greater weight are, first, an argument that it is a matter of choice on the claimant’s part to bring the proceedings against the first and third defendants here. Those defendants, he says, could equally well have been sued in Russia. There is no evidence before the court that that is the case, but I am prepared to assume for the purposes of argument today that it is the case, and in any event Mr Moverley Smith has confirmed, albeit only in the course of his oral submissions, that if necessary the first and third defendants will give undertakings to submit to the jurisdiction of the Russian courts.

9. The argument, therefore, is, in substance, that although the claimant has chosen to sue the first and third defendants in this country, it has an alternative forum available, a forum which is much more convenient when one considers all the connecting factors, and that if the claimant chooses still to pursue claims against the first and third defendants in England even if unsuccessful in joining the second defendant to those claims so that the second defendant can only be pursued in Russia, then that is a choice which it has made, and the fact that it is a matter of choice negates, or substantially diminishes, the weight that would otherwise be given to the importance and desirability of avoiding duplication of proceedings and the risk of inconsistent judgments.

10. I see the force of that point but it does not seem to me to answer the fact that it is a matter of entitlement on the claimant’s part to sue the first and third defendants in England. There is no reason why the claimant should be expected or required to relinquish that right in order to avoid duplication of proceedings. Rather, it seems to me that the existence of that right and the fact that it is being

exercised is the starting point and the background against which I ought to consider the question of whether England is also the appropriate forum for the claim against the second defendant."

77.
Coulson J was, in the present case, no doubt aware that Vedanta had made the same offer as had been made by the anchor defendant before Leggatt J to submit to the jurisdiction of the relevant foreign court, but the question is whether Leggatt J's analysis is or is not right in principle. If it is, then I consider that the judge's analysis of the proper place question in the present case cannot be faulted. But if it is not, then there is a need to consider whether the force of the risk of irreconcilable judgments ought to be either eliminated or at least reduced in the balancing of all relevant factors, below a level which the judge regarded as decisive.

78.
Mr Gibson submitted that, if Leggatt J's analysis is right, then the risk of irreconcilable judgments is likely to be decisive in every case where the claimants have a right to sue the anchor defendant in England under article 4, regardless of the strength of the other connecting factors with the foreign jurisdiction. It would, he said, be hard to imagine stronger connecting factors than those in either the OJSC VTB Bank case or in this case, and I am inclined to agree with him. The result would be, as outlined in paras 38 to 40 above, that the English court would not merely have one hand tied behind its back because of its inability to stay the proceedings against the anchor defendant, but the other hand paralysed by the almost inevitable priority to be given to the risk of irreconcilable judgments, where claimants chose to exercise their right to continue against the anchor defendant in England.

79.
After anxious consideration, I have come to the conclusion that Leggatt J's analysis of this point, followed by the judge, is wrong. At the heart of it lies the proposition that, because a claimant has a right to sue the anchor defendant in England, there is "no reason why the claimant should be expected or required to relinquish that right in order to avoid duplication of proceedings". In my judgment, there is good reason why the claimants in the present case should have to make that choice, always assuming that substantial justice is available in Zambia (which is a necessary but hypothetical predicate for the whole of the analysis of this issue).

80.
There is nothing in article 4 which can be interpreted as being intended to confer upon claimants a right to bring proceedings against an EU domiciliary in the member state of its domicile in such a way that avoids incurring the risk of irreconcilable judgments. On the contrary, article 4 is, as was emphasised in Owusu v Jackson, blind to considerations of that kind. The mitigation of that risk is available in a purely intra-EU context under article 8.1 (where that risk is expressly recognised). But it is unavailable where the related defendant is (as here) domiciled outside any of the member states.

81.
Looking at the matter from an intra-member states perspective, a person wishing to bring related claims against a number of defendants which, if litigated separately, would give rise to a risk of irreconcilable judgments, has a choice. The claimant may bring separate proceedings against each related defendant in the member state of that defendant's domicile, thereby incurring a risk of irreconcilable judgments. Or the claimant may bring a single set of proceedings against all the defendants in the member state of the domicile of only one of them, so as to avoid that risk. That choice is what article 8.1 expressly permits.

82.

If the risk of irreconcilable judgments is one which, as in the present case, exists to the prejudice only of the claimants, I can see no possible reason why a right to sue in England under article 4 should not give rise to the same choice, where the alternative jurisdiction lies outside that of the member states, in a place where the claimant may sue all the defendants, not because of article 8.1, but because they are all prepared to submit to that jurisdiction. The alternative view (as expressed by Leggatt J) that the right conferred by article 4 should not expose the claimants to the need to make such a choice would appear to convert the right conferred by article 4 to an altogether higher level of priority, where the alternative forum lies outside that of the member states, than it does where the alternative forum lies inside, under article 8. In short, if the article 4 right is not a trump card for the purpose of avoiding irreconcilable judgments within the confines of the member states, why should it become a trump card outside those confines?

83.
The recognition that claimants seeking to avail themselves of their article 4 rights to sue an anchor defendant are nonetheless exposed to a choice whether to do so at the risk of irreconcilable judgments, even in cases where article 8 is not available, but another proper, convenient or natural forum is available for the pursuit of the case against all the defendants is, to my mind, the answer to the conundrum posed in para 40 above. It does not in any way bring into play forum conveniens considerations as a reason for denying the claimants access to the jurisdiction of England as a member state, against the anchor defendant. It simply exposes the claimants to the same choice, whether or not to avoid the risk of irreconcilable judgments, as is presented by the combination of article 4 and article 8 in an intra-EU context.

84.
That analysis does not mean, when the court comes to apply its national rules of private international law to the question whether to permit service out of the jurisdiction upon KCM, that the risk of irreconcilable judgments is thereby altogether removed as a relevant factor. But it does in my view mean that it ceases to be a trump card, and that the basis upon which the judge, following Leggatt J in the OJSC VTB Bank case, regarded it as decisive, involved an error of principle. Since the Court of Appeal appears to have adopted the same approach as the judge on this issue, I would regard it as incumbent upon this court to carry out that balancing of connecting factors and risk of irreconcilable judgments afresh. Like the judge, it seems to me sensible first to do so without regard to any risk that the claimants would not obtain substantial justice if required to proceed, at least against KCM, in Zambia.

85.
It is unnecessary to do more than barely summarise the connecting factors with Zambia which led the judge to the conclusion that, putting aside the risk of irreconcilable judgments, Zambia was overwhelmingly the proper place for the claim to be tried. He described those factors as relevant to a trial as between the claimants and KCM, but the only factor to the contrary which he identified for the purposes of a notional trial as between the claimants and Vedanta was the risk of irreconcilable judgments. In fact, almost all the connecting factors with Zambia identified by the judge are equally applicable to the case as a whole (ie as against KCM and Vedanta). In summary:

i)
The allegedly wrongful acts or omissions occurred primarily in Zambia. This is plainly true of the claim against KCM, but since the liability of Vedanta depends mainly upon the extent to which it intervened in the operation of the Mine, it is likely to be true of Vedanta as well.

ii)
The causative link between the allegedly negligent operation of the Mine and the damage which ensued is of course the escape of noxious substances into waterways, which also occurred within Zambia.

iii)
The Mine was operated (whether by KCM alone, or by KCM and Vedanta together, as the claimants allege) pursuant to a Zambian mining licence and subject to Zambian legislation. In any event, it is common ground that all the applicable law is Zambian, even if that country may prove to follow the common law of England and Wales in material respects.

iv)
The claimants are all poor persons who would have real difficulty travelling to England to give evidence, for example of their injuries, or of the damage to their land and livelihoods. Although English is an official language in Zambia, many of the claimants only speak a local dialect which would require translation in order to be understood by an English judge or advocate, but not by their Zambian equivalents.

v)
KCM's witnesses of fact are all based in Zambia. They far outnumber the potential witnesses employed by Vedanta, some (but by no means all) of whom may be supposed to be domiciled in England.

vi)
Although relevant disclosable documents will be likely to be found in England and in Zambia (in the possession or control of Vedanta and KCM respectively), many of KCM's documents would, like the evidence of their witnesses, require translation for use in an English court, but not in a Zambian court, which has the considerable advantage in this context of being effectively bilingual.

vii)
All the regulatory and testing records and reports relevant to the alleged emissions from the Mine are likely to be based in Zambia, as is the responsible regulator.

viii)
Against all those factors it may, as already noted, be the case that significant relevant documents are located in England. In an age when documents may be scanned (if not already in electronic form) and then transmitted easily and cheaply round the world, this does not seem to me to be a powerful factor. Some of the relevant conduct which the claimants may allege against Vedanta or upon which Vedanta may wish to rely by way of defence, may well have occurred in England, for example at board meetings of Vedanta. But its relatively small number of employees are likely to find it much easier to travel to Zambia than their counterparts in KCM, let alone the claimants themselves, would find it for the purposes of travel to England, if only because of the enormous disparity in the number who would be required to travel in each case.

ix)
A judgment of the Zambian court would be recognisable and enforceable in England, against Vedanta. Zambian judgments are enforceable in England under Part II of the Administration of Justice Act 1920. Zambia is specifically listed as a relevant Commonwealth jurisdiction for the purposes of the 1920 Act by the Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II) (Consolidation) Order (SI 1984/129).

86.
I would not ignore, or downplay, the mitigation of those factors which good case management of an English claim might be able to achieve. For example, as has happened in the past, the English judge may arrange for sittings in Zambia, for Zambian evidence to be taken by video conference, and for a Zambian court room or building to be continuously available to the claimants and the Zambian public to listen to and to view on screen those parts of the trial being conducted in England. As already noted, even if the volume of documents located in Zambia greatly exceeds those located in England (as is likely), modern facilities for their transmission should, to a considerable extent, reduce the inconvenience which might otherwise arise from their current location.

87.
In conclusion, it is sensible to stand back and look at the matter in the round. This case seeks compensation for a large number of extremely poor Zambian residents for negligence or breach of Zambian statutory duty in connection with the escape within Zambia of noxious substances arising in connection with the operation of a Zambian mine. If substantial justice was available to the parties in Zambia as it is in England, it would offend the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England, if the risk of irreconcilable judgments arose purely from the claimants' choice to proceed against one of the defendants in England rather than, as is available to them, against both of them in Zambia. For those reasons I would have concluded that the claimants had failed to demonstrate that England is the proper place for the trial of their claims against these defendants, having regard to the interests of the parties and the ends of justice.

Substantial justice

88.
Even if the court concludes (as I would have in the present case) that a foreign jurisdiction is the proper place in which the case should be tried, the court may nonetheless permit (or refuse to set aside) service of English proceedings on the foreign defendant if satisfied, by cogent evidence, that there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction. The same test was, prior to Owusu v Jackson, applicable in the context of an application for a stay of English proceedings against a defendant served within the jurisdiction. The question whether there is a real risk that substantial justice will be unobtainable is generally treated as separate and distinct from the balancing of the connecting factors which lies at the heart of the issue as to proper place, but that is more because it calls for a separate and careful analysis of distinctly different evidence than because it is an inherently different question. If there is a real risk of the denial of substantial justice in a particular jurisdiction, then it seems to me obvious that it is unlikely to be a forum in which the case can be tried most suitably for the interests of the parties and the ends of justice.

89.
In the present case the judge described this as an "access to justice" issue. By this he meant that the real risk (in his view a probability) that substantial justice would be unavailable in Zambia had nothing to do with any lack of independence or competence in its judiciary or any lack of a fair civil procedure suitable for handling large group claims. Rather, it derived essentially from two factors: first, the practicable impossibility of funding such group claims where the claimants were all in extreme poverty; and secondly, the absence within Zambia of sufficiently substantial and suitably experienced legal teams to enable litigation of this size and complexity to be prosecuted effectively, in particular against a defendant (KCM) with a track record which suggested that it would prove an obdurate opponent. The judge acknowledged that in the large amount of evidence and lengthy argument

presented on this issue there was material going both ways, giving rise to factual issues some of which he had to resolve, but others of which he could not resolve without a full trial. Nonetheless he concluded not merely that there was a real risk but a probability that the claimants would not obtain access to justice so that, in his view, and notwithstanding the need for caution and cogent evidence, this reason for preferring the English to the Zambian jurisdiction was established by a substantial margin beyond the real risk which the law requires. There is no satisfactory substitute for a full reading of the judge's careful analysis of this issue, to which he gave his full and detailed attention notwithstanding the fact that he had already concluded, without regard to the access to justice issue, that he should refuse the defendants' applications upon the basis that England was the proper place for the trial of the case. I will confine myself to a bare summary of his reasoning, sufficient to make sense of the analysis which follows.

90.
The judge found that the claimants were at the poorer end of the poverty scale in one of the poorest countries of the world, that they had no sufficient resources of their own (even as a large group) with which to fund the litigation themselves, that they would not obtain legal aid for this claim and nor could it be funded by a Conditional Fee Agreement ("CFA") because CFAs are unlawful in Zambia.

91.
Nonetheless he acknowledged that there was some evidence that lawyers would be prepared to pursue such claims on the basis of the up-front payment of a modest deposit to fund disbursements, but otherwise on the basis that the lawyers would recover payment for their work from costs ordered to be paid (without a success fee) from the defendants, if the claim succeeded. He acknowledged also that the evidence did not demonstrate that no lawyers would be prepared to offer to undertake the litigation on that basis, but rather that those who might offer would simply lack the resources, in terms of numbers in the legal team, or experience, with which to be able to conduct complex litigation of this kind with the requisite degree of competence and efficiency. Finally, he acknowledged that there was some evidence of group environmental litigation of a similar kind being conducted before the Zambian courts, but he considered, upon the basis of detailed evidence about those cases that they supported, rather than detracted from, a view that the Zambian legal profession lacked the resources and experience with which to conduct such litigation successfully.

92.
As the Court of Appeal observed when affirming the judge's decision on this issue, the appellants face formidable difficulties in asking any appellate court to overturn this detailed fact-finding exercise, by an experienced judge who stated in terms (and there is no reason to doubt) that he had read all the relevant materials and carefully considered the detailed opposing arguments. Nonetheless, and supported by a written intervention by the Attorney General of Zambia, the appellants mounted a full-frontal attack on the judge's conclusions which, they submitted, this court ought to entertain because of flaws in the judge's application of the relevant law. In outline, these were as follows:

i)
The judge failed to heed judicial warnings that funding issues will only in exceptional cases justify a finding of lack of substantial justice.

ii)
The judge failed to acknowledge that substantial justice required the claimants to take their forum as they found it.

iii)

The judge failed to pay due regard to considerations of comity, and a requirement for cogent evidence.

I will take those in turn.

93.
There are indeed judicial warnings of undoubted authority that the English court should not in this context conclude, otherwise than in exceptional cases, that the absence of a means of funding litigation in the foreign jurisdiction, where such means are available in England, will lead to a real risk of the non-availability of substantial justice: see Connelly v RTZ Corpn plc (No 2) [1998] AC 854, 873 per Lord Goff and Lubbe v Cape plc [2000] 1 WLR 1545, 1555 per Lord Bingham of Cornhill. They were in fact both cases in which that hurdle of exceptionality was surmounted, in the first in relation to exposure to radiation at a uranium mine in Namibia and the second in relation to exposure to asbestos from mining and processing in South Africa. The judge plainly had those considerations well in mind, since he regarded the Lubbe case as one of three authorities which set out the relevant law, and Lord Goff's dicta in the Connelly case are quoted in full by Lord Bingham in the Lubbe case. Of course, a judge may cite all the relevant authorities and yet still misapply the law, but in this case the judge came nowhere near treating the absence of particular forms of litigation funding in Zambia, such as legal aid and CFAs, as conclusive. He conducted a searching analysis of all possible forms of funding, and found that most were unavailable but that the one which was in principle available would not attract a legal team which was both prepared to act, and able to do so with the requisite resources and experience. Although the judge did not refer to it expressly, the evidence included the possibility of funding cases of this kind, or the necessary underlying research, by contribution from locally based NGOs, but the absence of reference to a matter of detail in a judgment about an issue which the judge only dealt with for completeness comes nowhere near to demonstrating that he left this evidence out of account.

94.
The gist of the appellants' second point is that the judge's denigration of the accessibility of substantial justice in Zambia was too heavily based upon a comparison between the relatively rudimentary way in which a case of this kind could be litigated in Zambia, and its likely elaborate treatment by well-resourced legal teams (in particular on the claimants' side) in England. The judge plainly regarded this litigation as both complex and weighty. As an experienced judge of the Technology and Construction Court his assessment deserves respect. It is also in my view objectively justified. In the absence of any admissions from the appellants which might serve to narrow the issues (and there are none), large aspects of the claimants' collective and individual claims will depend upon the presentation of expert evidence. They will include identifying the emissions which actually occurred, and their toxicity, establishing whether the system of operation of the Mine (both in its planning and implementation) fell short of that requisite to satisfy a duty of care, tracing the emissions through to watercourses in the vicinity of the claimants, proving (during a considerable period of time) that these emissions caused damage to particular claimants' land, business and health, and quantifying (save perhaps in relation to personal injuries) the diminution in the value of business and property thereby caused. Much of that expert work will, from the perspective of the claimants' legal team, have to be paid for as disbursements, but it will still need to be supervised by competent and experienced lawyers. As is evident from the decision of the Supreme Court of Zambia in Nyasulu v Konkola Copper Mines plc [2015] ZMSC 33, it will be necessary for each individual claimant to prove both causation and loss, and to value their loss unless (which did not happen in that case and has not been volunteered here) KCM were to agree that issues of that kind could be determined either on the basis of typical claimants or by means of an out of court claims management process.

95.
It is of course possible, indeed likely, that the litigation of all those issues in Zambia would, even if funding and the necessary legal resources were available, be undertaken on a simpler and more economical scale than would be likely if undertaken in the Technology and Construction Court by large, sophisticated legal teams, without necessarily depriving the claimants of substantial justice. But the judge did not address this question by way of a comparison between litigation in England and in Zambia. His enquiry was directed to the question whether the unavoidable scale and complexity of this case (wherever litigated) could be undertaken at all with the limited funding and legal resources which the evidence led him to conclude were available within Zambia. His judgment does not therefore disclose the misdirection about the meaning of "substantial justice" which is suggested by the appellants.

96.
Finally, the judge's analysis positively demonstrates that he had due regard to considerations of comity and the requirement for cogent evidence. He referred to the need for cogent evidence in express terms, at para 174. He identified the evidence which he found persuasive and quoted from some of it. Cogent evidence does not mean unchallenged evidence.

97.
It is also evident that the judge was conscious of the need to exercise restraint on grounds of comity. At para 198 he said 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 … that the claimants would almost certainly not get access to justice if these claims were pursued in Zambia."

98.
My conclusion that the judge did not misdirect himself in law in any of the respects contended for by the appellants is sufficient to dispose of this issue since, otherwise, the appellants' case in relation to it is no more or less than a challenge to judicial fact-finding. But for completeness I will say something about what appeared to be the strongest point in the appellants' challenge. This was that the judge failed to have sufficient regard to the evidence constituted by a series of Zambian cases, comparable in differing extents to this case, in which groups of claimants had managed to litigate issues about pollution and environmental damage all the way to a fair trial and even to a success on liability in the Nyasulu case referred to above. The judge studied each of those cases (of which the Nyasulu case is the most relevant) in some detail and was presented with significant evidence about the underlying reasons why, save for 12 claimants out of 2,000 in that case, the claimants were almost routinely unsuccessful. There was one case against KCM which settled, but there was an issue, which the judge could not decide, as to whether many of the claimants received their share of the settlement sum.

99.
It is a sufficient example of the lack of foundation for this factual challenge on appeal to look at the appellants' best two examples. In the Nyasulu case, 2,000 claimants joined in group litigation about a discharge from the Mine in 2006 into the Mushishima stream and thereby into the Kafue river. Medical reports evidencing personal injuries were put in evidence only in relation to 12 claimants. The trial judge found in favour of the claimants on liability, and was content to award general

damages to all 2,000 claimants on the base of medical evidence about only 12 of them. In the Supreme Court ([2015] ZMSC 33) the judge was upheld on liability but the claim by the remaining 1,989 claimants was dismissed for want of medical evidence to prove that they had suffered any loss. At first sight this might appear to have been a disaster attributable to a difference of view between the first instance and appellate judges, but Coulson J was provided with evidence about how the case had been prepared, both from one of the claimants and from the lawyer who conducted the claimants' defence of KCM's appeal in the Supreme Court. The judge was entitled to conclude from that evidence that the reason why so few of the claimants had medical evidence deployed on their behalf was that this would have required funding from the claimants which they could not afford, for disbursements which the lawyers instructed would not have been able to pay for out of their own resources.

100.
In Shamilimo v Nitrogen Chemicals of Zambia Ltd (2007/HP/0725), a case about radiation emissions, there was evidence which entitled Coulson J to find, as he did, that this claim failed on causation because the claimants could not fund the necessary expert evidence to prove it. In conclusion therefore, there was in relation to both those cases evidence from which the judge was entitled to conclude that they supported rather than detracted from his overall finding that funding and local legal resources were insufficient to enable the claimants to obtain substantial justice in Zambia. It is irrelevant whether an appellate court might, upon a review of the same evidence, reach a different conclusion, even with the assistance from the Attorney General of Zambia, for which the court is grateful.

101.
The result is that the appellants fail on this issue of substantial justice.

Conclusion

102.
Having rejected the appellants' case on abuse of EU law and real triable issue, but having upheld their case on proper place, I would, but for their failure on the issue as to substantial justice, have been minded to allow their appeal. As it is however I consider that this appeal should be dismissed, on the substantial justice issue.