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**April 2019**

This Newsletter brings you the Supreme Court’s latest agonised musings on jurisdiction: a hot-off-the-press judgment reached after much “anxious consideration” (as its author, Lord Briggs put it). Imagine a group of overseas Claimants in a jurisdiction lacking the funding, expertise and other advantages that might be obtained by suing in England. These Claimants have a bit of luck: there is a claim against ACo, an English corporation with ultimate control of the premises that are the subject of the claim. The group’s claim against ACo is rather thin on the merits, but this claim is an invaluable anchor to the claim that the group really wants to pursue against BCo, the owner and principal operator of the subject premises. BCo is registered/domiciled outside England and outside the European Union. However, the group’s position is: (i) they have an Article 4(1) recast Brussels I right to sue ACo in England and – post ***Owusu v Jackson*** – this right cannot be displaced by *forum conveniens* considerations (even if the claim is otherwise much more closely connected to the foreign jurisdiction where BCo is registered); (ii) moreover, BCo is a necessary and proper party to the claim and, even if *forum conveniens* considerations might be relevant to jurisdiction for to this claim, the risk of irreconcilable judgments means that BCo must also take its place in the English Court alongside ACo. What’s the solution to this conundrum? Read on …

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**CASE NOTE:**

***Vedanta Resources Plc & Another v Lungowe & Others* [2019] UKSC 20**

This case concerned a jurisdictional challenge brought by two corporate entities, one English and one Zambian registered/domiciled, which made its way through the High Court ([2016] EWHC 975 (TCC)) and Court of Appeal ([2018] 1 WLR 3575) before a hearing in the Supreme Court on 15 and 16 January 2019. The Supreme Court judgment (of Lord Briggs, with whom all other Justices of the Court agreed without adding their own thoughts) was published (under the citation above) on 10 April 2019.

The underlying litigation concerned the Nchanga Copper Mine in Zambia. It was alleged that, in the period from 2005, the Mine had emitted toxic substances into watercourses used by local rural communities for drinking water and as water for livestock and the irrigation of crops. The Claimants were a group of 1,826 Zambian citizens allegedly affected by the activities of the Mine. Their actions, pleaded in common law negligence and breach of statutory duty, were for personal injury, property damage and loss of income, amenity and enjoyment of land. The Defendants were: the immediate owner of the Mine, the Second Defendant (“*D2*”), a public company incorporated and, therefore, domiciled in Zambia; and, the First Defendant (“*D1*”), a parent company, incorporated/domiciled in England (with multinational interests), with ultimate control of D2 (although the Zambian Government had a significant minority stake in D2).

The Claimants served proceedings on D1 in England and then obtained permission to serve D2 out of the jurisdiction. The response to service was a Part 11 jurisdictional challenge by D1 and D2 (on a number of grounds and seeking remedy by means of declaratory relief, among other things). The jurisdictional challenge was dismissed by Coulson J at first instance and then by the Court of Appeal.

Permission to appeal was granted by the Supreme Court.

At first sight, this claim appeared to have only the most tenuous, if any, real connection with England. D1’s principal gripe – pursued under a variety of headings – was that its involvement was a procedural device (more bluntly, an abuse of process) designed to bring a Zambian dispute (in reality, pursued against D2) before an unsuitable and inappropriate Court (in England). The basis on which the jurisdiction of the English Court was asserted by the Claimants is helpfully summarised in the judgment of Lord Briggs (at para 4), “*As against …* [D1], *the Claimants rely upon article 4 of the Recast Brussels Regulation (Regulation (EU) 1215/2012 … . As against …* [D2] *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.*” In essence, the Claimants sought to stitch an EU law ground of jurisdiction pursued against an English “*anchor*” Defendant (D1) (and not amenable to any *forum conveniens* argument: see, ***Owusu v Jackson*** Case C-281 [2005] QB 801) to the non-EU ground of jurisdiction provided by CPR Part 6. The obvious purpose of this was to bring D2 before the English Court.

On appeal, the Defendants argued as follows:

1. There was no Triable issue against D1 (D1 was simply an indirect owner of the Mine and did not control or operate the same to the extent necessary to give rise to any common law duty of care or to any action for breach of Zambian statutory duties);
2. In the circumstances, D1 was sued only as a device to bring D2 before the English Court and, notwithstanding Article 4 of the recast Brussels I Regulation and ***Owusu v Jackson***, this was an abuse of EU law;
3. In any event, England was not the proper place in which to litigate the claims and there was no “*cogent evidence that there was a real risk that substantial justice will not be obtained in …* [the] *foreign jurisdiction*.” (*per* Lord Briggs at para 88).

Lord Briggs’ judgment dealt first with the Defendants’ arguments as to abuse of EU law. It was argued that Article 4 of recast Brussels I was designed to protect Defendants domiciled within an EU Member State (providing them with the right – subject to narrowly drawn exceptions – to be sued within their own Courts of domicile). It followed that the deployment of Article 4 to drag D1 before the English Court only as an anchor to establish jurisdiction against D2 (the real target of the Claimants’ action) was an abuse of EU law. The Supreme Court, following the judgment of Coulson J at first instance, dismissed this element of the Defendants’ appeal (at paras 28 – 29 of Lord Briggs’ judgment), “*a) the Claimants have pleaded a real triable issue against …* [D1]; *b) the Claimants genuinely desire to obtain judgment for damages against …* [D1]; *c) one of the principal reasons (although not the sole reason) why the Claimants sued …* [D1] *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 …* [D2] *in England as well. On that factual basis* [as found by Coulson J at first instance], *I am satisfied to the extent that the point is act 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, … 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 … 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.*” Referring to CJEU case law (among these, ***Freeport plc v Arnoldsson*** Case C-98/06 [2008] QB 634), Lord Briggs was not prepared to adopt a sufficiently wide approach to the concept of abuse (in this context) to avail the Defendants. Instead, he directed the Court that CJEU jurisprudence as to Article 8 of Recast Brussels I made it clear that it was only where a claim was pursued against an anchor Defendant with the sole purpose of dragging a Defendant domiciled elsewhere before the (English) Court (and thus depriving it of the right to be sued in its home Courts) that an abuse would have taken place. Lord Briggs went further (at para 36), “*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*.” Applying ***Owusu v Jackson***, the Supreme Court also dismissed this element of the Defendants’ appeal. Lord Briggs identified what I will term a “*double lock*” faced by anchor Defendants (at para 40): “*Two consequences flow from that analysis. The first is that … 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*.” Lord Briggs floated the idea that an adjustment of the domestic jurisprudence on *forum conveniens* such as to “*temper the rigour of the need to avoid irreconcilable judgments*” might be the solution to this conundrum.

The central passages of Lord Briggs’ judgment considered whether there was a real issue to be tried against D1 and whether the Claimants had an arguable case in breach of statutory duty against D1. In this context the Court considered jurisprudence on the extent to which a parent company might (by an assumption of responsibility) bear a duty of care with respect to the operations of a subsidiary. The Court rejected the Defendants’ contention that, “… *a conclusion that …* [D1] *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 existing categories …* [a task which, it was argued] *neither the Judge nor the Court of Appeal carried out.*” The Supreme Court did not agree.

Having disposed of these matters, the Court turned to *forum conveniens* considerations with respect to the non-anchor, non-EU Defendant: D2. Lord Briggs confessed to finding this, “*the most difficult issue in this appeal*” (para 66). The conundrum might be summarised as follows. First, the fetter placed by ***Owusu v Jackson*** on the Court’s *forum conveniens* discretion meant that the claim proceeded in England against D1, the anchor Defendant, by reason of Article 4 of recast Brussels I. This then meant that if the English Court then deployed *forum conveniens* considerations in order to refuse jurisdiction over D2 (the non-EU Defendant) then a risk of irreconcilable judgments (with parallel proceedings in two jurisdictions) might arise. As Lord Briggs observed (para 70 citing ***OJSC VTB Bank*** [2013] EWHC 3538 (Comm)), “*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.*” Lord Briggs noted that, by the time of the first instance hearing before Coulson J, D1 had offered to submit to the jurisdiction of the Zambian Court so that the entire case could be tried in that jurisdiction (a stance which bore some resemblance to the approach taken by the Defendant in ***KXL v Nicholas Murphy*** [2016] EWHC 2702 (QB) where ***Owusu v Jackson*** also operated to prevent the Defendant from raising a *forum conveniens* jurisdictional challenge). As Lord Briggs observed (para 75), “*This did not … prevent the Claimants from continuing against …* [D1] *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* …[D1] *and in Zambia against …* [D2] *would give rise to a risk of irreconcilable judgments is because the Claimants have chosen to exercise that right to continue against …* [D1] *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?*” Lord Briggs concluded – after “*anxious consideration*” – that over-emphasis on the risk of irreconcilable judgments might result in a paralysed jurisdiction in which *forum conveniens* had no effective application against either the anchor or foreign Defendant. He said this (para 80), “*There is nothing in article 4 which can be interpreted as 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*.”

Lord Briggs decided that the risk of irreconcilable judgments should continue to be a relevant factor when the English Court considered the grant of permission to serve outside the jurisdiction, but it should cease to be a “*trump card*” (para 84) and, insofar as Coulson J, had treated it as such that justified the Supreme Court considering afresh the connecting factors (to England and Zambia) relevant to *forum conveniens*. Comparing the connections to England and Zambia (and, perhaps unsurprisingly) it was concluded that the Claimants had failed to demonstrate that England was the proper place for Trial of their claims.

The Defendants’ appeal nonetheless failed. This was because the Court was “*satisfied, by cogent evidence, that there …* [was] *a real risk that substantial justice …* [would] *not be obtainable in …* [Zambia].” By the narrowest of margins, therefore (given the Court’s conclusions on *forum conveniens*), the appeal was dismissed.

It will be apparent from the complexity of the issues discussed in this case note that the ***Vedanta*** jurisdictional challenge gave rise to enormous time and expense in the excavation of both factual and legal issues (and that this happened on appeal). The Supreme Court was highly critical of this and indicated that a disproportionate approach to issues of jurisdiction (with consideration of factual issues before the Supreme Court) might result in “*condign costs consequences*” for litigants and for their lawyers. The Supreme Court’s reluctance in this case to entertain – on final appeal – factual complexity in the context of a jurisdictional contest might provoke a hollow laugh from anyone who has read the Court’s judgment in ***Four Seasons Holdings Inc v Brownlie*** [2018] 1 WLR 192 (SC), but it is not for me to accuse their Lordships of inconsistency.

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