

# Seeking Redress against Multinationals for Acts Committed Abroad: Recent Developments in Kiobel and Vedanta



Over the last couple of years, the possibility to seek redress against multinationals for acts committed abroad has been the subject of high-profile cases in national courts. Today, I wanted to raise your attention to two major recent developments in this field.

## **Dutch court agrees to hear Kiobel's case**

On 1 May 2019, [The Hague's district court ruled](#) that it had jurisdiction to determine whether *Royal Dutch Shell* (**Shell**) was complicit in human rights violations committed in the 1990's by the Nigerian government against local environmental protesters who fought against widespread pollution in the Niger Delta (see background information on the case [here](#) and [here](#)).

One of the plaintiffs in this case is Esther Kiobel, whose husband was executed during those events. Esther Kiobel has

long sought to obtain reparations against Shell for her husband's death. She even gave her name to a well-known case before the U.S. Supreme Court, in which the U.S. Supreme Court found that U.S. courts did not have jurisdiction to hear Mrs Kiobel's claim.

In [its judgment of 1 May 2019](#), The Hague's district court found that it had jurisdiction to hear that claim. The relevant paragraph is para. 4.29:

*“Er is geen regel van geschreven of ongeschreven Nederlands internationaal privaatrecht, die noopt tot de conclusie dat deze Nigeriaanse regel van relatieve bevoegdheid eraan in de weg staat dat de Nederlandse rechter die – zoals hiervoor is vastgesteld – rechtsmacht heeft ten aanzien van alle gedaagden, kennisneemt van vorderingen gegrond op een rechtstreeks beroep op de door eiseressen ingeroepen grondrechten. Eiseressen kunnen hun direct op de onder 4.5 genoemde grondrechten gebaseerde vorderingen, waarin zij redress vorderen in de vorm van publieke verontschuldiging en een verklaring voor recht, dus ook instellen in deze procedure voor de Nederlandse rechter.”*

In addition, The Hague's district court also ordered Shell to produce additional documents for the case to be heard on the substance.

### **U.K. Supreme Court in *Vedanta v. Lungowe***

In addition to the developments in the *Kiobel* case, [the \*Financial Times\* published yesterday a very interesting article](#) on how the recent judgment of the U.K. Supreme in [Vedanta Resources PLC and Others v. Lungowe and Others](#) serves as a warning shot that “[m]ultinationals can no longer assume that distance – or a legal distinction between parent and subsidiary – will protect them from being held accountable when damage is done very far from home”. According the

*Financial Times*, the decision in *Vedanta* was “particularly welcomed by campaigners” after the 2018 decision of the U.S. Supreme Court in *Jesner v. Arab Bank* (see our coverage [here](#)) “all but eliminated the use of the American courts for trying to hold [multinational companies] accountable for human rights violations in far-flung places”.

[We had previously covered the decision of the Court of Appeal in \*Vedanta\*](#). In a nutshell, that case concerned a claim taken by 1826 Zambian citizens against the U.K.–based *Vedanta Resources plc (Vedanta)* and its Zambian subsidiary *Konkola Copper Mines plc (KCM)*. The claimants sought damages for harm caused to their property and persons due to discharges from a copper mine operated by KCM in Zambia.

The claimants argued that the courts in the U.K. had jurisdiction as KCM was owned by Vedanta, which is a U.K.-based company. In 2015, the High Court agreed with the claimants and held that the Zambian citizens could bring their case in England, even though the alleged tort and harm had occurred in Zambia. The Court of Appeal upheld that judgment on 13 October 2017. This judgment of the Court of Appeal was the subject of the challenge before the U.K. Supreme Court.

In their challenge before the Supreme Court, the defendants argued that:

- The claimants had wrongly relied on Article 4 of EU Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels Recast Regulation***) in order to assert jurisdiction against Vedanta. In particular, the defendants argued that such reliance by the claimants constituted an abuse of EU law;
- Pursuant to Paragraph 3.1 of Practice Direction 6B in the U.K. Civil Procedure Rules, in order to successfully bring a claim against KCM before U.K. courts, the

claimants had to have “*a real issue which it is reasonable to the court to try*”. However, in the case at hand, the claimants did not have real prospect of success since Vedanta did not owe them any duty of care;

- Zambia, and not England, was the proper forum to bring a claim; and

- If the case was litigated in Zambia, there was no risk that the claimants would not be able to obtain justice there.

In its judgment of 10 April 2019, the Supreme Court dismissed all these claims.

Interestingly, as for the question regarding whether England was the proper forum where to bring the claim against KCM, the Supreme Court recognised that:

- Almost all the connecting factors (such as the places where the wrongful acts or omissions occurred; the place where the mine was operated; the place where the primary applicable law was sourced; the place where the witnesses and evidences were based, etc...) related to Zambia;

- Technologies made it possible for sittings to be arranged in and evidences to be sent to Zambia; and

- A judgment of a Zambian court would be recognisable and enforceable in England.

However, the U.K. Supreme Court nonetheless permitted service of English proceedings on the foreign defendant (KCM), on the ground that there was a real risk that substantial justice will not be obtainable in Zambia because of (i) the practical impossibility of funding big group claims where the claimants were all in extreme poverty and (ii) the absence within Zambia of sufficiently substantial and suitably experienced legal teams to enable litigation of this size and complexity to be

prosecuted effectively.

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