Case No: A1/2016/2502 & 2504

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

BETWEEN:

(1) VEDANTA RESOURCES PLC

(2) KONKOLA COPPER MINES PLC

Appellants

-and-

DOMINIC LISWANISO LUNGOWE AND OTHERS

Respondents

-and-

(1) THE INTERNATIONAL COMMISSION OF JURISTS

(2) THE CORPORATE RESPONSIBILITY (CORE) COALITION LTD

Proposed Interveners

DRAFT STATEMENT IN INTERVENTION

References in this Statement in intervention are in the following form:

Judgment of the Court of Appeal: **[Judgment ¶x]** where x refers to the paragraph in question

Appellants' Grounds of Appeal: **[A Grounds ¶x]**

INTRODUCTION AND SUMMARY

1. The International Commission of Jurists and The Corporate Responsibility (CORE) Coalition Ltd (together **"the Interveners**")[1] intervene in this appeal in order to assist the Court in relation to a discrete set of materials not addressed by the parties before the Court of Appeal.

2. These submissions address the issue of whether the First Appellant ("**Vedanta**") at least arguably owed the Claimants a duty of care, and are relevant to Grounds 1(a) and 4 of the Appellants' Grounds of Appeal. Specifically, the Interveners submit that the Court of Appeal's conclusion that Vedanta arguably owed the Claimants a duty of care **[Judgment ¶¶67-92]** is supported by (i) international standards regarding the responsibilities of business enterprises in relation to human rights and environmental protection; (ii) material published by the United Kingdom Government with the aim of implementing those international standards; and (iii) comparative law jurisprudence. The Court of Appeal's judgment does not refer to these materials, but the Interveners submit that they provide further support for its conclusion on the duty of care issue.

3. The Appellants argue their appeal on the basis that *"the Caparo principles"* or *"the Caparo requirements"* are not satisfied in this case.[2] The Interveners are, however, mindful that the Supreme Court has emphasised that one should not reach too hastily for the factors famously referred to in *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 617H-618A, and that "*the characteristic approach of the common law… is to develop incrementally and by analogy with established authority*": *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] 2 WLR 595 (per Lord Reed at ¶¶21-27, with the quotation at ¶27); *NRAM Ltd v Steel* [2018] UKSC 13, [2018] 1 WLR 1190 (per

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1 The Interveners are two of the world's leading non-governmental organisations in the field of international legal standards and comparative law.

The International Commission of Jurists is a globally esteemed NGO, working to advance understanding of and respect for the rule of law and the protection of human rights throughout the world. It is composed of over 60 eminent jurists, representing different justice systems. It plays a leading role in the development and implementation of international human rights standards. It has consultative status at two of the United Nations Councils as well as the Council of Europe and the African Union.

The Corporate Responsibility (Core) Coalition Ltd is a UK-based civil society coalition composed of a wide range of partner organisations including Amnesty International, Oxfam, Christian Aid and UNICEF UK. It works, with its partner organisations, to promote a clearer and stronger regulatory framework governing the global operations of UK companies.

2 **[A Grounds ¶¶12, 14, 16]**.

Lord Wilson at ¶22); *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50, [2018] 3 WLR 1153 (per Lord Lloyd Jones at ¶15).

4. The Interveners consider that there is no need to reach for *Caparo* in this case. The duty contended for by the Claimants is not novel, or is at least closely analogous to established situations in which a duty of care applies:

   (a) The essence of the Claimants' case on the duty of care issue is understood to be that Vedanta owed them a duty to exercise reasonable care in monitoring and controlling the Second Appellant (**"Konkola"**), in order to prevent Konkola's activities from causing harm to them by virtue of the unusual level of control, direction and knowledge exercised by Vedanta in relation to the allegedly harmful operations.

   (b) In *Smith v Littlewoods Organisation Ltd* [1987] 1 AC 241 (HL), Lord Goff noted (at 271-272) that there are significant exceptions to the position that there is no general duty of care to prevent a third party from causing harm to others. Those exceptions include (i) where there is *"an imposition or assumption of responsibility upon or by the defender"*; and (ii) where there is *"a special relationship between the defender and the third party, by virtue of which the defender is responsible for controlling the third party"*. That a duty of care will arise in such circumstances is illustrated by (for example) cases in which it has been held that parents and others responsible for supervising children owe a duty to exercise reasonable care to prevent them from causing harm to third parties: see, e.g. *Smith v Leurs* [1945] 70 CLR 256 (High Court of Australia);[3] *Carmarthenshire County Council v Lewis* [1955] AC 549 (HL); *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL).

   (c) The duty for which the Claimants contend falls within the established categories referred to by Lord Goff. Just as a human parent's control over, and responsibility for, his or her child may give rise to a duty to take reasonable care to prevent the child from harming others, so may a corporate parent owe a like duty based on its control over, and responsibility for, a subsidiary. See *Chandler v Cape plc* [2012] 1 WLR 3111, in which Arden LJ (as she then was) reached such a conclusion, on the basis of the established principles in *Smith v Littlewoods* and *Dorset Yacht* (¶¶62-70, 80).

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[3] Cited with approval by Lord Goff in *Smith v Littlewoods* at 272F.

(d) Vedanta has (as set out more fully below) stated that its "*sustainable development agenda*" has been developed in line with the international standards to which the Interveners draw the Court's attention. Those standards are therefore relevant to the factual question of whether Vedanta controlled and/or had assumed responsibility for the activities of Konkola.

5. In the alternative, if this is a "*novel type of case, where established principles do not provide an answer"*, the Court will need to consider whether the duty of care contended for is (at least arguably) *"fair, just and reasonable"*.[4] In making such an assessment, the Court may (and indeed should) have regard to: (i) domestic and international standards relevant to the responsibilities of parent companies in relation to the activities of their subsidiaries; and (ii) comparative law jurisprudence on the issue.

6. This Statement in Intervention adopts the following structure:

(a) **Section 1** identifies relevant domestic materials, including the United Kingdom Government publication *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* ("**Good Business**"). As the title of that document indicates, it draws on, and seeks to give effect to, international standards. The Appellants recognise that domestic Government guidance is relevant to the assessment of whether Vedanta owed a duty of care to the Claimants **[A Grounds ¶12]**. If Good Business is to be properly understood, it must be considered in light of the international standards that it seeks to implement.

(b) **Section 2** identifies the relevant international materials, including the *UN Guiding Principles on Business and Human Rights* ("**UNGPs**"), the *Ten Principles* of the UN Global Compact, and the *OECD Guidelines for Multinational Enterprises* ("**OECD Guidelines**"). These international materials are relevant to the duty of care issue, whether or not the duty for which the Claimants contend is considered to be a novel one.

(c) **Section 3** identifies an emerging body of comparative law jurisprudence consistent with the proposition that a parent company may owe a duty to exercise reasonable care in monitoring and controlling its subsidiaries, in order to prevent them from causing harm to others.

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4 *Robinson*, per Lord Reed at ¶27.

7. In short, the Interveners submit that, whether or not this is a novel duty situation, Good Business, international standards and comparative law jurisprudence provide additional support to the Court of Appeal's conclusion that Vedanta (at least arguably) owed a duty of care to the Claimants.

SECTION 1: DOMESTIC STANDARDS CONCERNING BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT

8. It is common ground between the Interveners and the Appellants that the considerations relevant to whether Vedanta owed the Claimants a duty of care include United Kingdom Government publications. The Appellants submit that:[5]

> "… the duty of care claims must be considered in the relevant context, with proper regard to the fundamental legal principle of corporate separateness (*Salomon v Salomon* and *Adams v Cape*), the obligations on companies set out in the Companies Acts, modern listing requirements, group reporting norms and **government guidance on best practice**." (emphasis added)

9. The Interveners make four observations in this regard.

10. First, the United Kingdom Government's policy in relation to business and human rights expressly draws upon relevant international standards:

    (a) As noted above, the key domestic document on the standards that the Government expects of UK-domiciled companies is *Good Business*.[6] That this document seeks to give effect to the UNGPs is plain from its full title: *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* (updated May 2016). The UNGPs are not, however, the only set of international standards on which *Good Business* draws; it also refers to various other international instruments that the UK has endorsed, including the OECD Guidelines (see paragraph 15).

    (b) In consequence, the United Kingdom Government publications that should (as the Appellants recognise) inform the Court's assessment of whether Vedanta (at least arguably) owed a duty of care must be considered in the light of the relevant

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5 **[A Grounds ¶12].**

6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf

international standards in this field. The implications of such international standards for this case are addressed further in section 2 below.

11. Second, *Good Business* stresses the importance of victims being able to secure access to justice in respect of wrongdoing by UK-based business enterprises both domestically and overseas, and indicates that such persons should have access to remedies through the judicial mechanisms of the UK itself:[7]

> "The UK has a range of judicial mechanisms that help to support access to remedy for human rights abuses by business enterprises both at home and overseas. This includes:
>
> …. Avenues to pursue **civil law claims** in relation to human rights abuses by business enterprises." (underlining added; bold type as per the original)

12. Third, *Good Business* recognises that human rights and environmental issues are intertwined. A number of the examples of good practice set out in *Good Business* refer to the importance of environmental protection and environmental impacts, when considering compliance with the UNGPs.[8] The attention paid to environmental issues in *Good Business* also reflects the OECD Guidelines, which contain a whole chapter on environmental protection (see further below).

13. Fourth, the Companies Acts, to which the Appellants refer in the passage quoted at paragraph 8 above, impose specific obligations in relation to human rights and the environment:

    (a) Section 414A of the Companies Act 2006 provides that "*The directors of a company must prepare a strategic report for each financial year of the company*". Section 414A(3) provides that, where there is a parent company and subsidiaries with consolidated financial accounts, the directors of the parent company must prepare a strategic report in respect of the corporate group. Section 414C(7) requires that the strategic report of a quoted company must include information about *"environmental matters (including the impact of the company's business on the environment)"* and *"social, community and human rights issues"*.[9] Sections

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7 Ibid, p. 20.

8 See the examples on p. 19 (concerning the Myanmar Centre for Responsible Business in Burma, and its role in shaping the debate concerning environmental impacts) and p. 23 (concerning the World Wildlife Fund's complaint about environmental damage associated with oil exploration in Virunga National Park in the Democratic Republic of Congo).

9 Sections 414A-414C were inserted into the Act in 2013. The Government has stated that part of the purpose of including these provisions was "*to ensure that directors of quoted companies consider human rights issues when making their annual strategic reports*": *Good Business*, p.7. The Financial Reporting Council has published Guidance on the Strategic Report (July 2018):

414CA and 414CB also impose obligations on certain kinds of company (e.g. companies whose shares are traded on regulated markets) to include similar information in a strategic report.

(b) Vedanta's Annual Report for 2017-18 – which provides consolidated financial statements for Vedanta's group companies – includes a substantial section on sustainability and environmental matters.[10] This is consistent with Vedanta's obligation to report on the environmental impacts that it (i.e. Vedanta Resources plc) has. The Annual Report does not, however, confine its consideration to impacts within the UK, and describes steps that Vedanta has taken to protect the environment in other countries where it operates through non-UK subsidiaries. Indeed, the Annual Report refers on several occasions to Konkola, and includes a "Case Study" about how the quality of the water discharged from Konkola's mines had been improved following Vedanta's acquisition of the company.[11]

(c) Irrespective of whether such obligations and statements would lead to the imposition of a duty of care in every case, it is the Interveners' contention that they must at least be relevant to a Court's assessment of whether a parent company (here Vedanta) arguably has control over a subsidiary (here Konkola), and has assumed responsibility for the environmental impacts of its operations.

SECTION 2: INTERNATIONAL STANDARDS CONCERNING BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT

International standards

14. The key international standards regarding the responsibilities of multinational businesses in the fields of human rights and environmental protection include the UNGPs, the OECD Guidelines and the UN Global Compact.

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https://www.frc.org.uk/getattachment/fb05dd7b-c76c-424e-9daf-4293c9fa2d6a/Guidance-on-the-Strategic-Report-31-7-18.pdf and see especially pages 31-34.

10 See https://www.vedantaresources.com/VedantaDocuments/vedanta_resources_2018ar_online_version.pdf. Vedanta delisted from the London Stock Exchange in October 2018.

11 See pp. 51 and 88-91.

15. The UNGPs were endorsed by a consensus of the United Nations Human Rights Council that included the United Kingdom,[12] and are considered by many States and businesses to be a globally authoritative standard on businesses' human rights responsibilities.[13] The key provisions of the UNGPs include the following:

(a) Guiding Principle 11 provides:

> "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."

(b) The official Commentary to the UNGPs (which is contained within the UNGPs themselves) notes:

> "The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights."[14]

16. The UN Global Compact is a UN initiative to encourage businesses worldwide to adopt sustainable and socially responsible policies, and to report on their implementation. Vedanta has signed up to the Compact, as have in excess of 13,000 businesses from over 160 countries. The Compact has *Ten Principles*, which include:[15]

> "Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
> Principle 2: make sure that they are not complicit in human rights abuses.
> …
> Principle 7: Businesses should support a precautionary approach to environmental challenges;
> Principle 8: undertake initiatives to promote greater environmental responsibility; and
> Principle 9: encourage the development and diffusion of environmentally friendly technologies."

17. The OECD Guidelines are a set of recommendations addressed by the governments of all OECD member states (including the UK) and various other countries to "*multinational*

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12 UN HRC Resolution 17/4 (2011).

13 See Zeid Ra'ad Al Hussein, then UN High Commissioner for Human Rights, November 2015: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16760&LangID=E.

14 UNGPs, Commentary to Guiding Principle 11 https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

15 The *Ten Principles* are set out at https://www.unglobalcompact.org/what-is-gc/mission/principles. The participants in the UN Global Compact are listed at https://www.unglobalcompact.org/what-is-gc/participants

enterprises" operating in or from those countries.[16] The OECD Guidelines include specific chapters on both human rights and environmental protection.

18. The International Council on Mining and Metals ("**ICMM**") has also published sector-specific guidance for extractive industries. This guidance reflects a recognition within the mining community of the responsibilities of businesses in that sector in relation to human rights and the environment. Relevant provisions of the ICMM guidance include the following:

(a) The ICMM's Sustainable Development Framework provides that members will:[17]

> "Implement a management system focused on continual improvement of the health and safety of employees, contractors and people in the communities where we operate.
> …
> Pursue continual improvement in environmental performance issues, such as water stewardship, energy use and climate change."

(b) The ICMM's Statement on Human Rights stresses that "*respect for human rights is a key aspect of sustainable development, and a baseline expectation for all businesses…*"[18]

(c) The ICMM's Position Statement on Water Stewardship states:[19]

> "Water is a precious shared resource with high social, cultural, environmental and economic value. Access to water has been recognised as a right; integral to wellbeing and livelihoods and the spiritual and cultural practices of many communities. It is also essential to the healthy functioning of ecosystems and the services they provide."

19. The ICMM represents a large proportion of the mining sector. Its members include 27 of the leading companies in the sector and 30 industry associations, including the International Copper Association (which has 37 companies as members). Neither of the Appellants is a member, but: (i) as set out below, Vedanta publicly states that its *"sustainable development agenda"* has been *"developed in line"* with the standards set by the ICMM; and (ii) the guidelines produced by this sector-specific body in any event

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16 OECD Guidelines, Foreword http://www.oecd.org/daf/inv/mne/48004323.pdf

17 ICCM Sustainable Development Framework Principles 5 and 6, https://www.icmm.com/en-gb/about-us/member-commitments/icmm-10-principles/the-principles

18 ICMM Statement on Human Rights, https://www.icmm.com/en-gb/society-and-the-economy/mining-and-communities/human-rights

19 https://www.icmm.com/water-ps

offer a benchmark against which the conduct of an international mining enterprise may reasonably be assessed.

Observations on the significance of such standards

20. The Interveners make four points regarding the significance of such international standards.

21. First, Vedanta itself has recognised the relevance to it of such standards:

(a) The Vedanta Resources Plc website describes Vedanta's commitment to Sustainable Development and Community, and states:[20]

> "As a diversified natural resources company, Vedanta is committed to delivering sustainable and responsible growth, which creates value for both our shareholders and our stakeholders.
>
> Our sustainable development agenda is built on four pillars – Responsible Stewardship; Building Strong Relationships; Adding and Sharing Value; and Strategic Communications – developed in line with our core values, internal and external sustainability imperatives (such as materiality), **UNGC's 10 principles, United Nations' SDGs and standards set by International Finance Corporation (IFC), ICMM and OECD.**" (emphasis added)

(b) Vedanta presumably does not contend that it gives effect to its *"sustainable development agenda"* directly through the work of the small staff that it employs to attend to *"regulatory and listing obligations"*.[21] Rather, when Vedanta says that it pursues a *"sustainable development agenda"*, this reflects that it does so through its subsidiaries: Vedanta is able to do so because it has control over its subsidiaries, and is responsible for monitoring and directing them.

22. Second, the international standards identified above do not confine the responsibilities of a parent company to the actions of its own direct employees:

(a) The UNGPs apply to *"all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure"*.[22] Guiding Principle 14 emphasises that *"The responsibility of business enterprises to respect*

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20 https://www.vedantaresources.com/Pages/Overview.aspx (viewed on 19 October 2018).

21 **[A Grounds ¶16]** states that Vedanta has 19 employees.

22 UNGPs, page 1.

human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure".

(b) The reference to *"structure"* indicates that the drafters of the UNGPs selected the term "*business enterprises*" in order to encompass all forms in which a business may be organised, including corporations, unincorporated associations, partnerships and groups. That the UNGPs treat a parent company as part of a wider *"enterprise"*, rather than a discrete enterprise in itself, is plain from the Commentary to Guiding Principle 2, which provides that a State may place "*requirements on 'parent' companies to report on the global operations of the entire enterprise*".

(c) Guiding Principle 13 of the UNGPs provides:

> "The responsibility to respect human rights requires that business enterprises:
> (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."

(d) The responsibilities of a *"business enterprise"* are thus not limited to a responsibility to avoid causing or contributing to adverse human rights impacts through the enterprise's own activities: business enterprises are also responsible for taking steps to prevent or mitigate adverse impacts to which the enterprise's own operations do not contribute. *A fortiori*, the responsibilities of an entity at the pinnacle of a business enterprise must include ensuring that the activities of subordinate entities within the same enterprise do not have negative human rights impacts.

(e) Likewise, the OECD Guidelines are intended for "*multinational enterprises*", and are *"addressed to all the entities within the multinational enterprise (parent companies and/or local entities)"*.[23] The Commentary on the *"General Policies"* section of the OECD Guidelines states:

> "8. The Principles call on the board of the parent entity to ensure the strategic guidance of the enterprise, the effective monitoring of management and to be accountable to the enterprise and to the shareholders, while taking into account the interests of stakeholders…
> 9. The Principles extend to enterprise groups, although boards of subsidiary enterprises might have obligations under the law of their jurisdiction of incorporation.

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[23] See OECD Guidelines, Concepts and Principles, ¶4.

> Compliance and control systems should extend where possible to these subsidiaries. Furthermore, the board's monitoring of governance includes continuous review of internal structures to ensure clear lines of management accountability throughout the group."

(f) Similarly, the principles on which the UN Global Compact operates assume the responsibility of a parent company for its subsidiaries. The Compact's website explains:[24]

> "The UN Global Compact applies the leadership principle. If the CEO of a company's global parent (holding, group, etc.) embraces the Ten Principles of the UN Global Compact by sending a letter to the UN Secretary-General, the UN Global Compact will post only the name of the parent company on the global list assuming that all subsidiaries participate as well."

23. Third, the international standards indicate that a reasonable and responsible enterprise will take proper steps to: (i) conduct due diligence as to the risks of adverse impacts on human rights and the environment; (ii) prevent or mitigate the risks of such adverse impacts; and (iii) remediate such adverse impacts as may occur. Relevant provisions under each of those three heads are identified below.

(a) Human rights and environmental due diligence.

(1) The UNGPs state:

> "In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[25]

(2) The OECD Guidelines make much the same point: "*due diligence can help enterprises observe their legal obligations on matters pertaining to the OECD Guidelines.*"[26] In the specific context of environmental impacts, the Guidelines stress the importance of *ex ante* assessment.[27]

(3) The Office of the High Commissioner for Human Rights ("**OHCHR**") has defined human rights due diligence as: *"…an ongoing management process*

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24 https://www.unglobalcompact.org/about/faq

25 Guiding Principle 17.

26 p. 18. The OECD has recently published extensive advice on due diligence: *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf

27 See ¶¶63-67 of the Commentary to the Guidelines.

*that a **reasonable and prudent enterprise** needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights"* (emphasis added).[28] This reference to the standards applicable to a "*reasonable and prudent enterprise*" would be of particular significance if the Court were to conclude that the duty contended for is novel, such that there is a need to consider what is *"fair, just and reasonable"*.[29]

(b) Prevention or mitigation of risks of adverse impacts on human rights and the environment.

(1) The OECD Guidelines state that enterprises should "*… take due account of the need to protect the environment, public health and safety, and to generally conduct their activities in a manner contributing to the wider goal of sustainable development... Maintain contingency plans for preventing, mitigating and controlling serious environmental and health damage from their operations*."[30]

(2) The UNGPs use similar language to similar effect, referring to the responsibility of business enterprises to (i) "*avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur"*; and (ii) "*Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or*

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28 Office of the UN High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (OHCHR, 2012) at 4.

29 The similarity between this language and that of tortious liability has been noted by several commentators. See, for example:

(i) Doug Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence' (2016) 1 *Business and Human Rights Journal* 179 and Cees Van Dam 'Tort Law and Human Rights: Brothers in Arms – On the Role of Tort Law in the Area of Business and Human Rights' (2011) *Journal of European Tort Law* 221.

(ii) The Framework Report, which preceded the UNGPs, defines human rights due diligence as a standard of conduct by referring to the definition of due diligence in Black's Law Dictionary: "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation" : Report to the UN Human Rights Council 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (7 April 2008), UN Doc A/HRC/8/5, available at http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf para 25.

30 Chapter 6, opening paragraph and ¶5.

services by their business relationships, even if they have not contributed to those impacts."[31]

(3) Principle 7 of the UN Global Compact is that "*Businesses should support a precautionary approach to environmental challenges*."

(4) Similarly, the ICMM's Water Stewardship Framework states that members should "*Understand the social, cultural, economic and environmental value of water at the catchment scale to identify material water stewardship risks and provide context for corporate and operational water management*."[32]

(c) Remediation.

(1) The General Policies, within the OECD Guidelines, stress the importance of remediation: "*Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation*."[33]

(2) Similarly, the UNGPs devote an entire section to "*Access to Remedy*", and provide that: "*Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes*."[34]

24. Fourth, recognition of a duty of care on the part of parent companies is consistent with the UK's obligations under treaties to which it is a party:

(a) Principle 26 of the UNGPs provides that *"States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy"*. The Commentary on this Principle identifies that one of the barriers that States should address is where *"The way in which legal responsibility is attributed*

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31 Principle 13.

32 ICMM's Water Stewardship Framework , https://www.icmm.com/website/publications/pdfs/water/2014_water-stewardship-framework.pdf p.3.

33 Commentary to General Policies ¶ 14.

34 Principle 22.

among members of a corporate group under domestic…civil laws facilitates the avoidance of appropriate accountability".

(b) Under the International Covenant on Economic, Social and Cultural Rights, the UK has agreed (*inter alia*) to take steps necessary for *"the improvement of all aspects of environmental and industrial hygiene"*.[35] The UN Committee on Economic, Social and Cultural Rights has said the following in its General Comment on State obligations under the Covenant in the context of business activities (emphasis added):[36]

(1) *"The obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights"* (¶16).

(2) ***"The extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control****, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective"* (¶30).

(3) *"In discharging their duty to protect,* ***States parties should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries*** *(including all business entities in which they have invested, whether registered under the State party's laws or under the laws of another State) or business partners (including suppliers, franchisees and subcontractors),* ***respect Covenant rights. Corporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights***

35 International Covenant on Economic, Social and Cultural Rights, article 12(2)(b). The UK ratified the Covenant in 1976.

36 United Nations Committee on Economic, Social and Cultural Rights General Comment No 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.

by such subsidiaries *and business partners, wherever they may be located"* (¶33).

(4) *"Because of how corporate groups are organized, business entities routinely escape liability by hiding behind the so-called corporate veil, as the parent company seeks to avoid liability for the acts of the subsidiary even when it would have been in a position to influence its conduct…States parties have the duty to take necessary steps to address these challenges in order to prevent a denial of justice and ensure the right of effective remedy and reparation.* ***This requires States parties to remove substantive, procedural and practical barriers to remedies, including by establishing parent company or group liability regimes****…"* (¶¶42, 44).

(c) There are analogous provisions in the UN Committee on the Rights of the Child's General Comment on State obligations regarding the impact of the business sector on children's rights: see especially ¶¶38, 39, 43, 62, 67.[37]

25. Similarly, the Committee of Ministers of the Council of Europe's recommendation on *"Human rights and business"* states:[38]

(a) *"Member States should apply such measures as may be necessary to encourage or, where appropriate, require that…business enterprises domiciled within their jurisdiction apply human rights due diligence throughout their operations…"* (¶20).

(b) *"Member States should apply such legislative or other measures as may be necessary to ensure that their domestic courts have jurisdiction over civil claims concerning business-related human rights abuses against business enterprises domiciled within their jurisdiction. The doctrine of forum non conveniens should not be applied in these cases"* (¶34).

26. These points are significant to the question of whether Vedanta (at least arguably) owed the Claimants a duty of care:

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37 United Nations Committee on the Rights of the Child General Comment No 16 (2013) on State obligations regarding the impact of the business sector on children's rights. The UK ratified the UN Convention on the Rights of the Child in 1991.

38 Recommendation CM/Rec(2016)3 of the Committee of Ministers to members states, "*Human rights and business"*

(a) That Vedanta itself states that it seeks to advance many of the international standards referred to above is indicative of its control over, and responsibility for, its subsidiaries. This supports the proposition that there is no real novelty in the duty for which the Claimants contend. Rather, as the Court of Appeal rightly concluded in *Chandler*, the duty of a parent company to exercise reasonable care in monitoring and controlling its subsidiaries is a manifestation of (or at least closely analogous to) the well-established principles articulated in *Dorset Yacht* and other cases.

(b) If, however, the duty contended for is held to be novel, and a *"fair, just and reasonable"* analysis is required, relevant factors in that analysis include: (i) the standards on which Vedanta itself says that its *"sustainable development agenda"* is based; (ii) the standards of conduct which the United Kingdom Government and various international organisations have identified as appropriate for business enterprises; and (iii) the UK's international obligations to provide effective remedies for infringements of human rights and environmental damage. Those factors all point towards it being fair, just and reasonable to recognise the duty of care contended for.

(c) The materials identified above thus provide additional reasons – not referred to by the Court of Appeal – why it is at least arguable that Vedanta owed a duty of care to the Claimants. The Appellants seek to distinguish *Chandler* on the basis that *"listing requirements, guidance and reporting norms"* have changed since the 1950s.[39] Standards of environmental and human rights protection, and associated reporting obligations/expectations, have indeed changed since the 1950s: they have become much more solidly established over the last six decades. This strengthens, rather than weakens, the case for recognition of the duty of care contended for, in that: (i) the better-established a standard of conduct, the more likely it is to be fair, just and reasonable for the common law to require adherence thereto; (ii) it is fair, just and reasonable to expect that listed entities will act in accordance with the statements that they make to the public and regulatory authorities; and (iii) parent companies' statements about group environmental and human rights policies and standards assist in showing a relationship of proximity

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39 **[A Grounds ¶12]**.

between the parent company and those who are harmed by the activities of its subsidiaries.

SECTION 3: COMPARATIVE LAW JURISPRUDENCE SUPPORTS THE RECOGNITION OF A DUTY OF CARE

27. There have been a number of cases before national courts – in both common law and civil law jurisdictions – which have considered the issue of the duty of care of parent companies. None of these cases were referred to in the judgment of the Court of Appeal, but they indicate that its conclusion is consistent with the developing jurisprudence in other jurisdictions.

28. In *Recherches Internationales Québec v Cambior Inc* [1988] QJ No 2554, the Superior Court of Quebec held that it would have jurisdiction to hear claims against a Guyanese mining company's Canadian parent, in respect of environmental damage caused by the bursting of a dam at an effluent treatment plant. The parent company argued that the court had no jurisdiction, on the basis that the mine operator was a separate legal entity, and that the parent had little or no involvement in the day-to-day running of the mine (¶¶17-19). The Court rejected these arguments, holding that the parent company could in principle be liable in respect of damage caused by its subsidiary's activities (¶¶20-27). Having concluded that it had jurisdiction, however, the Court declined to exercise it, on the grounds that Guyana was the appropriate forum on the facts of the case (¶¶28-100).

29. In *Choc v Hudbay Minerals Inc* 2013 ONSC 1414, the Superior Court of Ontario dismissed an application to strike out claims against a Canadian mining company, in respect of violence said to have been perpetrated by security personnel working for one of its subsidiaries in Guatemala. The claimants alleged that the parent company had been negligent in its management of those working for the subsidiary. The Court held that the claimants had pleaded facts that could give rise to a duty of care on the part of the parent company (¶¶50-75). The Court noted that the parent company had arguably assumed responsibility for the actions of its subsidiary's security personnel, *inter alia* by making public statements about its adoption of international standards applicable to the use of private security forces at resource extraction projects (¶¶67-68). In reaching this conclusion, the Court applied the approach to novel duties of care under Canadian law, as articulated by the Supreme Court of Canada in *Kamloops (City of) v Nielson* [1984] 2 SCR 2 and *Odhavji Estate v Woodhouse* 2003 SCC 69, [2003] 3 SCR 263. Those cases draw on *Anns v Merton London Borough Council* [1978] AC 728 (HL), which is of

course no longer good law in this jurisdiction. The Canadian courts have, however, glossed *Anns* in such a way as to require consideration of foreseeability, proximity and policy considerations (see *Odhavji*, ¶52), i.e. factors which closely resemble those referred to in *Caparo* at 617H-618A (and quoted in *Robinson* at ¶24).

30. *Das v George Weston Ltd* 2017 ONSC 4129 is another case decided by the Superior Court of Ontario. The principal defendants were garment retailers, which had bought clothes made in a factory in the Rana Plaza building in Bangladesh.[40] The building collapsed in 2013, killing 1,130 people. The claimants alleged that the defendants had negligently failed to secure safe conditions for persons working in their supplier's factory. The Court dismissed the claims, holding that the defendants did not owe an arguable duty of care to persons working in a factory operated by an unrelated third party. However, in reaching this conclusion, the Court emphasised that a duty of care is more likely to arise in the context of a parent company's liability for damage caused *by a subsidiary* (¶¶433-435, 538-540).[41]

31. In *Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others*,[42] the Court of Appeal at The Hague held that a Dutch parent company could be liable for environmental damage caused by a leak from an oil pipeline operated by a Nigerian subsidiary. The Court of Appeal held that it was arguable that Nigerian law would impose a duty of care on the parent company, and drew explicitly on *Chandler* and *Caparo*, both as comparative law and as relevant to what might be Nigerian law. The Court stated that a parent company could be liable on the basis of a culpable failure to act, whether or not it was actively involved in the subsidiary's operations: "*it cannot be ruled out in advance that a parent company may, in certain circumstances, be liable for damages resulting from acts or omissions of a (sub)subsidiary*" (¶3.2).

32. This comparative law jurisprudence reinforces the Interveners' core submissions, and demonstrates that other leading jurisdictions have, taking account of the particular factual matrix of the cases before them, recognised the potential existence of a duty of

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40 There was also a claim against a company that had carried out an inspection of the factory.

41 The claimants' appeal has been heard, but judgment has yet to be handed down: https://www.lawtimesnews.com/author/shannon-kari/legal-fight-over-plaza-collapse-continues-15665/

42 200.126.843 (case c) + 200.126.848 (case d), December 18, 2015, ECLI:NL:GHDHA:2015:3586.

parent companies to exercise reasonable care in monitoring and controlling their subsidiaries in relation to human rights and environmental protection.

CONCLUSION

33. For the reasons above, the Interveners invite the Court to uphold the Court of Appeal's conclusion that Vedanta (at least arguably) owed the Claimants the duty of care for which they contend.

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