Human rights claims against English-based multinational energy companies

31 May 2017
Energy Alert

London is home to some of the world's largest multinational energy companies. In recent years, they have become the targets of claims for alleged human rights violations committed overseas. In this article, we consider the impact of three recent English High Court cases and consider steps that companies can take to reduce the risk of adverse human rights impacts and associated litigation.

Under the traditional doctrine of *forum non-conveniens,* the English courts would generally refuse jurisdiction in a case involving an act allegedly carried out overseas by a foreign subsidiary. The appropriate forum would likely be the state in which the harmful act allegedly took place or where the defendant subsidiary was domiciled. Whether the subsidiary was ultimately owned by an English parent company would have been irrelevant.

However, for some time European rules on jurisdiction have been applied to leave the English courts with little, if any, discretion. In the cases of *Vedanta ([2016] EWHC 975 (TCC), Shell [2017]* EWHC 89 (TCC) and *Unilever [2017] EWHC 371 (QB))*, the High Court emphatically restated that there is no room for the doctrine of *forum non-conveniens* where a defendant is domiciled in England. All that the claimants need to do to establish jurisdiction is show that there is a *"real issue to be tried"* between the claimants and the parent company. And the threshold for this is low – akin to proving that the claimants have an arguable case against the parent so as to avoid strike out of their claim.

The English courts have steadfastly maintained the separate legal identity of parent and subsidiary companies – just because a subsidiary may have committed a wrongful act, it does not necessarily follow that there is a "real issue to be tried" against the parent. However, a "real issue" may arise where it can be shown that the parent company owed a direct duty of care to the claimants.

The law in this area remains unsettled and will likely remain so until *Vedanta* goes to the Court of Appeal this summer. Nevertheless, as things stand, a direct duty is more likely to arise where the parent company is more than a mere holding company owning shares in the subsidiary and plays an active role in the overseas operations associated with the human rights impact.

Provided that the claimants can demonstrate that there is a real issue to be tried against the parents, this will, in most circumstances, be sufficient to join the subsidiary as a "necessary and proper party" to the claim under the relevant rules of civil procedure. Once this has been accomplished, it does not matter whether the claim against the parent ultimately fails; the English courts have jurisdiction over the subsidiary and a trial can continue against them regardless. This gives the claimants a strong hand in any settlement negotiations.

So, the door remains ajar to claims in the English courts against both parent companies and subsidiaries for human rights violations committed overseas. In order to minimise the risk of such claims, multinational energy companies should engage with the UN Guiding Principles and industry standards and take steps to embed the principles throughout their global operations and supply chain. Done properly, this will help to avoid causing, contributing to or being otherwise linked to adverse human rights impacts and discharge any duty which may arise under English law.

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