

**COURT OF APPEAL OF ONTARIO**

**B E T W E E N :**

**SOPHIA MATIKO JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD, KELVIN; ANACRETUS MARINGO GIMANWA; ESTA GEORGE RANGE, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOSEPH, GODFREY, FILEMON AND REBEKA; ELIZABETH MATIKO IRONDO; NEEMA STEPHEN JOHN, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN JOHN, MIRIAM, ESTA AND TIMOTHY; MASWI MARWA MOHABE; DOTTO WILLIAM ITAMA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD CHRISTINA; LYIMO ITAMA MACHELA; ITAMA MACHELA MAX; CHARLES DANIEL NYAKINA; BHOKE HAGALE MARO; DANIEL NYAKINA GHATI; DICKSON JULIUS SISE; SIBORA MARWA MWITA; EMMANUEL NYAKORENGA MBURI; RYOBA ELIAS KEBWE; PASCO MAREMBELA MWITA; NYAHELI MARWA NYAKORENGA; CHRISTOPHER JHOMU MAKENDE; RANGE MWITA RANGE; AND FREDY CHACHA WAMBURA LEMA**

Plaintiffs  
(Appellants)

and

**BARRICK GOLD CORPORATION**

Defendant  
(Respondent)

and

**AMNESTY INTERNATIONAL CANADA**

Intervener

And Between

**ESTER NYANGI PETRO, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILD LUCIA; LEONIDA RUBEN JOSHUA, IN HER PERSONAL CAPACITY AND AS LITIGATION GUARDIAN FOR HER MINOR CHILDREN MACHUGU, NEEMA, AND DANIEL; ABEL SAIMA MACHUGU NYAMARUNGU; CLEMENSIA PROTAS MARWA; MACHERA KIMIRA W ANKA; CHARLES IKAYA MGAYA; MAHERI MWITA NTORA; AND CHARLES MWITA MSETI**



Plaintiffs  
(Appellants)

and

**BARRICK GOLD CORPORATION**

Defendant  
(Respondent)

and

**AMNESTY INTERNATIONAL CANADA**

Intervener

**ORAL COMPENDIUM OF THE PLAINTIFFS/ APPELLANTS**

November 20, 2025

**CFM LAWYERS LLP**  
400-856 Homer Street  
Vancouver, BC V6B 2W5  
Tel: (604) 689-7555

**Joe Fiorante, K.C.**  
**(LSBC #9197/LSO # 863420)**  
jfiorante@cfmlawyers.ca  
**Jen Winstanley (LSBC #508967)**  
jwinstanley@cfmlawyers.ca  
**Briana Leibel (LSBC #519404)**  
bleibel@cfmlawyers.ca

**PHILLIPS BARRISTERS  
PROFESSIONAL CORPORATION**  
36 Toronto Street, Suite 1120  
Toronto, ON M5C 2C5

**W. Cory Wanless (LSO No.: 57288M)**  
cory@phillipsbarristers.ca  
**Patti Shedden (LSO No.: 46210W)**  
patti@phillipsbarristers.ca

Tel: 647-261-4486

Lawyers for the Plaintiffs/Appellants

TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**  
155 Wellington Street West  
Toronto ON M5V 3J7

**Kent E. Thomson** (LSO# 24264J)  
Tel: 416.863.5566  
Email: kentthomson@dwpv.com

**Steven G. Frankel** (LSO# 58892E)  
Tel: 416.367.7441  
Email: sfrankel@dwpv.com

**Anisha Visvanatha** (LSO# 74421O)  
Tel: 416.367.7480  
Email: avisvanatha@dwpv.com

**Alexander Barnes** (LSO# 89981N)  
Tel: 416.863.4131  
Email: abarnes@dwpv.com

*Lawyers for the Defendant (Respondent)*

AND TO: **CHAMP & ASSOCIATES**  
43 Florence Street  
Ottawa, ON K2P 0W6

**Paul Champ** (LSO# 45305K)  
Tel: 613.237.2441  
Email: [pchamp@champlaw.com](mailto:pchamp@champlaw.com)

**ASTARA LEGAL BARRISTERS  
AND SOLICITORS**  
2 Bloor Street West, Suite 700  
Toronto, ON M4W 3E2

**Vibhu Sharma** (LSO# 70130V)  
Tel: 416.800.2922  
Email: [vibhu@astara.legal](mailto:vibhu@astara.legal)

**Lawyers for the Intervener**

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# TAB 39

COURT OF APPEAL FOR ONTARIO

CITATION: Black & McDonald Limited v. Eiffage Innovative Canada Inc.,  
2023 ONCA 91  
DATE: 20230209  
DOCKET: C70823 & C70824

Huscroft, Miller and Nordheimer JJ.A.

DOCKET: C70823

BETWEEN

Black & McDonald Limited

Plaintiff (Appellant)

and

Eiffage Innovative Canada Inc., Francois Bordachar, Aliraza Pirzada  
and Sherry Alward

Defendants (Respondents)

DOCKET: C70824

AND BETWEEN

Black & McDonald Limited

Plaintiff (Appellant)

and

Liberty Mutual Insurance Company

Defendant (Respondent)

heavily on that finding for his conclusion that a stay of the Ontario action should be granted. For the reasons we have set out above, the motion judge erred in reaching that conclusion. Given that error, his *forum non conveniens* analysis is flawed and is not entitled to any deference from this court.

[19] On our view of the analysis, the location where the contract in dispute was signed favours Ontario as that is where the contract was negotiated and signed.

[20] The law of the contract favours British Columbia. That conclusion flows from Article 10.2.1 which provides that the "laws of the Place of the Work shall govern the Sub-Contract". The Place of Work was clearly British Columbia. That said, however, this factor carries little weight when one appreciates that there is no appreciable difference in the laws of British Columbia from the laws of Ontario as they apply to this dispute. This is a breach of contract claim at its heart and the law relating to such a claim is the same as between those provinces.

[21] The location of witnesses, especially key witnesses, is difficult to determine because the evidence, such as it is, is inconclusive. The Eiffage Individuals are resident in Ontario as are many of the persons involved from the appellant's side. Eiffage says that the two employees most concerned with the Project from their side were in British Columbia. However, Eiffage had to acknowledge that those two people are no longer employed by Eiffage and Eiffage has no current information as to where they reside.

[22] Further, on this point, the motion judge found that this factor was neutral because of “the post COVID reality that converted court proceedings from in person to virtual.” We do not agree that that reality renders this factor neutral. Virtual appearances by witnesses cannot be safely equated to appearances in person in terms of their impact on the fact-finding process. Further, there is no way of knowing, at this point in time, whether the trial of this action will proceed virtually or in person or a combination of both – the most likely result. We also do not know what witnesses might appear in person and which might appear virtually. All of that said, we do accept that this new reality will often lessen the weight to be given to this factor.

[23] In terms of where the bulk of the evidence will come from, invoices, payments and communications were exchanged between the parties in Ontario. However, that does not change the fact that the work undertaken, and the reasons for any delays in the completion of the work, will naturally involve the location where the work was performed, i.e., British Columbia. Given those countervailing considerations, we agree with the motion judge that this factor does not significantly favour one side or the other.

[24] Regarding the jurisdiction where the factual matters arose, we also agree with the motion judge that this factor favours British Columbia.

[25] The residence or place of business of the parties all favour Ontario.

[26] Finally, there is no loss of any juridical advantage by having this action proceed in Ontario as opposed to proceeding in British Columbia.

[27] A proper analysis of the factors demonstrate that they do not clearly favour one jurisdiction over the other. That result then leads into the overriding principle that “on a forum non conveniens motion, the standard to displace the plaintiff’s chosen jurisdiction is high”: *Young*, at para. 28. That standard was not met in this case. The Eiffage action in Ontario ought not to have been stayed.

### **The Liberty Mutual Action**

[28] Liberty Mutual’s submission rests entirely on its position that section 3(c) of the Payment Bond requires that any action be commenced in British Columbia.

The precise wording of that section bears repeating:

No suit or action shall be commenced by any claimant

...

(c) other than in a Court of competent jurisdiction or in a Province or Territory of Canada in which the subject matter of the Contract, or any part thereof, is situated and not elsewhere, and the parties hereto agree to submit to the jurisdiction of such Court.

[29] Some additional facts are relevant to this issue. First, the Payment Bond was required by the Ministry, that is, the owner of the Project. It essentially obligates Liberty Mutual to ensure that Eiffage pays its subcontractors for work done by them. Second, the Payment Bond is a standard form contract although there is no evidence as to whose standard form contract it is. Third, the Payment



**TAB 40**

**Chevron Corporation and  
Chevron Canada Limited** *Appellants*

v.

Daniel Carlos Lusitande Yaiguaje,  
Benancio Fredy Chimbo Grefa,  
Miguel Mario Payaguaje Payaguaje,  
Teodoro Gonzalo Piaguaje Payaguaje,  
Simon Lusitande Yaiguaje,  
Armando Wilmer Piaguaje Payaguaje,  
Angel Justino Piaguaje Lucitante,  
Javier Piaguaje Payaguaje, Fermin Piaguaje,  
Luis Agustin Payaguaje Piaguaje,  
Emilio Martin Lusitande Yaiguaje,  
Reinaldo Lusitande Yaiguaje, Maria Victoria  
Aguinda Salazar, Carlos Grefa Huatatoca,  
Catalina Antonia Aguinda Salazar,  
Lidia Alexandria Aguinda Aguinda,  
Clide Ramiro Aguinda Aguinda,  
Luis Armando Chimbo Yumbo,  
Beatriz Mercedes Grefa Tanguila,  
Lucio Enrique Grefa Tanguila,  
Patricio Wilson Aguinda Aguinda,  
Patricio Alberto Chimbo Yumbo,  
Segundo Angel Amanta Milan,  
Francisco Matias Alvarado Yumbo,  
Olga Gloria Grefa Cerda, Narcisa Aida  
Tanguila Narvaez, Bertha Antonia  
Yumbo Tanguila, Gloria Lucrecia  
Tanguila Grefa, Francisco Victor  
Tanguila Grefa, Rosa Teresa  
Chimbo Tanguila, Maria Clelia Reascos Revelo,  
Heleodoro Pataron Guaraca, Celia Irene  
Viveros Cusangua, Lorenzo Jose  
Alvarado Yumbo, Francisco Alvarado Yumbo,  
Jose Gabriel Revelo Llore, Luisa Delia  
Tanguila Narvaez, Jose Miguel  
Ipiales Chicaiza, Hugo Gerardo  
Camacho Naranjo, Maria Magdalena  
Rodriguez Barcenos, Elias Roberto  
Piyahuaje Payahuaje, Lourdes Beatriz  
Chimbo Tanguila, Octavio Ismael  
Cordova Huanca, Maria Hortencia

**Chevron Corporation et  
Chevron Canada Limited** *Appelantes*

c.

Daniel Carlos Lusitande Yaiguaje,  
Benancio Fredy Chimbo Grefa,  
Miguel Mario Payaguaje Payaguaje,  
Teodoro Gonzalo Piaguaje Payaguaje,  
Simon Lusitande Yaiguaje,  
Armando Wilmer Piaguaje Payaguaje,  
Angel Justino Piaguaje Lucitante,  
Javier Piaguaje Payaguaje, Fermin Piaguaje,  
Luis Agustin Payaguaje Piaguaje,  
Emilio Martin Lusitande Yaiguaje,  
Reinaldo Lusitande Yaiguaje, Maria Victoria  
Aguinda Salazar, Carlos Grefa Huatatoca,  
Catalina Antonia Aguinda Salazar,  
Lidia Alexandria Aguinda Aguinda,  
Clide Ramiro Aguinda Aguinda,  
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Lucio Enrique Grefa Tanguila,  
Patricio Wilson Aguinda Aguinda,  
Patricio Alberto Chimbo Yumbo,  
Segundo Angel Amanta Milan,  
Francisco Matias Alvarado Yumbo,  
Olga Gloria Grefa Cerda, Narcisa Aida  
Tanguila Narvaez, Bertha Antonia  
Yumbo Tanguila, Gloria Lucrecia  
Tanguila Grefa, Francisco Victor  
Tanguila Grefa, Rosa Teresa  
Chimbo Tanguila, Maria Clelia Reascos Revelo,  
Heleodoro Pataron Guaraca, Celia Irene  
Viveros Cusangua, Lorenzo Jose  
Alvarado Yumbo, Francisco Alvarado Yumbo,  
Jose Gabriel Revelo Llore, Luisa Delia  
Tanguila Narvaez, Jose Miguel  
Ipiales Chicaiza, Hugo Gerardo  
Camacho Naranjo, Maria Magdalena  
Rodriguez Barcenos, Elias Roberto  
Piyahuaje Payahuaje, Lourdes Beatriz  
Chimbo Tanguila, Octavio Ismael  
Cordova Huanca, Maria Hortencia

**Viveros Cusangua, Guillermo Vincente  
Payaguaje Lusitante, Alfredo Donald  
Payaguaje Payaguaje and Delfin Leonidas  
Payaguaje Payaguaje** *Respondents*

and

**International Human Rights Program  
at the University of Toronto  
Faculty of Law, MiningWatch Canada,  
Canadian Centre for International Justice  
and Justice and Corporate Accountability  
Project** *Interveners*

**INDEXED AS: CHEVRON CORP. v. YAIGUAJE**

**2015 SCC 42**

File No.: 35682.

2014: December 11; 2015: September 4.

Present: McLachlin C.J. and Abella, Rothstein,  
Cromwell, Karakatsanis, Wagner and Gascon JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR  
ONTARIO**

*Private international law — Foreign judgments — Recognition — Enforcement — Foreign judgment creditor sought recognition and enforcement of foreign judgment in Ontario against U.S. foreign judgment debtor's and Canadian seventh-level indirect subsidiary — Foreign judgment debtor served ex juris at U.S. head office — Subsidiary served in juris at place of business in Ontario — Whether a real and substantial connection must exist between defendant or dispute and Ontario for jurisdiction to be established — Whether Ontario courts have jurisdiction over foreign judgment debtor's subsidiary when subsidiary is a third party to the judgment for which recognition and enforcement is sought.*

The oil-rich Lago Agrio region of Ecuador has long attracted the exploration and extraction activities of global oil companies, including Texaco. As a result of those activities, the region is said to have suffered extensive environmental pollution that has disrupted the lives and jeopardized the futures of its residents. For over 20 years, the 47 respondents/plaintiffs, who represent

**Viveros Cusangua, Guillermo Vincente  
Payaguaje Lusitante, Alfredo Donald  
Payaguaje Payaguaje et Delfin Leonidas  
Payaguaje Payaguaje** *Intimés*

et

**International Human Rights Program  
at the University of Toronto  
Faculty of Law, Mines Alert Canada,  
Centre canadien pour la justice internationale  
et Justice and Corporate Accountability  
Project** *Intervenants*

**RÉPERTORIÉ : CHEVRON CORP. c. YAIGUAJE**

**2015 CSC 42**

N° du greffe : 35682.

2014 : 11 décembre; 2015 : 4 septembre.

Présents : La juge en chef McLachlin et les juges Abella,  
Rothstein, Cromwell, Karakatsanis, Wagner et Gascon.

**EN APPEL DE LA COUR D'APPEL DE L'ONTARIO**

*Droit international privé — Jugements étrangers — Reconnaissance — Exécution — Demande de reconnaissance et d'exécution d'un jugement étranger présentée en Ontario par le créancier judiciaire à l'encontre du débiteur judiciaire américain et de sa filiale canadienne indirecte au septième degré — Signification ex juris de la demande au siège social du débiteur judiciaire aux États-Unis — Demande signifiée à la filiale à son établissement commercial en Ontario — L'établissement de la compétence du tribunal exige-t-il l'existence d'un lien réel et substantiel entre le défendeur ou le litige et l'Ontario? — Les tribunaux ontariens ont-ils compétence à l'égard de la filiale d'un débiteur en vertu d'un jugement étranger alors que cette filiale est une tierce partie au jugement dont on demande la reconnaissance et l'exécution?*

La région riche en pétrole de Lago Agrio, en Équateur, attire depuis longtemps les activités d'exploration et d'extraction de sociétés pétrolières multinationales, y compris Texaco. En raison de ces activités, la région aurait subi une pollution environnementale importante qui a eu pour effet de perturber les vies et de compromettre l'avenir des personnes qui y vivent. Depuis plus de 20 ans,

2013), at pp. 52-53; see also *Van Breda*, at para. 101. Establishing jurisdiction merely means that the alleged debt merits the assistance and attention of the Ontario courts. Once the parties move past the jurisdictional phase, it may still be open to the defendant to argue any or all of the following, whether by way of preliminary motions or at trial: that the proper use of Ontario judicial resources justifies a stay under the circumstances; that the Ontario courts should decline to exercise jurisdiction on the basis of *forum non conveniens*; that any one of the available defences to recognition and enforcement (i.e. fraud, denial of natural justice, or public policy) should be accepted in the circumstances; or that a motion under either Rule 20 (summary judgment) or Rule 21 (determination of an issue before trial) of the Rules should be granted. The availability of these potential arguments, however, does not oust the jurisdiction of the Ontario courts over the plaintiffs' action for recognition and enforcement.

#### B. *Jurisdiction With Respect to Chevron Canada*

[78] For its part, Chevron Canada contends that — whatever might be the case for Chevron — jurisdiction cannot be established over it, a stranger to the original foreign judgment. It advances two primary submissions. First, in its view, the Court of Appeal erroneously found jurisdiction over Chevron without inquiring into the nature of the relationship between that defendant or the subject matter of the action and Ontario. This error allegedly had important consequences on the issue of whether jurisdiction exists over Chevron Canada. Given that I have found that jurisdiction properly exists over Chevron, this submission is now moot.

[79] Chevron Canada's second submission is that the other factors relied upon by the Court of Appeal to find jurisdiction (C.A. reasons, at para. 38) —

qu'il convient de le faire : A. Briggs, *The Conflict of Laws* (3<sup>e</sup> éd. 2013), p. 52-53; voir également *Van Breda*, par. 101. La déclaration de compétence signifie simplement que la dette alléguée mérite l'aide et l'attention des tribunaux ontariens. Lorsque les parties franchissent l'étape relative à la compétence, il est encore loisible à la défenderesse de faire valoir un ou plusieurs des arguments suivants, par voie de requêtes préliminaires ou au procès : que l'usage judicieux des ressources judiciaires de l'Ontario justifie un sursis en l'espèce; que les tribunaux ontariens devraient décliner compétence pour cause de *forum non conveniens*; que l'un ou plusieurs des moyens de défense qu'elle peut opposer à la reconnaissance et à l'exécution (par exemple, la fraude, le déni de justice naturelle ou l'ordre public) devraient être accueillis en l'espèce; ou qu'une motion fondée sur la règle 20 (jugement sommaire) ou 21 (décision d'une question avant l'instruction) des Règles devrait être accueillie. Toutefois, la possibilité de faire valoir ces arguments ne prive pas les tribunaux ontariens de leur compétence à l'égard de l'action en reconnaissance et en exécution introduite par les demandeurs.

#### B. *Compétence à l'égard de Chevron Canada*

[78] Pour sa part, Chevron Canada soutient que — quelle que soit la situation dans laquelle se trouve Chevron — la compétence ne peut être établie à son endroit, car le jugement étranger initial ne la concerne pas. Elle plaide deux arguments principaux à l'appui de cette thèse. Tout d'abord, à son avis, la Cour d'appel a conclu à tort qu'elle avait compétence à l'égard de Chevron sans avoir examiné la nature de la relation entre cette défenderesse ou l'objet de l'action et l'Ontario. Cette erreur aurait eu des répercussions importantes quant à savoir si les tribunaux ontariens ont compétence à l'égard de Chevron Canada. Comme j'ai conclu que les tribunaux ontariens ont, à juste titre, compétence à l'égard de Chevron, cet argument est désormais théorique.

[79] Chevron Canada soutient ensuite que les autres facteurs sur lesquels s'est fondée la Cour d'appel pour conclure que les tribunaux ontariens sont

namely, Chevron Canada’s “bricks-and-mortar business in Ontario” and its “economically significant relationship” with Chevron — do not in fact establish jurisdiction. Chevron Canada argues that while corporations domiciled in Ontario can be brought before the province’s courts even in the absence of a relationship between the claim and that province, the same cannot be said for corporations that merely carry on business in Ontario. Relying on *Van Breda*, it argues that in such cases, Ontario courts only have jurisdiction if there is a connection between the subject matter of the claim and the business conducted in the province. According to Chevron Canada, while the Court in *Van Breda* maintained the traditional jurisdictional grounds of presence and consent, it also limited the instances in which presence-based jurisdiction can be said to exist. For corporations, the Court recognized that the existence of an office other than the head office is not an independent jurisdictional ground, but is properly considered part of carrying on business in the province. In Chevron Canada’s view, carrying on business from an office is only a presumptive connecting factor that can be rebutted by showing that there is no connection between the claim and the business the corporation conducts in the province. This flows from the constitutional limits on the state’s exercise of power and applies regardless of whether service is effected *ex juris* or *in juris*.

[80] Chevron Canada further submits that the existence of its “economically significant relationship” with Chevron is insufficient to find jurisdiction: A.F., at para. 65. Such a finding would disregard the concept of separate corporate personality, “a bedrock principle of law” since *Salomon v. Salomon & Co.*, [1897] A.C. 22. This case is not one of the limited instances in which piercing the corporate veil is permissible. Chevron Canada adds that in every action, there must be a “good arguable case” that

compétents (motifs de la C.A., par. 38), soit [TRADUCTION] « l’établissement physique, en briques et mortier, exploité en Ontario » par Chevron Canada et les « rapports économiques importants » qu’elle entretient avec Chevron, n’établissent pas en fait la compétence. Chevron Canada plaide que, bien qu’il soit possible de poursuivre devant les tribunaux de l’Ontario des sociétés domiciliées dans cette province sans qu’il soit nécessaire de démontrer l’existence d’un rapport entre le recours et cette province, on ne peut pas en dire autant des sociétés qui y exploitent simplement une entreprise. S’appuyant sur l’arrêt *Van Breda*, elle plaide que dans ces cas, les tribunaux ontariens ne sont compétents que s’il existe un lien entre l’objet du recours et l’entreprise exploitée dans la province. Toujours selon Chevron Canada, bien que notre Cour dans *Van Breda* ait confirmé les fondements traditionnels de la compétence que sont la présence et le consentement, elle a aussi limité les cas dans lesquels on peut affirmer qu’il y a compétence fondée sur la présence. Quant aux sociétés, la Cour a reconnu que la présence d’un bureau autre que le siège social ne constitue pas un fondement de compétence distinct; elle est plutôt considérée à bon droit comme un élément pertinent de l’exploitation d’une entreprise dans la province. Selon Chevron Canada, l’exploitation d’une entreprise à partir d’un bureau n’est qu’un facteur de rattachement créant une présomption, laquelle peut être réfutée par la preuve de l’absence de lien entre le recours et l’entreprise que la société exploite dans la province. Ce constat découle des limites imposées par la Constitution à l’exercice, par une juridiction, de son pouvoir et il s’applique, peu importe que la signification soit effectuée *ex juris* ou *in juris*.

[80] Chevron Canada plaide en outre que ses [TRADUCTION] « rapports économiques importants » avec Chevron sont insuffisants pour que l’on puisse conclure à la compétence des tribunaux ontariens : m.a., par. 65. Une telle conclusion ferait abstraction de la notion de personnalité morale distincte, « un principe de droit fondamental » accepté depuis l’arrêt *Salomon c. Salomon & Co.*, [1897] A.C. 22. Il ne s’agit pas en l’espèce de l’un des cas restreints dans lesquels on peut lever le voile

a sufficient connection with Ontario exists before the province's courts can exercise jurisdiction: A.F., at para. 86, citing *Ontario v. Rothman's Inc.*, 2013 ONCA 353, 115 O.R. (3d) 561, at para. 54. In its submission, there is none here.

[81] I do not accept Chevron Canada's submissions. *Van Breda* specifically preserved the traditional jurisdictional grounds of presence and consent. Chevron Canada erroneously seeks to conflate the rules on presence-based jurisdiction and those on assumed jurisdiction, even though they have always developed in their respective spheres. Here, presence-based jurisdiction is made out on the basis of Chevron Canada's office in Mississauga, Ontario, where it was served *in juris*. Carrying on a business in Ontario at which the defendant is served is sufficient to find presence-based jurisdiction. Several Ontario courts have found this to be the case. The reference in *Van Breda* to constitutional conflict of laws principles does not change the fact that a sufficient jurisdictional basis exists to allow the plaintiffs' case to proceed against Chevron Canada. In any event, even in the context of the rules on assumed jurisdiction, which I do not need to consider in this case, it would be inappropriate to import the connecting factors for tort claims identified in *Van Breda* into the recognition and enforcement context without further analysis.

(1) *Van Breda* and the Traditional Jurisdictional Grounds

[82] *Van Breda* was a case about assumed jurisdiction, one of three bases for asserting jurisdiction *in personam* over an out-of-province defendant. The other two bases, known as the "traditional" jurisdictional grounds, are presence-based jurisdiction and consent-based jurisdiction: *Muscutt*

corporatif. Chevron Canada ajoute que dans toute action, il faut une « cause tout à fait défendable » à l'appui de l'existence d'un lien suffisant avec l'Ontario pour que les tribunaux de la province puissent exercer leur compétence : m.a., par. 86, citant *Ontario c. Rothman's Inc.*, 2013 ONCA 353, 115 O.R. (3d) 561, par. 54. À son avis, il n'y en a pas en l'espèce.

[81] Je ne retiens pas les arguments de Chevron Canada. La Cour a expressément maintenu dans *Van Breda* les fondements traditionnels de la compétence que sont la présence et le consentement. Chevron Canada cherche à tort à confondre les règles en matière de compétence fondée sur la présence et celles relatives à la déclaration de compétence, même si ces règles ont toujours évolué dans leurs sphères respectives. En l'espèce, la compétence fondée sur la présence est établie du fait que Chevron Canada exploite un établissement situé à Mississauga, en Ontario, où elle a reçu signification *in juris*. L'exploitation en Ontario d'une entreprise où un acte de procédure est signifié au défendeur suffit pour que l'on puisse conclure à la compétence fondée sur la présence. Plusieurs tribunaux ontariens en ont décidé ainsi. La mention des principes constitutionnels de droit international privé dans *Van Breda* ne change rien au fait qu'il existe un fondement juridictionnel suffisant pour que les demandeurs puissent poursuivre Chevron Canada. Quoi qu'il en soit, même dans le contexte des règles relatives à la déclaration de compétence, une question que je n'ai pas à étudier en l'espèce, il ne conviendrait pas, faute d'une analyse plus poussée, d'introduire dans le domaine de la reconnaissance et de l'exécution les facteurs de rattachement applicables aux actions en responsabilité délictuelle qui sont énumérés dans *Van Breda*.

(1) L'arrêt *Van Breda* et les fondements traditionnels de la compétence

[82] Dans *Van Breda*, il était question de déclaration de compétence, un des trois moyens pour un tribunal de s'attribuer une compétence *in personam* sur un défendeur se trouvant à l'extérieur de la province. Les deux autres moyens, appelés les fondements « traditionnels » de la compétence, sont la

v. *Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), at para. 19.

[83] Chevron Canada’s appeal concerns the traditional ground of presence. Presence-based jurisdiction has existed at common law for several decades; its historical roots “cannot be over-emphasized”: S. G. A. Pitel and C. D. Dusten, “Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada’s New Approach to Jurisdiction” (2006), 85 *Can. Bar Rev.* 61, at p. 69. It “is based upon the requirement and sufficiency of personal service of the originating process within the province or territory of the forum (service *in juris*)”: J.-G. Castel, *Introduction to Conflict of Laws* (4th ed. 2002), at p. 83. If service is properly effected on a person who is in the forum at the time of the action, the court has jurisdiction regardless of the nature of the cause of action: T. J. Monestier, “(Still) a ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2013), 36 *Fordham Int’l L.J.* 396, at p. 449. Assumed jurisdiction, for its part, emerged much later and developed through the adoption of rules for service *ex juris*: Pitel and Rafferty, at p. 53. When a court finds that it has jurisdiction on this basis, that jurisdiction is limited to the specific action at issue before it.

[84] While *Van Breda* simplified, justified, and explained many critical aspects of Canadian private international law, it did not purport to displace the traditional jurisdictional grounds. LeBel J. explicitly stated that, in addition to the connecting factors he established for assumed jurisdiction, “jurisdiction may also be based on traditional grounds, like the defendant’s presence in the jurisdiction or consent to submit to the court’s jurisdiction, if they are established”: para. 79. In other words, “[t]he real and substantial connection test does not oust the traditional private international law bases for court jurisdiction”: *ibid.*

compétence fondée sur la présence et celle fondée sur le consentement : *Muscutt c. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), par. 19.

[83] Le pourvoi de Chevron Canada porte sur le fondement traditionnel lié à la présence. La compétence fondée sur la présence existe en common law depuis des dizaines d’années; l’on [TRADUCTION] « ne saurait trop insister » sur ses racines historiques : S. G. A. Pitel et C. D. Dusten, « Lost in Transition : Answering the Questions Raised by the Supreme Court of Canada’s New Approach to Jurisdiction » (2006), 85 *R. du B. can.* 61, p. 69. Elle [TRADUCTION] « repose sur l’exigence et le caractère suffisant de la signification à personne de l’acte introductif d’instance dans la province ou le territoire du tribunal (signification *in juris*) » : J.-G. Castel, *Introduction to Conflict of Laws* (4<sup>e</sup> éd. 2002), p. 83. Si la signification est effectuée correctement à un particulier dans le ressort au moment de l’action, le tribunal a compétence peu importe la nature de la cause d’action : T. J. Monestier, « (Still) a “Real and Substantial” Mess : The Law of Jurisdiction in Canada » (2013), 36 *Fordham Int’l L.J.* 396, p. 449. La déclaration de compétence, quant à elle, est apparue beaucoup plus tard et s’est développée avec l’adoption des règles de signification *ex juris* : Pitel et Rafferty, p. 53. Lorsqu’un tribunal se déclare compétent du fait de la signification *ex juris*, sa compétence ne s’applique qu’à l’action en question.

[84] Même si la Cour a simplifié, justifié et expliqué dans *Van Breda* bien des éléments cruciaux du droit international privé au Canada, elle n’entendait pas y écarter les fondements traditionnels de la compétence. Le juge LeBel a explicitement affirmé qu’outre les facteurs de rattachement qu’il a établis pour la déclaration de compétence, « la compétence peut également reposer sur des fondements traditionnels, comme la présence du défendeur à l’intérieur du ressort ou son consentement à se soumettre à la compétence du tribunal, si ces fondements sont établis » : par. 79. En d’autres termes, « [l]e critère du lien réel et substantiel n’écarter pas les fondements traditionnels de la compétence judiciaire en droit international privé » : *ibid.*

[85] To establish traditional, presence-based jurisdiction over an out-of-province corporate defendant, it must be shown that the defendant was carrying on business in the forum at the time of the action. Whether a corporation is “carrying on business” in the province is a question of fact: *Wilson v. Hull* (1995), 174 A.R. 81 (C.A.), at para. 52; *Ingersoll Packing Co. v. New York Central and Hudson River R.R. Co.* (1918), 42 O.L.R. 330 (S.C. (in chambers)), at p. 337. In *Wilson*, in the context of statutory registration of a foreign judgment, the Alberta Court of Appeal was asked to assess whether a company was carrying on business in the jurisdiction. It held that to make this determination, the court must inquire into whether the company has “some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time”: para. 13. These factors are and always have been compelling indicia of corporate presence; as the cases cited in *Adams v. Cape Industries Plc.*, [1990] 1 Ch. 433, at pp. 467-68, per Scott J., demonstrate, the common law has consistently found the maintenance of physical business premises to be a compelling jurisdictional factor. LeBel J. accepted this in *Van Breda* when he held that “carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there”: para. 87.

[86] The motion judge in this case made the following factual findings concerning Chevron Canada’s Mississauga office:

Chevron Canada operates a business establishment in Mississauga, Ontario. It is not a mere “virtual” business. It runs a bricks and mortar office from which it carries out a non-transitory business with human means and its Ontario staff provides services to and solicits sales from its customers in this province. [para. 87]

These findings have not been contested. They are sufficient to establish presence-based jurisdiction.

[85] Pour prouver la compétence traditionnelle, fondée sur la présence, à l’égard d’une société défenderesse de l’extérieur de la province, il faut démontrer que cette défenderesse exploitait une entreprise dans le ressort au moment de l’action. La question de savoir si une société « exploite une entreprise » dans la province est une question de fait : *Wilson c. Hull* (1995), 174 A.R. 81 (C.A.), par. 52; *Ingersoll Packing Co. c. New York Central and Hudson River R.R. Co.* (1918), 42 O.L.R. 330 (C.S. (en cabinet)), p. 337. Dans *Wilson*, dans le cadre de l’enregistrement, prévu par la loi, d’un jugement étranger, la Cour d’appel de l’Alberta devait déterminer si une société exploitait une entreprise dans le ressort du tribunal. Elle a conclu que pour ce faire, le tribunal doit se demander si cette société a [TRADUCTION] « une présence directe ou indirecte dans l’État du tribunal qui s’attribue compétence, et si elle se livre à des activités commerciales soutenues pendant un certain temps » : par. 13. Ces facteurs sont et ont toujours été des indices convaincants de la présence d’une société; comme le démontrent les décisions citées dans *Adams c. Cape Industries Plc.*, [1990] 1 Ch. 433, p. 467-468, le juge Scott, la common law considère invariablement que la tenue de locaux commerciaux constitue un facteur convaincant de compétence. Le juge LeBel l’a reconnu dans *Van Breda* lorsqu’il a conclu que « [l]’exploitation d’une entreprise exige une forme de présence effective — et non seulement virtuelle — dans le ressort en question, par exemple le fait d’y tenir un bureau » : par. 87.

[86] Le juge saisi de la motion en l’espèce a tiré les conclusions de fait suivantes concernant le bureau de Chevron Canada à Mississauga :

[TRADUCTION] Chevron Canada exploite un établissement commercial à Mississauga, en Ontario. Ce n’est pas un simple établissement « virtuel ». Elle dirige un bureau traditionnel d’où elle exploite une entreprise permanente avec des ressources humaines, et ses employés ontariens fournissent des services et sollicitent des ventes à sa clientèle de cette province. [par. 87]

Ces conclusions n’ont pas été contestées et elles suffisent à établir la compétence fondée sur la présence.

Chevron Canada has a physical office in Mississauga, Ontario, where it was served pursuant to rule 16.02(1)(c), which provides that valid service can be made at a place of business in Ontario. Chevron Canada's business activities at this office are sustained; it has representatives who provide services to customers in the province. Canadian courts have found that jurisdiction exists in such circumstances: *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 (C.A.), at para. 36; *Prince v. ACE Aviation Holdings Inc.*, 2013 ONSC 2906, 115 O.R. (3d) 721, appeal dismissed and cross-appeal allowed 2014 ONCA 285, 120 O.R. (3d) 140; *Abdula v. Canadian Solar Inc.*, 2011 ONSC 5105, 92 B.L.R. (4th) 324, aff'd 2012 ONCA 211, 110 O.R. (3d) 256; *Wilson; Charron v. Banque provinciale du Canada*, [1936] O.W.N. 315 (H.C.J.).

[87] The motion judge's analysis was correct, and the Ontario Court of Appeal had no need to go beyond these considerations to find jurisdiction. As several lower courts have noted both prior to and since *Van Breda*, where jurisdiction stems from the defendant's presence in the jurisdiction, there is no need to consider whether a real and substantial connection exists: *Incorporated Broadcasters Ltd.*, at para. 29, cited with approval in *Prince* (C.A.), at para. 48; *Patterson v. EM Technologies, Inc.*, 2013 ONSC 5849, at paras. 13-16 (CanLII). In other words, the question of whether jurisdiction exists over Chevron Canada should begin and end with traditional, presence-based jurisdiction in this case.

(2) Effect of the Constitutional Principles Developed in *Van Breda*

[88] Nonetheless, Chevron Canada adds constitutional flavour to its submissions, contending that LeBel J.'s comments in *Van Breda* on the prerequisites for assuming jurisdiction over corporate defendants should apply to all types of jurisdiction — presence-based, consent-based, and assumed — by

Chevron Canada possède un bureau à Mississauga, en Ontario, où elle a reçu signification conformément à l'al. 16.02(1)c des Règles, qui prévoit que la signification peut valablement être faite à un établissement en Ontario. Les activités commerciales qu'elle exerce dans ce bureau sont soutenues; ses représentants servent la clientèle dans cette province. Les tribunaux canadiens ont conclu à l'existence de la compétence dans une telle situation : *Incorporated Broadcasters Ltd. c. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 (C.A.), par. 36; *Prince c. ACE Aviation Holdings Inc.*, 2013 ONSC 2906, 115 O.R. (3d) 721, appel rejeté et appel incident accueilli à 2014 ONCA 285, 120 O.R. (3d) 140; *Abdula c. Canadian Solar Inc.*, 2011 ONSC 5105, 92 B.L.R. (4th) 324, conf. par 2012 ONCA 211, 110 O.R. (3d) 256; *Wilson; Charron c. Banque provinciale du Canada*, [1936] O.W.N. 315 (H.C.J.).

[87] L'analyse du juge saisi de la motion était juste, et la Cour d'appel de l'Ontario n'avait pas à examiner d'autres considérations que celles qui précèdent pour conclure à la compétence des tribunaux ontariens. Comme l'ont fait remarquer plusieurs juridictions inférieures tant avant que depuis l'arrêt *Van Breda*, point n'est besoin de se demander s'il existe un lien réel et substantiel lorsque la compétence découle de la présence du défendeur dans le ressort : *Incorporated Broadcasters Ltd.*, par. 29, cité avec approbation dans *Prince* (C.A.), par. 48; *Patterson c. EM Technologies, Inc.*, 2013 ONSC 5849, par. 13-16 (CanLII). Autrement dit, l'analyse de la question de savoir si les tribunaux ontariens ont compétence à l'égard de Chevron Canada doit commencer et prendre fin avec la compétence traditionnelle fondée sur la présence en l'espèce.

(2) Effet des principes constitutionnels élaborés dans *Van Breda*

[88] Chevron Canada pimente néanmoins son argumentation d'une saveur constitutionnelle, prétendant que les propos du juge LeBel dans *Van Breda* au sujet des conditions préalables de la déclaration de compétence à l'égard de sociétés défenderesses devraient s'appliquer à tous les types de compétence

virtue of the real and substantial connection test as a constitutional principle: A.F., at paras. 42-50. As noted in my discussion of Chevron, LeBel J. articulated this constitutional principle as suggesting that “the connection between a state and a dispute cannot be weak or hypothetical”, as such a connection “would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute”: *Van Breda*, at para. 32.

[89] In my view, the real and substantial connection test as a constitutional principle does not dictate that it is “illegitimate” to find jurisdiction over Chevron Canada in this case. Chevron Canada has elected to establish and continue to operate a place of business in Mississauga, Ontario, at which it was served. It should therefore have expected that it might one day be called upon to answer to an Ontario court’s request that it defend against an action. If a defendant maintains a place of business in Ontario, it is reasonable to say that the Ontario courts have an interest in the defendant and the disputes in which it becomes involved. As the Ontario Court of Appeal put it in *Incorporated Broadcasters Ltd.*, at para. 33, “[t]here is no constitutional impediment to a court asserting jurisdiction over a person having a presence in the province”, at least as presence is established in this case. To accept Chevron Canada’s submission to the contrary would be to endorse an unduly “narrow” view of jurisdiction, one towards which this Court has shown no prior inclination: J. Blom, “New Ground Rules for Jurisdictional Disputes: The *Van Breda* Quartet” (2012), 53 *Can. Bus. L.J.* 1, at p. 12. For Ontario courts to have jurisdiction over Chevron Canada in this case, mere presence through the carrying on of business in the province, combined with service therein, suffices to find jurisdiction on the traditional grounds. There is no need to resort to the *Van Breda* criteria for assumed jurisdiction in tort claims in such a situation. To accept Chevron Canada’s submissions would be to permit a total conflation of presence-based and assumed jurisdiction. As Briggs has noted, “[c]ommon law jurisdiction draws a fundamental distinction between cases

— la compétence fondée sur la présence, celle fondée sur le consentement et la déclaration de compétence — parce que le critère du lien réel et substantiel est un principe constitutionnel : m.a., par. 42-50. Comme je l’ai fait remarquer dans mon analyse relative à Chevron, le juge LeBel a dit que ce principe constitutionnel suppose que « le lien entre un État et un litige ne peut être tenu ni hypothétique », puisqu’un lien de cette nature « jetterait un doute sur la légitimité de l’exercice, par l’État, de son pouvoir sur les personnes que touche le litige » : *Van Breda*, par. 32.

[89] À mon avis, le critère du lien réel et substantiel en tant que principe constitutionnel n’indique pas forcément qu’il est « illégitime » de conclure à la compétence à l’égard de Chevron Canada en l’espèce. Chevron Canada a choisi d’établir et de continuer d’exploiter un établissement à Mississauga, en Ontario, où elle a reçu signification. Elle devait donc s’attendre à ce qu’elle soit appelée un jour à répondre à une demande du tribunal de l’Ontario pour se défendre contre une action. Si une société défenderesse tient un établissement en Ontario, on peut raisonnablement affirmer que les tribunaux ontariens ont un intérêt envers cette défenderesse et les litiges auxquelles elle prend part. Comme l’a expliqué la Cour d’appel de l’Ontario dans *Incorporated Broadcasters Ltd.*, par. 33, [TRADUCTION] « [a]ucun obstacle constitutionnel n’empêche un tribunal de s’attribuer compétence à l’égard d’une personne présente dans la province », du moins lorsque la présence est établie comme en l’espèce. Se ranger à l’argument contraire de Chevron Canada reviendrait à cautionner une conception trop [TRADUCTION] « étroite » de la compétence, une conception pour laquelle notre Cour n’a montré aucun penchant : J. Blom, « New Ground Rules for Jurisdictional Disputes : The *Van Breda* Quartet » (2012), 53 *Rev. can. dr. comm.* 1, p. 12. Pour que les tribunaux ontariens aient compétence à l’endroit de Chevron Canada en l’espèce, la simple présence assurée par l’exploitation d’une entreprise dans la province, conjuguée à la signification dans celle-ci, suffit pour permettre de conclure à la compétence reposant sur les fondements traditionnels. Il n’est pas nécessaire, dans une telle situation, de recourir au critère de déclaration de compétence applicable

where the defendant is and is not within the territorial jurisdiction of the court when the proceedings are commenced”: p. 112.

[90] Because jurisdiction over Chevron Canada exists on the basis of the traditional grounds, I need not consider how jurisdiction might be found over a third party who is not present in and does not attach to the jurisdiction of the Ontario courts, but who is alleged to be capable of satisfying a foreign judgment debt. I offer only two comments in this regard.

[91] First, it should be remembered that the specific connecting factors that LeBel J. established in *Van Breda* were designed for and should be confined to the assumption of jurisdiction in tort actions. His comments with respect to carrying on business in the jurisdiction, at paras. 85 and 87, were tailored to that context. The same is true of the examples he gave to show how the presumption of jurisdiction can be rebutted in respect of the connecting factors he identified. LeBel J.’s statement that the presumptive connecting factor of “carrying on business in the province . . . can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant’s business activities in the province” must be confined accordingly: para. 96. The connecting factors that he identified for tort claims did not purport to be an inventory covering all claims known to law, and the appropriate connecting factors can reasonably be expected to vary depending on the cause of action at issue.

aux actions en responsabilité délictuelle qui a été énoncé dans *Van Breda*. Faire droit à l’argumentation de Chevron Canada équivaldrait à permettre que soient entièrement confondues la compétence fondée sur la présence et la déclaration de compétence. Comme l’a souligné Briggs, [TRADUCTION] « [l]a compétence en common law établit une distinction fondamentale entre les cas où le défendeur se trouve dans le ressort du tribunal et ceux où il se trouve à l’extérieur du ressort lorsque la procédure est engagée » : p. 112.

[90] Puisque les tribunaux ontariens ont compétence à l’endroit de Chevron Canada sur la base des fondements traditionnels, je n’ai pas à me demander s’il est possible de conclure à la compétence de ces tribunaux à l’endroit d’un tiers absent qui n’a pas acquiescé à leur compétence, mais qui serait prétendument en mesure d’acquitter la dette constatée par un jugement étranger. Je n’ai que deux commentaires à faire sur ce point.

[91] Premièrement, il faut se rappeler que les facteurs de rattachement précis établis par le juge LeBel dans *Van Breda* visaient la déclaration de compétence dans les actions en responsabilité délictuelle et devaient s’y limiter. Il a adapté à ce contexte ses remarques sur l’exploitation d’une entreprise dans le ressort, aux par. 85 et 87. C’était aussi le cas des exemples qu’il a employés pour montrer la façon de réfuter la présomption de compétence en ce qui a trait aux facteurs de rattachement qu’il a dégagés. Ainsi, l’énoncé du juge LeBel, selon lequel le facteur de rattachement créant une présomption que constitue « le fait que le défendeur exploite une entreprise dans la province [. . .] peut être réfuté par la preuve que l’objet du litige est sans rapport avec les activités commerciales du défendeur dans la province », doit se limiter à ce contexte : par. 96. Les facteurs de rattachement qu’il a relevés pour les actions en responsabilité délictuelle ne se voulaient pas une liste complète concernant tous les recours connus en droit, et on peut raisonnablement s’attendre à ce que les facteurs de rattachement applicables varient en fonction de la cause d’action concernée.



**TAB 41**

**Club Resorts Ltd.** *Appellant*

v.

**Morgan Van Breda, Viktor Berg, Joan Van Breda, Tony Van Breda, Adam Van Breda and Tonnille Van Breda** *Respondents*

and

**Tourism Industry Association of Ontario, Amnesty International, Canadian Centre for International Justice, Canadian Lawyers for International Human Rights and Ontario Trial Lawyers Association** *Interveners*

- and -

**Club Resorts Ltd.** *Appellant*

v.

**Anna Charron, Estate Trustee of the Estate of Claude Charron, deceased, the said Anna Charron, personally, Jennifer Candace Charron, Stephanie Michelle Charron, Christopher Michael Charron, Bel Air Travel Group Ltd. and Hola Sun Holidays Limited** *Respondents*

and

**Tourism Industry Association of Ontario, Amnesty International, Canadian Centre for International Justice, Canadian Lawyers for International Human Rights and Ontario Trial Lawyers Association** *Interveners*

**INDEXED AS: CLUB RESORTS LTD. v. VAN BREDA**  
**2012 SCC 17**

File Nos.: 33692, 33606.

2011: March 21; 2012: April 18.

**Club Resorts Ltd.** *Appelante*

c.

**Morgan Van Breda, Viktor Berg, Joan Van Breda, Tony Van Breda, Adam Van Breda et Tonnille Van Breda** *Intimés*

et

**Tourism Industry Association of Ontario, Amnistie internationale, Centre canadien pour la justice internationale, Juristes canadiens pour les droits de la personne dans le monde et Ontario Trial Lawyers Association** *Intervenants*

- et -

**Club Resorts Ltd.** *Appelante*

c.

**Anna Charron, fiduciaire de la succession de Claude Charron, décédé, la dite Anna Charron, personnellement, Jennifer Candace Charron, Stephanie Michelle Charron, Christopher Michael Charron, Bel Air Travel Group Ltd. et Hola Sun Holidays Limited** *Intimés*

et

**Tourism Industry Association of Ontario, Amnistie internationale, Centre canadien pour la justice internationale, Juristes canadiens pour les droits de la personne dans le monde et Ontario Trial Lawyers Association** *Intervenants*

**RÉPERTORIÉ : CLUB RESORTS LTD. c. VAN BREDA**  
**2012 CSC 17**

N<sup>os</sup> du greffe : 33692, 33606.

2011 : 21 mars; 2012 : 18 avril.

[78] Some authors take the view that the true core of the revised *Van Breda-Charron* test consists of a set of objective factual connections. Likewise, the Court of Appeal stated in *Van Breda-Charron* that the issue was essentially about connections: “The core of the real and substantial connection test is the connection that the plaintiff’s claim has to the forum and the connection of the defendant to the forum respectively” (para. 84; T. Monestier, “A ‘Real and Substantial’ Improvement? *Van Breda* Reformulates the Law of Jurisdiction in Ontario”, in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2010* (2010) 185, at pp. 204-7). In my view, identifying a set of relevant presumptive connecting factors and determining their legal nature and effect will bring greater clarity and predictability to the analysis of the problems of assumption of jurisdiction, while at the same time ensuring consistency with the objectives of fairness and efficiency that underlie this branch of the law.

[79] From this perspective, a clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity. These principles and analytical tools will inform their assessment in order to determine whether the real and substantial connection test is met. However, jurisdiction may also be based on traditional grounds, like the defendant’s presence in the jurisdiction or consent to submit to the court’s jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.

[80] Before I go on to consider a list of presumptive connecting factors for tort cases, I must define the legal nature of the list. It will not be exhaustive. Rather, it will, first of all, be illustrative of the factual situations in which it will typically be open to a court to assume jurisdiction over a matter. These factors therefore warrant presumptive effect,

[78] Certains auteurs estiment que le véritable cœur du nouveau critère de l’arrêt *Van Breda-Charron* se compose d’un ensemble de liens factuels objectifs. De même, la Cour d’appel a affirmé dans l’arrêt *Van Breda-Charron* que la question en litige portait essentiellement sur les liens : [TRADUCTION] « Le lien entre le recours du demandeur et le tribunal et le lien entre le défendeur et le tribunal constituent respectivement le cœur du critère du lien réel et substantiel » (par. 84; T. Monestier, « A “Real and Substantial” Improvement? *Van Breda* Reformulates the Law of Jurisdiction in Ontario », dans T. L. Archibald et R. S. Echlin, dir., *Annual Review of Civil Litigation, 2010* (2010) 185, p. 204-207). À mon sens, l’établissement d’un ensemble de facteurs de rattachement pertinents créant une présomption et la détermination de leur nature et de leur effet juridiques rendra l’analyse des problèmes de déclaration de compétence plus claire et plus prévisible, tout en assurant leur conformité avec les objectifs d’équité et d’efficacité sur lesquels repose cette branche du droit.

[79] Dans cette optique, il faut conserver une nette distinction entre, d’une part, les facteurs ou les situations de fait qui relient l’objet du litige et le défendeur au tribunal et, d’autre part, les principes et les outils d’analyse, comme les valeurs que sont l’équité et l’efficacité ou le principe de la courtoisie. Ces principes et outils d’analyse éclaireront l’examen des facteurs en vue de décider s’il est satisfait au critère du lien réel et substantiel. Toutefois, la compétence peut également reposer sur des fondements traditionnels, comme la présence du défendeur à l’intérieur du ressort ou son consentement à se soumettre à la compétence du tribunal, si ces fondements sont établis. Le critère du lien réel et substantiel n’écarte pas les fondements traditionnels de la compétence judiciaire en droit international privé.

[80] Cependant, avant de passer à l’examen d’une liste de facteurs de rattachement créant une présomption applicables dans les actions fondées sur un délit, je dois préciser la nature juridique de cette liste. Celle-ci ne sera pas exhaustive. Il s’agira plutôt d’illustrer avant tout les situations de fait permettant généralement à un tribunal de se déclarer

conditions for the assumption of jurisdiction over all claims known to the law.

[86] The presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor. (I will not discuss its relevance or importance in the context of the forum of necessity doctrine, which is not at issue in these appeals.) Absent other considerations, the presence of the plaintiff in the jurisdiction will not create a presumptive relationship between the forum and either the subject matter of the litigation or the defendant. On the other hand, a defendant may always be sued in a court of the jurisdiction in which he or she is domiciled or resident (in the case of a legal person, the location of its head office).

[87] Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, “carrying on business” within the meaning of rule 17.02(p) may be an appropriate connecting factor.

[88] The *situs* of the tort is clearly an appropriate connecting factor, as can be seen from rule 17.02(g), and from the *CJPTA*, the *Civil Code of Québec* and the jurisprudence of this Court since

complète des facteurs de rattachement concernant les conditions permettant aux tribunaux de se déclarer compétents à l’égard de tous les recours connus en droit.

[86] La présence du demandeur dans le ressort n’est pas en soi un facteur de rattachement suffisant. (Je n’examinerai pas la pertinence ou l’importance de ce facteur dans le contexte de la doctrine du for de nécessité, car cette question n’a pas été soulevée dans les pourvois qui nous occupent.) À elle seule, la présence du demandeur n’établira pas entre le tribunal et l’objet du litige ou le défendeur un lien créant une présomption. Par contre, un défendeur peut toujours être poursuivi devant un tribunal du ressort dans lequel se trouve son domicile ou sa résidence (dans le cas d’une personne morale, le lieu de son siège social).

[87] On peut également considérer l’exploitation d’une entreprise dans la province comme un lien factuel adéquat. Cela peut toutefois soulever des questions plus complexes. Il faut faire preuve d’une certaine prudence au moment de résoudre ces questions, et ce, afin d’éviter de créer ce qu’on pourrait assimiler à des formes de compétence universelle applicable aux actions en matière de responsabilité délictuelle découlant de certaines catégories d’entreprises ou d’activités commerciales. Une publicité active dans le ressort ou, par exemple, l’accès que l’on y offre à un site Web, ne suffirait pas à établir que le défendeur y exploite une entreprise. La notion d’exploitation d’une entreprise exige une forme de présence effective — et non seulement virtuelle — dans le ressort en question, par exemple le fait d’y tenir un bureau ou d’y effectuer régulièrement des visites. Cependant, la Cour n’est pas appelée à décider si, et, le cas échéant, à quel moment, le commerce électronique dans un ressort pourrait équivaloir à une présence dans celui-ci. Compte tenu de ces réserves, l’« exploit[ation] [d’]une entreprise » au sens de l’al. 17.02p) peut constituer un facteur de rattachement approprié.

[88] Tel qu’il appert de l’al. 17.02g), ainsi que de la *LUCTRI*, du *Code civil du Québec* et de la jurisprudence de notre Cour depuis l’arrêt *Tolofson*, le lieu du délit constitue clairement un facteur de

**TAB 42**

**Haaretz.com, Haaretz Daily Newspaper Ltd.,  
Haaretz Group, Haaretz.co.il, Shlomi Barzel  
and David Marouani** *Appellants*

v.

**Mitchell Goldhar** *Respondent*

and

**Samuelson-Glushko Canadian Internet Policy  
and Public Interest Clinic** *Intervener*

**INDEXED AS: HAARETZ.COM v. GOLDHAR**

**2018 SCC 28**

File No.: 37202.

2017: November 29; 2018: June 6.

Present: McLachlin C.J. and Abella, Moldaver,  
Karakatsanis, Wagner, Gascon, Côté, Brown and  
Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR  
ONTARIO

*Private international law — Choice of forum — Court having jurisdiction — Forum non conveniens — Libel action commenced in Ontario in respect of statements published in Israeli newspaper available electronically in Canada — Defendants bringing motion to stay action on grounds that Ontario court lacks jurisdiction or, alternatively, that Ontario court should decline to exercise its jurisdiction on basis of forum non conveniens — Whether situs of tort is reliable basis on which to presume real and substantial connection between chosen forum and subject matter of litigation in Internet defamation cases — If so, whether presumption of jurisdiction can be rebutted — Whether choice of law factor in forum non conveniens analysis for Internet defamation cases should be based on place where plaintiff suffered most substantial harm to reputation.*

G is a prominent Canadian businessman who also owns one of the most popular professional soccer teams in Israel. H is Israel's oldest daily newspaper, which is published in print and online. H published an article about G, which the

**Haaretz.com, Haaretz Daily Newspaper Ltd.,  
Haaretz Group, Haaretz.co.il, Shlomi Barzel  
et David Marouani** *Appelants*

c.

**Mitchell Goldhar** *Intimé*

et

**Clinique d'intérêt public et de politique  
d'internet du Canada Samuelson-Glushko**  
*Intervenante*

**RÉPERTORIÉ : HAARETZ.COM c. GOLDHAR**

**2018 CSC 28**

N° du greffe : 37202.

2017 : 29 novembre; 2018 : 6 juin.

Présents : La juge en chef McLachlin et les juges Abella,  
Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown  
et Rowe.

EN APPEL DE LA COUR D'APPEL DE  
L'ONTARIO

*Droit international privé — Choix du tribunal — Jurisdiction compétente — Forum non conveniens — Action en diffamation intentée en Ontario à l'égard de propos diffusés dans un journal israélien qui pouvaient être consultés en ligne au Canada — Requête déposée par les défendeurs pour faire suspendre l'action au motif que le tribunal ontarien n'a pas compétence ou, subsidiairement, que le tribunal ontarien devrait décliner l'exercice de sa compétence pour cause de forum non conveniens — Le lieu du délit constitue-t-il un fondement fiable à partir duquel on peut présumer l'existence d'un lien réel et substantiel entre le ressort choisi et l'objet du litige dans les affaires de diffamation sur Internet? — Dans l'affirmative, la présomption de compétence peut-elle être réfutée? — Le facteur du choix du droit applicable dans l'analyse relative au forum non conveniens en matière de diffamation sur Internet doit-il reposer sur le lieu où le demandeur a subi l'atteinte la plus substantielle à sa réputation?*

G est un homme d'affaires canadien bien connu qui est aussi propriétaire de l'une des équipes professionnelles de soccer les plus populaires en Israël. H est le plus ancien quotidien d'Israël et il est publié en version papier et en

- *Fairness clearly favoured a trial in Israel.* The motion judge focused on vindication of Goldhar’s reputation while failing to mention the burden a trial in Ontario would impose on Haaretz or the ability of a trial in Israel to achieve the vindication sought by Goldhar.
- *Enforcement favoured a trial in Israel.* The motion judge said nothing about enforcement. The only evidence before him was that Haaretz had no assets in Ontario, whereas it could be inferred that Goldhar did have assets in Israel.
- *L’équité favorisait manifestement la tenue d’un procès en Israël.* Le juge des requêtes s’est attaché au rétablissement de la réputation de Goldhar mais a omis de mentionner le fardeau qu’un procès en Ontario imposerait à Haaretz, ou le fait qu’un procès en Israël permette à Goldhar de rétablir sa réputation.
- *L’exécution du jugement militait en faveur d’un procès en Israël.* Le juge des requêtes n’a rien dit à propos de l’exécution du jugement. La seule preuve qui lui a été soumise à ce sujet établissait qu’Haaretz n’avait aucun actif en Ontario, tandis qu’on pouvait déduire que Goldhar avait des actifs en Israël.

#### IV. Issues

[19] This appeal raises the following issues and sub-issues:

1. Did the motion judge err in assuming jurisdiction?
  - (a) Is the *situs* of the tort a reliable basis on which to presume a “real and substantial connection” in Internet defamation cases?
  - (b) Under what circumstances, if any, can the presumption of jurisdiction be rebutted?
2. Did the motion judge err in finding that Israel is not a clearly more appropriate forum than Ontario? Notably, should the “most substantial harm” test rather than the *lex loci delicti* test apply to determine the applicable law in defamation actions?

#### V. Analysis

##### A. *The Scope of Goldhar’s Claim*

[20] At the outset, it is important to define the scope of Goldhar’s claim; the relevance of any given consideration to the jurisdiction *simpliciter* and *forum non conveniens* analyses is dependent on the

#### IV. Questions en litige

[19] Le présent pourvoi soulève les questions et sous-questions suivantes :

1. Le juge des requêtes a-t-il commis une erreur en se déclarant compétent?
  - a) Le lieu du délit constitue-t-il un fondement fiable à partir duquel on peut présumer l’existence d’un « lien réel et substantiel » dans les affaires de diffamation sur Internet?
  - b) Dans quelles circonstances, le cas échéant, la présomption de compétence peut-elle être réfutée?
2. Le juge des requêtes a-t-il eu tort de conclure qu’Israël n’est pas un ressort nettement plus approprié que l’Ontario? Notamment, convient-il d’appliquer le critère de « l’atteinte la plus substantielle » ou celui de la *lex loci delicti* pour déterminer le droit applicable dans les actions en diffamation?

#### V. Analyse

##### A. *La portée du recours intenté par Goldhar*

[20] Il importe d’entrée de jeu de définir la portée du recours de Goldhar; la pertinence de toute considération relative aux analyses de la simple reconnaissance de compétence et du *forum non conveniens* est

scope of the claim. In my view, a careful review of Goldhar's amended statement of claim reveals that his action was never limited to libellous statements pertaining to his Canadian business or damage to his Canadian reputation — with respect, my colleagues McLachlin C.J. and Moldaver and Gascon JJ. err by limiting the claim in this way.

[21] It is well established that the statement of claim, which in this case was amended by experienced counsel, defines the issues and informs the opposing parties of the case they have to meet (*Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 41). It frames the action for the purposes of analysing the assumption and exercise of jurisdiction.

[22] I cannot conclude from Goldhar's amended statement of claim, as my colleagues in dissent do, that Goldhar is particularly "concerned about the impact on his Canadian business reputation" or that the "sting" of libel underlying his claim relates to his reputation in Ontario (paras. 213-14). While the amended statement of claim states that he is a business owner and operator and an active community member in Toronto, it refers directly to only one of his business enterprises, Maccabi Tel Aviv, and does not even mention SmartCentres Inc. Similarly, para. 9 of his amended statement of claim, which sets out what he considers the natural and ordinary meaning of the article, fails to identify any connection to his Canadian business. Furthermore, para. 10, which lists alleged factual errors and fabrications in the article, does not identify any such errors or fabrications relating to Goldhar's Canadian business practices, but it does specifically identify statements pertaining to his management of Maccabi Tel Aviv (for example, "Goldhar does not have a long term plan for the team"). Most notably, the amended statement of claim makes no mention of the article's claim that "Goldhar's management model was imported directly from his main business interest — a partnership with Wal-Mart to operate shopping centers in Canada", even though this is the passage that is said to provide the connection between the allegedly libellous statements and Goldhar's Canadian business reputation. Finally, in describing the damage he

tributaire de la portée du recours. À mon avis, un examen attentif de la déclaration modifiée de Goldhar révèle que son action n'a jamais visé uniquement les propos diffamatoires portant sur son entreprise canadienne ou le dommage causé à sa réputation au Canada. Avec égards, mes collègues la juge en chef McLachlin et les juges Moldaver et Gascon font erreur en limitant ainsi le recours.

[21] Il est bien établi que la déclaration, qui en l'espèce a été modifiée par des avocats d'expérience, définit ce qui est en litige et informe les parties adverses de la cause qu'elles auront à contrer (*Bande indienne des Lax Kw'alaams c. Canada (Procureur général)*, 2011 CSC 56, [2011] 3 R.C.S. 535, par. 41). Ce document délimite l'action en vue de l'analyse de la déclaration et de l'exercice de la compétence.

[22] La déclaration modifiée de Goldhar ne me permet pas de conclure, comme le font mes collègues dissidents, que Goldhar se « soucie [particulièrement] de l'incidence de l'article sur sa réputation commerciale au Canada » ou que l'affront diffamatoire à la base de son recours a trait à sa réputation en Ontario (par. 213-214). Bien que la déclaration modifiée indique que Goldhar est propriétaire et exploitant d'une entreprise, de même qu'un membre actif de la communauté à Toronto, elle ne désigne directement que le Maccabi Tel Aviv comme l'une de ses entreprises et ne mentionne même pas SmartCentres Inc. De même, au par. 9 de sa déclaration modifiée, où Goldhar énonce ce qu'il considère être le sens naturel et ordinaire de l'article, il omet d'indiquer tout lien avec son entreprise canadienne. De plus, le par. 10, qui énumère les prétendues erreurs factuelles et inventions figurant dans l'article, n'identifie aucune erreur ou invention concernant les pratiques commerciales de Goldhar au Canada, mais il indique expressément les déclarations portant sur la façon dont il gère le Maccabi Tel Aviv (par exemple, [TRADUCTION] « M. Goldhar n'a aucun plan à long terme pour l'équipe »). Plus particulièrement, la déclaration modifiée ne mentionne pas l'affirmation qui figure dans l'article et selon laquelle « [l]e modèle de gestion adopté par Goldhar s'inspire directement de son principal intérêt commercial, soit un partenariat avec Wal-Mart en vue de l'exploitation de centres commerciaux au Canada », même s'il

**TAB 43**

COURT OF APPEAL FOR ONTARIO

CITATION: Hearn v. McLeod Estate, 2019 ONCA 682

DATE: 20190903

DOCKET: C65584

Lauwers, Pardu and Nordheimer JJ.A.

BETWEEN

Kevin Hearn

Plaintiff (Appellant)

and

Estate of Joseph Bertram McLeod, Deceased  
and Maslak-McLeod Gallery Inc.

Defendants (Respondents)

Matthew Fleming and Chloe Snider, for the appellant

No one appearing for the respondents

Michael Panacci for the proposed interveners

Heard: April 9, 2019

On appeal from the judgment of Justice Edward M. Morgan of the Superior Court of Justice, dated May 24, 2018, with reasons reported at 2018 ONSC 2918.

**Lauwers J.A.:**

[1] Kevin Hearn, the appellant, claimed that the respondents sold him a fake painting by the renowned Anishinaabe artist Norval Morrisseau, accompanied by a false provenance statement verifying the painting's authenticity. He claimed the return of the purchase price of \$20,000, an additional \$25,000 representing the

The Morellian analysis simply does not produce the kind of scientific, objective conclusions that its promoters claim for it. It stresses the artist's conventions, but, as leading critical theorists' caution, "conventions are by essence violable and precarious, in themselves and by the fictionality that constitutes them, even before there has been any overt transgression": Jacques Derrida, *Limited Inc.* (Northwestern University Press, 1988), p. 105.

[28] I see three errors here. The first is a breach of the rules of natural justice. In *Pfizer Co. v. Deputy Minister of National Revenue (Customs & Excise)*, [1977] 1 S.C.R. 456, the Tariff Board relied on two scientific publications that were not put into evidence or referred to at the hearing. The Supreme Court found this to be a breach of the rules of natural justice. Pigeon J. noted, at para. 18: "It is clearly contrary to those rules to rely on information obtained after the hearing was completed without disclosing it to the parties and giving them an opportunity to meet it." He added at para. 19 that this was a "grave error". In my view this principle applies to this case. See also *Cronk v. Canadian General Insurance Co.* (1995) 25 O.R. (3d) 505, at paras. 24-26, per Lacourciere J.A.

[29] The second and corollary error is with respect to the sufficiency of reasons. There is no obligation on a trial judge to accept all or any of an expert witness's evidence. But, if the evidence is to be rejected, reasons must be given for doing so, and those reasons must themselves be rooted in the evidence before the trial judge. Otherwise the trial reasons are not reasonably intelligible to the parties and cannot provide the basis for meaningful appellate review: *R. v. Sheppard*,

2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 1, 24, 28, and 55, per Binnie J.; *C.(R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para 98; and *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158, [2011] 4 F.C.R. 425, at para. 16, per Stratas J.A.

[30] The third error relates to the treatment of expert evidence. The trial judge rejected Professor Robertson's expert evidence on a contrary theory that was not put to her and on which she was not cross-examined. He drew on resources that were not in evidence but were obtained by him outside of the courtroom through research done by him or at his direction. In doing so, the trial judge stepped out of the impartiality of his position as trial judge and descended into the arena, effectively becoming the art expert posed against Professor Robertson. In the words of Doherty J.A. in *R. v. Hamilton*, 72 O.R. (3d) 1, at para. 71, the trial judge assumed "the multi-faceted role of advocate, witness, and judge". This was not appropriate: *Phillips v. Ford Motor Co. of Canada*, [1971] 2 O.R. 637, at para. 64, per Evans J.A.; *R. v. Bornyk*, 2015 BCCA 28, 366 B.C.A.C. 194, at paras. 10, 11, and 16.

[31] I note in passing that neither Professor Robertson's curriculum vitae nor her expert report were provided to this court by the appellant's counsel in the Exhibit Book or the Compendium. This oversight defeats the purpose for which a trial record is designed: *1162740 Ontario Limited v. Pingue*, 2017 ONCA 52, 135 O.R. (3d) 792, at para. 14.

**TAB 44**

**H.M.B. Holdings Limited** *Appellant*

v.

**Attorney General of Antigua and Barbuda**  
*Respondent*

**INDEXED AS: H.M.B. HOLDINGS LTD. v.  
ANTIGUA AND BARBUDA**

**2021 SCC 44**

File No.: 39130.

2021: April 20; 2021: November 4.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR  
ONTARIO

*Private international law — Foreign judgments — Reciprocal enforcement — Registration — Carrying on business — Foreign judgment awarding compensation to judgment creditor for expropriation of lands by judgment debtor — Judgment creditor successfully obtaining default judgment in British Columbia to enforce foreign judgment — Judgment creditor then applying for registration of default judgment in reciprocating jurisdiction of Ontario — Application dismissed on basis that judgment debtor not carrying on business in British Columbia — Whether judgment creditor is precluded from having default judgment registered in Ontario — Reciprocal Enforcement of Judgments Act, R.S.O. 1990, c. R.5, s. 3(b).*

Antigua and Barbuda (“Antigua”), a country comprised of several islands in the Caribbean, expropriated property owned by H.M.B. Holdings Limited (“HMB”), a private company incorporated in Antigua. Litigation ensued at the Judicial Committee of the Privy Council, and Antigua was ordered to compensate HMB for the expropriation. Years later, HMB brought a common law action in British Columbia to enforce the foreign judgment in that province. Antigua did not defend the action, and as a result, HMB obtained a default judgment. HMB then commenced an application in Ontario to enforce the British Columbia judgment by having it registered under the *Reciprocal Enforcement of Judgments Act* (“REJA”). The application judge found that ss. 3(b) and 3(g) of the REJA — which

**H.M.B. Holdings Limited** *Appelante*

c.

**Attorney General of Antigua and Barbuda**  
*Intimé*

**RÉPERTORIÉ : H.M.B. HOLDINGS LTD. c.  
ANTIGUA-ET-BARBUDA**

**2021 CSC 44**

N° du greffe : 39130.

2021 : 20 avril; 2021 : 4 novembre.

Présents : Le juge en chef Wagner et les juges Karakatsanis, Côté, Rowe et Kasirer.

EN APPEL DE LA COUR D’APPEL DE L’ONTARIO

*Droit international privé — Jugements étrangers — Exécution réciproque — Enregistrement — Exercice d’activités — Jugement étranger portant indemnisation du créancier en vertu du jugement pour l’expropriation d’un terrain par le débiteur en vertu du jugement — Obtention, par le créancier en vertu du jugement, d’un jugement par défaut en Colombie-Britannique pour faire exécuter le jugement étranger — Requête présentée ensuite par le créancier en vertu du jugement pour faire enregistrer le jugement par défaut dans le ressort accordant la réciprocité qu’est l’Ontario — Requête rejetée au motif que le débiteur en vertu du jugement n’exerçait pas ses activités en Colombie-Britannique — Le créancier en vertu du jugement est-il empêché d’obtenir l’enregistrement du jugement par défaut en Ontario? — Loi sur l’exécution réciproque des jugements, L.R.O. 1990, c. R.5, art. 3b).*

Antigua-et-Barbuda (« Antigua »), un pays constitué de plusieurs îles des Caraïbes, a exproprié une propriété appartenant à H.M.B. Holdings Limited (« HMB »), une société privée constituée en personne morale à Antigua. Des procédures judiciaires ont été engagées devant le Comité judiciaire du Conseil privé, et Antigua a été condamnée à dédommager HMB pour l’expropriation. Des années plus tard, HMB a intenté une action en common law en Colombie-Britannique pour faire exécuter le jugement étranger dans cette province. Antigua n’a pas contesté l’action et, en conséquence, HMB a obtenu un jugement par défaut. HMB a par la suite introduit une requête en Ontario en vue de faire exécuter le jugement de la Colombie-Britannique en demandant qu’il soit enregistré

jurisdiction, accompanied by a degree of business activity which is sustained for a period of time”. These factors are and always have been compelling indicia of corporate presence; as the cases cited in *Adams v. Cape Industries Plc.*, [1990] 1 Ch. 433 [Ch. Div.], at pp. 467-68, per Scott J., demonstrate, the common law has consistently found the maintenance of physical business premises to be a compelling jurisdictional factor. LeBel J. accepted this in *Van Breda* when he held that “carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there”. [Emphasis added; citations omitted; para. 85.]

[39] It should be noted that the term “carrying on business” appeared in *Van Breda* as a presumptive connecting factor in the tort context for the purposes of assumed jurisdiction. Although this Court in *Chevron* cited *Van Breda* for the meaning of that term in the context of traditional presence-based jurisdiction, it is important to remember that traditional presence-based jurisdiction is an independently sufficient ground of jurisdiction that operates alongside the assumed jurisdiction of *Van Breda* (para. 79). If the term “carrying on business” held the same meaning in both contexts, this would create overlap between the two tests (see Pitel and Rafferty, at p. 94). If a corporate defendant were carrying on business in a jurisdiction such that a plaintiff could simply serve that defendant *in juris* and establish traditional presence-based jurisdiction, it is not clear why that plaintiff would ever try to establish “carrying on business” as a mere presumptive connecting factor going to assumed jurisdiction. This suggests that “carrying on business” as it appears in *Van Breda*, as a mere presumptive connecting factor for assumed jurisdiction, may be a less onerous standard than “carrying on business” for the purpose of establishing traditional presence-based jurisdiction.

« une présence directe ou indirecte dans l’État du tribunal qui s’attribue compétence, et si elle se livre à des activités commerciales soutenues pendant un certain temps ». Ces facteurs sont et ont toujours été des indices convaincants de la présence d’une société; comme le démontrent les décisions citées dans *Adams c. Cape Industries Plc.*, [1990] 1 Ch. 433 [Ch. Div.], p. 467-468, le juge Scott, la common law considère invariablement que la tenue de locaux commerciaux constitue un facteur convaincant de compétence. Le juge LeBel l’a reconnu dans *Van Breda* lorsqu’il a conclu que « [l]’exploitation d’une entreprise exige une forme de présence effective — et non seulement virtuelle — dans le ressort en question, par exemple le fait d’y tenir un bureau ». [Je souligne; références omises; par. 85.]

[39] Il convient de noter que l’expression « exploitation d’une entreprise » est apparue dans l’arrêt *Van Breda* comme un facteur de rattachement créant une présomption dans le contexte d’une déclaration de compétence des tribunaux en matière de responsabilité civile délictuelle. Bien que, dans l’arrêt *Chevron*, notre Cour ait cité l’arrêt *Van Breda* pour cerner le sens de cette expression dans le contexte de la compétence traditionnelle fondée sur la présence, il est important de se rappeler que la compétence traditionnelle fondée sur la présence est une source de compétence suffisante et indépendante qui s’applique parallèlement à la déclaration de compétence dont il est question dans l’arrêt *Van Breda* (par. 79). Si l’expression « exploitation d’une entreprise » avait le même sens dans les deux contextes, il y aurait chevauchement entre ces deux critères (voir Pitel et Rafferty, p. 94). Si une personne morale défenderesse exploitait une entreprise dans un ressort où le demandeur pourrait se contenter de lui signifier la demande *in juris* et établir la compétence traditionnelle fondée sur la présence, on ne voit pas pourquoi ce demandeur essaierait de démontrer qu’il « exploite une entreprise » en tant que simple facteur de rattachement créant une présomption permettant au tribunal de se déclarer compétent. On peut en déduire que l’expression « exploitation d’une entreprise » qui, dans l’arrêt *Van Breda*, n’était considérée que comme un simple facteur de rattachement créant une présomption en ce qui concerne une déclaration de compétence, est peut-être une norme moins exigeante que celle de l’« exploitation d’une entreprise » lorsqu’il s’agit d’établir la compétence traditionnelle fondée sur la présence.

[40] I need not decide here whether the term “carrying on business” as it appears in *Van Breda* carries the same meaning as in the case law on traditional presence-based jurisdiction. However, it is safe to say that if the *Van Breda* standard is different, it is lower. In any event, the *Van Breda* requirements for “carrying on business” must also apply for the purposes of traditional presence-based jurisdiction. In *Chevron*, this Court recognized as much by quoting LeBel J.’s remark that “carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there”, in describing what it means to “carry on business” for the purposes of presence-based jurisdiction.

[41] *Chevron* thus provided a clear definition of “carrying on business” as part of traditional presence-based jurisdiction at common law. For the reasons given above, this informs the interpretation of s. 3(b) of the *REJA*. In sum, to determine whether a defendant is carrying on business in a jurisdiction, the court must inquire into whether it has some direct or indirect presence in the jurisdiction, accompanied by a degree of business activity that is sustained for a period of time. Whether or not a corporation is “carrying on business” is a question of fact, and in order to determine whether this definition is met, the court should consider the 10 *Adams* indicia listed above. And some kind of actual presence, whether direct or indirect, is required. A physical presence in the form of maintenance of physical premises will be compelling, and a virtual presence that falls short of an actual presence will not suffice.

[42] I am therefore unpersuaded by H.M.B.’s argument that the courts below erred in failing to interpret “carrying on business” in a “generous and liberal” manner in accordance with *Chevron*. *Chevron* itself affirms the test for carrying on business for the purposes of traditional presence-based jurisdiction.

[40] Je n’ai pas besoin de décider ici si l’expression « exploitation d’une entreprise » qui figure dans l’arrêt *Van Breda* a le même sens que celui que lui attribue la jurisprudence sur la compétence traditionnelle fondée sur la présence. Cependant, on peut affirmer sans risque de se tromper que, si la norme énoncée dans l’arrêt *Van Breda* est différente, elle est moins exigeante. Quoiqu’il en soit, les exigences fixées dans l’arrêt *Van Breda* en ce qui concerne l’« exploitation d’une entreprise » doivent également s’appliquer pour déterminer la compétence traditionnelle fondée sur la présence. C’est ce que notre Cour a reconnu dans l’arrêt *Chevron*, en reprenant les propos du juge LeBel selon lesquels « [l]’exploitation d’une entreprise exige une forme de présence effective — et non seulement virtuelle — dans le ressort en question, par exemple le fait d’y tenir un bureau », pour expliquer ce qu’il faut entendre par « exploitation d’une entreprise » pour les besoins de la compétence fondée sur la présence.

[41] L’arrêt *Chevron* propose donc une définition claire de la notion d’« exploitation d’une entreprise » dans le cadre de la compétence traditionnelle fondée sur la présence en common law. Pour les motifs que j’ai déjà exposés, cette définition est utile pour interpréter l’al. 3b) de la *LERJ*. En résumé, pour déterminer si un défendeur exploite une entreprise dans un ressort, le tribunal doit vérifier s’il a une présence directe ou indirecte dans ce ressort et s’il s’y livre à des activités commerciales soutenues pendant un certain temps. La question de savoir si une société « exploite une entreprise » est une question de fait et, pour déterminer si la société répond à cette définition, le tribunal doit tenir compte des 10 indices susmentionnés qui figurent dans l’arrêt *Adams*. Ce concept exige une forme de présence effective, qu’elle soit directe ou indirecte. Une présence physique sous la forme de la tenue d’un bureau sera un facteur convaincant et une présence virtuelle qui ne correspond pas à une présence effective ne suffira pas.

[42] Je ne suis donc pas convaincu par l’argument de H.M.B. selon lequel les juridictions inférieures ont commis une erreur en n’interprétant pas la notion d’« exercice d’activités » d’une façon « souple et libérale » conformément à l’arrêt *Chevron*. Cet arrêt confirme lui-même le critère de l’exploitation d’une

**TAB 45**

**Nevsun Resources Ltd.** *Appellant*

v.

**Gize Yebeyo Araya,  
Kesete Tekle Fshazion and  
Mihretab Yemane Tekle** *Respondents*

and

**International Human Rights Program,  
University of Toronto Faculty of Law,  
EarthRights International,  
Global Justice Clinic at New York  
University School of Law,  
Amnesty International Canada,  
International Commission of Jurists,  
Mining Association of Canada and  
MiningWatch Canada** *Interveners*

**INDEXED AS: NEVSUN RESOURCES LTD. v.  
ARAYA**

**2020 SCC 5**

File No.: 37919.

2019: January 23; 2020: February 28.

Present: Wagner C.J. and Abella, Moldaver,  
Karakatsanis, Gascon, Côté, Brown, Rowe and  
Martin JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR  
BRITISH COLUMBIA**

*Public international law — Human rights — Act of state doctrine — Customary international law — Jus cogens — Peremptory norms — Doctrine of adoption — Direct remedy for breach of customary international law — Eritrean workers commencing action against Canadian corporation in British Columbia — Workers alleging they were forced to work at mine owned by Canadian corporation in Eritrea and subjected to violent, cruel, inhuman and degrading treatment and seeking damages for breaches of customary international law prohibitions and of domestic torts — Corporation bringing motion to strike pleadings on basis of act of state doctrine and on basis that claims based on customary international law have no reasonable prospect of success — Whether act of state doctrine forms part of Canadian common law — Whether customary*

**Nevsun Resources Ltd.** *Appelante*

c.

**Gize Yebeyo Araya,  
Kesete Tekle Fshazion et  
Mihretab Yemane Tekle** *Intimés*

et

**International Human Rights Program,  
University of Toronto Faculty of Law,  
EarthRights International,  
Global Justice Clinic at New York  
University School of Law,  
Amnesty International Canada,  
Commission Internationale de Juristes,  
Association minière du Canada et  
Mines Alerte Canada** *Intervenants*

**RÉPERTORIÉ : NEVSUN RESOURCES LTD. c.  
ARAYA**

**2020 CSC 5**

N° du greffe : 37919.

2019 : 23 janvier; 2020 : 28 février.

Présents : Le juge en chef Wagner et les juges Abella,  
Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et  
Martin.

**EN APPEL DE LA COUR D'APPEL DE LA  
COLOMBIE-BRITANNIQUE**

*Droit international public — Droits de la personne — Doctrine de l'acte de gouvernement — Droit international coutumier — Jus cogens — Normes impératives — Doctrine de l'adoption — Recours direct pour violation du droit international coutumier — Action intentée par des travailleurs érythréens contre une société canadienne en Colombie-Britannique — Travailleurs alléguant qu'ils ont été contraints de travailler à une mine détenue par une société canadienne en Érythrée et qu'ils ont subi un traitement violent, cruel, inhumain et dégradant et réclamant des dommages-intérêts pour violations d'interdictions de droit international coutumier et délits de droit interne — Société présentant une demande de radiation des actes de procédure sur le fondement de la doctrine de l'acte de gouvernement et au motif que les réclamations fondées sur*

*Luis Sarabia and Steven Frankel*, for the intervener the Mining Association of Canada.

*Bruce W. Johnston, Andrew E. Cleland, Jean-Marc Lacourcière and Clara Poissant-Lespérance*, for the intervener MiningWatch Canada.

The judgment of Wagner C.J. and Abella, Karakatsanis, Gascon and Martin J.J. was delivered by

[1] ABELLA J. — This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.

[2] The process of identifying and responsively addressing breaches of international human rights law involves a variety of actors. Among them are courts, which can be asked to determine and develop the law's scope in a particular case. This is one of those cases.

[3] Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle are refugees and former Eritrean nationals. They claim that they were indefinitely conscripted through their military service into a forced labour regime where they were required to work at the Bisha mine in Eritrea and subjected to violent, cruel, inhuman and degrading treatment. The mine is owned by a Canadian company, Nevsun Resources Ltd.

[4] The Eritrean workers started these proceedings in British Columbia as a class action against Nevsun on behalf of more than 1,000 individuals who claim to have been compelled to work at the Bisha mine between 2008 and 2012. In their pleadings, the Eritrean workers sought damages for breaches of domestic

*Luis Sarabia et Steven Frankel*, pour l'intervenante l'Association minière du Canada.

*Bruce W. Johnston, Andrew E. Cleland, Jean-Marc Lacourcière et Clara Poissant-Lespérance*, pour l'intervenante Mines Alerté Canada.

Version française du jugement du juge en chef Wagner et des juges Abella, Karakatsanis, Gascon et Martin rendu par

[1] LA JUGE ABELLA — Le présent pourvoi porte sur l'application du droit international moderne des droits de la personne, le phénix qui est né des cendres de la Deuxième Guerre mondiale et qui a lancé la lutte mondiale contre les violations des droits de la personne. Ce droit visait à empêcher les violations des normes acceptées à l'échelle internationale. Ces normes ne se voulaient pas des aspirations théoriques ni des extravagances juridiques, mais bien des impératifs moraux et des nécessités juridiques. La conduite portant atteinte aux normes devait être cernée et traitée.

[2] Le processus qui consiste à cerner les violations du droit international des droits de la personne et à prendre des mesures adéquates à cet égard fait intervenir divers acteurs. Les tribunaux se retrouvent parmi ceux-ci, pouvant être appelés à établir et à faire évoluer la portée du droit dans un cas donné. Nous sommes en présence d'un tel cas.

[3] Gize Yebeyo Araya, Kesete Tekle Fshazion et Mihretab Yemane Tekle sont des réfugiés et d'anciens ressortissants érythréens. Ils affirment avoir été conscrits indéfiniment, par l'entremise de leur service militaire, dans un régime de travail forcé dans le cadre duquel ils ont dû travailler à la mine Bisha en Érythrée et ont subi un traitement violent, cruel, inhumain et dégradant. La mine appartient à une société canadienne, Nevsun Resources Ltd.

[4] Les travailleurs érythréens ont introduit la présente instance en Colombie-Britannique au moyen d'un recours collectif contre Nevsun au nom de plus de 1 000 personnes qui affirment avoir été contraintes de travailler à la mine Bisha entre 2008 et 2012. Dans leurs actes de procédure, les travailleurs érythréens

[121] The right to a remedy in the context of allegations of human rights violations was discussed by this Court in *Kazemi*, where a Canadian woman’s estate sought damages against the Islamic Republic of Iran for torture. The majority did not depart from the position in *Hape* that customary international law, including peremptory norms, are part of Canadian common law, absent express legislation to the contrary. However, it concluded that the *State Immunity Act* was the kind of express legislation that prevented a remedy against the State of Iran for the breach of the *jus cogens* prohibition against torture, which it agreed was part of domestic Canadian law. LeBel J. for the majority noted that “[w]hile rights would be illusory if there was never a way to remedy their violation, the reality is that certain rights do exist even though remedies for their violation may be limited by procedural bars” (para. 159). In effect, the majority in *Kazemi* held that the general right to a remedy was overridden by Parliament’s enactment of the *State Immunity Act*. However, the *State Immunity Act* protects “foreign states” from claims, not individuals or corporations.

[122] Unlike *Kazemi*, there is no law or other procedural bar precluding the Eritrean workers’ claims. Nor is there anything in *Kazemi* that precludes the possibility of a claim against a Canadian corporation for breaches in a foreign jurisdiction of customary international law, let alone *jus cogens*. As a result, it is not “plain and obvious” that Canadian courts cannot develop a civil remedy in domestic law for corporate violations of the customary international law norms adopted in Canadian law.

[123] Nevsun additionally argues that the harms caused by the alleged breaches of customary international law can be adequately addressed by the recognized torts of conversion, battery, “unlawful

[121] La Cour a examiné le droit à un recours dans le contexte d’allégations de violations des droits de la personne dans l’arrêt *Kazemi*, où la succession d’une Canadienne réclamait à la République islamique d’Iran des dommages-intérêts pour torture. Les juges majoritaires ne se sont pas écartés de la position adoptée dans l’arrêt *Hape*, selon laquelle le droit international coutumier, notamment les normes impératives, font partie de la common law canadienne, sauf disposition législative expresse contraire. Cependant, ils ont conclu que la *Loi sur l’immunité des États* constituait un type de loi expresse qui empêchait l’exercice d’un recours contre l’État de l’Iran pour violation de la prohibition de la torture fondée sur le *jus cogens*, qui, ils en ont convenu, faisait partie du droit interne canadien. Le juge LeBel, au nom des juges majoritaires, a souligné que « [c]ertes, les droits seraient dénués de tout contenu s’il n’existait jamais un moyen de remédier à leur violation. Toutefois, en réalité, certains droits peuvent exister même si des obstacles de nature procédurale sont susceptibles de restreindre les réparations pour leur violation » (par. 159). En effet, les juges majoritaires dans l’arrêt *Kazemi* ont conclu que la *Loi sur l’immunité des États* adoptée par le Parlement l’emportait sur le droit général à un recours. Or, la *Loi sur l’immunité des États* protège les « États étrangers » contre les poursuites — et non les particuliers ou les sociétés.

[122] Contrairement à la situation dans l’affaire *Kazemi*, aucune loi ni aucun autre obstacle de nature procédurale n’empêche les réclamations des travailleurs érythréens. Il n’y a rien non plus dans l’arrêt *Kazemi* qui écarte la possibilité qu’une réclamation soit présentée contre une société canadienne pour des violations dans un ressort étranger du droit international coutumier, et encore moins du *jus cogens*. Par conséquent, il n’est pas « évident et manifeste » que les tribunaux canadiens ne peuvent élaborer un recours civil en droit interne pour les violations par une société des normes de droit international coutumier adoptées en droit canadien.

[123] Nevsun soutient en outre qu’il est possible de remédier adéquatement aux préjudices causés par les violations alléguées du droit international coutumier au moyen des délits reconnus de détournement, voies

confinement”, conspiracy and negligence, all of which the Eritrean workers have also pleaded. In my view, it is at least arguable that the Eritrean workers’ allegations encompass conduct not captured by these existing domestic torts.

[124] Customary international law norms, like those the Eritrean workers allege were violated, are inherently different from existing domestic torts. Their character is of a more public nature than existing domestic private torts since the violation of these norms “shock[s] the conscience of humanity” (M. Cherif Bassiouni, “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*” (1996), 59 *Law & Contemp. Probs.* 63, at p. 69).

[125] Refusing to acknowledge the differences between existing domestic torts and forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, may undermine the court’s ability to adequately address the heinous nature of the harm caused by this conduct. As Professor Virgo notes, in the context of allegations of human rights violations, the symbolism reflected by the characterization or labelling of the allegations is crucial:

From the perspective of the victim . . . the fact that torture is characterised as a tort, such as battery, will matter — simply because characterising torture in this way does not necessarily reflect the seriousness of the conduct involved. In the context of violations of human rights . . . symbolism is crucial.

...

[In this context, accurately labelling the wrong is important] because the main reason why the victim wishes to commence civil proceedings will presumably be to ensure public awareness of the violation of fundamental human rights. The remedial consequence of successfully bringing a case is often, or even usually, only a secondary concern.

de fait, « séquestration », complot et négligence, qui ont également tous été invoqués par les travailleurs érythréens. À mon avis, on peut à tout le moins soutenir que les allégations des travailleurs érythréens englobent une conduite qui n’est pas visée par ces délits internes existants.

[124] Les normes de droit international coutumier, comme celles dont les travailleurs érythréens allèguent la violation, sont fondamentalement différentes des délits de droit interne existants. Elles ont un caractère plus public que les délits de droit privé interne puisque leur violation [TRADUCTION] « heurte la conscience de l’humanité » (M. Cherif Bassiouni, « International Crimes : *Jus Cogens* and *Obligatio Erga Omnes* » (1996), 59 *Law & Contemp. Probs.* 63, p. 69).

[125] Le refus de reconnaître les différences entre les délits internes existants et le travail forcé; l’esclavage; les traitements cruels, inhumains ou dégradants; et les crimes contre l’humanité pourrait miner la capacité de la cour à répondre adéquatement au caractère odieux des dommages causés par de tels actes. Comme le souligne le professeur Virgo, dans le contexte de violations alléguées des droits de la personne, le symbolisme de la qualification ou de la désignation des allégations est crucial :

[TRADUCTION] Du point de vue de la victime [. . .] le fait que la torture soit qualifiée de délit, comme le délit de voies de fait, a de l’importance — simplement parce qu’une telle qualification de la torture ne reflète pas nécessairement la gravité de la conduite reprochée. Dans le contexte des violations des droits de la personne [. . .] le symbolisme est crucial.

...

[Dans ce contexte, il est important de bien qualifier le tort causé] parce que la principale raison pour laquelle la victime souhaite introduire une instance civile est sans doute de sensibiliser l’opinion publique à la violation des droits fondamentaux de la personne. La conséquence réparatrice liée au fait d’avoir gain de cause ne constitue souvent, voire même généralement, qu’une préoccupation secondaire.

(Graham Virgo, “Characterisation, Choice of Law and Human Rights”, in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 325, at p. 335)

[126] While courts can, of course, address the extent and seriousness of harm arising from civil wrongs with tools like an award of punitive damages, these responses may be inadequate when it comes to the violation of the norms prohibiting forced labour; slavery; cruel, inhuman or degrading treatment; or crimes against humanity. The profound harm resulting from their violation is sufficiently distinct in nature from those of existing torts that, as the workers say, “[i]n the same way that torture is something more than battery, slavery is more than an amalgam of unlawful confinement, assault and unjust enrichment”. Accepting this premise, which seems to be difficult to refute conceptually, reliance on existing domestic torts may not “do justice to the specific principles that already are, or should be, in place with respect to the human rights norm” (Craig Scott, “Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms”, in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 45, at p. 62, fn. 4; see also Sandra Raponi, “Grounding a Cause of Action for Torture in Transnational Law”, in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 373; Virgo).

[127] The workers’ customary international law pleadings are broadly worded and offer several ways in which the violation of adopted norms of customary international law may potentially be compensable in domestic law. The mechanism for how these claims should proceed is a novel question that must be left to the trial judge. The claims may well be allowed to proceed based on the recognition of new nominate torts, but this is not necessarily the only possible

(Graham Virgo, « Characterisation, Choice of Law and Human Rights », dans Craig Scott, dir., *Torture as Tort : Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 325, p. 335)

[126] Bien que les tribunaux puissent, évidemment, répondre à la portée et à la gravité du préjudice découlant des fautes civiles au moyen d’outils comme les dommages-intérêts punitifs, ces réponses peuvent être inadéquates lorsqu’il s’agit de la violation de normes interdisant le travail forcé; l’esclavage; les traitements cruels, inhumains ou dégradants; ou les crimes contre l’humanité. Le préjudice profond découlant de la violation de ces normes est de nature suffisamment distincte de celle des délits existants; comme le disent les travailleurs, [TRADUCTION] « [d]e la même façon que la torture est plus que des voies de fait, l’esclavage est plus qu’un amalgame d’une séquestration, de voies de fait et d’un enrichissement injustifié ». Si on accepte cette prémisse, qui semble difficile à réfuter sur le plan conceptuel, il est possible que le fait de se fonder sur les délits de droit interne existants ne puisse pas [TRADUCTION] « rendre justice aux principes particuliers qui sont déjà en place, ou qui devraient l’être, en ce qui a trait à la norme en matière de droits de la personne (Craig Scott, « Translating Torture into Transnational Tort : Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms », dans Craig Scott, dir., *Torture as Tort : Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 45, p. 62, note 4; voir également Sandra Raponi, « Grounding a Cause of Action for Torture in Transnational Law », dans Craig Scott, dir., *Torture as Tort : Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 373; Virgo).

[127] Les actes de procédure fondés sur le droit international coutumier des travailleurs sont formulés en termes généraux, et présentent de nombreuses façons dont la violation des normes de droit international coutumier adoptées pourrait donner lieu à une compensation en droit interne. Le mécanisme relatif à la façon dont ces demandes devraient être instruites est une question inédite qui doit être laissée au juge de première instance. Il pourrait y avoir

route to resolving the Eritrean workers' claims. A compelling argument can also be made, based on their pleadings, for a direct approach recognizing that since customary international law is part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied based on a breach of customary international law.

[128] The doctrine of adoption in Canada entails that norms of customary international law are directly and automatically incorporated into Canadian law absent legislation to the contrary (Gib van Ert, "What Is Reception Law?", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 85, at p. 89). That may mean that the Eritrean workers' customary international law claims need not be converted into newly recognized categories of torts to succeed. Since these claims are based on norms that already form part of our common law, it is not "plain and obvious" to me that our domestic common law cannot recognize a direct remedy for their breach. Requiring the development of new torts to found a remedy for breaches of customary international law norms automatically incorporated into the common law may not only dilute the doctrine of adoption, it could negate its application.

[129] Effectively and justly remedying breaches of customary international law may demand an approach of a different character than a typical "private law action in the nature of a tort claim" (*Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, at para. 22, citing *Dunlea v. Attorney-General*, [2000] NZCA 84, at para. 81). The objectives associated with preventing violations of *jus cogens* and norms of customary international law are unique. A good argument can be made that appropriately remedying these violations requires different and stronger responses than

lieu de laisser les demandes suivre leur cours sur le fondement de la reconnaissance de nouveaux délits nommés, mais il ne s'agit pas nécessairement de l'unique façon de régler les réclamations des travailleurs érythréens. Une thèse convaincante peut être aussi avancée, fondée sur les actes de procédure des travailleurs, en faveur d'une approche directe reconnaissant le fait que, vu que le droit international coutumier fait partie de la common law canadienne, il peut théoriquement être remédié directement à une violation commise par une société canadienne sur la base d'une violation du droit international coutumier.

[128] Au Canada, la doctrine de l'adoption implique que les normes de droit international coutumier soient directement et automatiquement incorporées au droit canadien sauf disposition législative contraire (Gib van Ert, « Qu'est-ce que le droit de la réception? », dans Oonagh E. Fitzgerald, dir., *Règle de droit et mondialisation : Rapports entre le droit international et le droit interne* (2006), 107, p. 113). Cela peut vouloir dire que les réclamations des travailleurs érythréens en droit international coutumier n'ont pas à être converties en nouvelles catégories de délits pour être accueillies. Étant donné que ces réclamations reposent sur des normes qui font déjà partie de notre common law, il ne me semble pas « évident et manifeste » que notre common law interne ne reconnaît pas un recours direct pour leur violation. Exiger la création de nouveaux délits pour établir le fondement d'un recours à l'égard de violations des normes de droit international coutumier automatiquement incorporées à la common law pourrait non seulement avoir pour effet de diluer la doctrine de l'adoption, mais pourrait aussi en nier l'application.

[129] Remédier de façon juste et efficace aux violations du droit international coutumier peut commander une approche différente de « [l']action de droit privé de la nature d'un recours délictuel » typique (*Vancouver (Ville) c. Ward*, [2010] 2 R.C.S. 28, par. 22, citant *Dunlea c. Attorney-General*, [2000] NZCA 84, par. 81). Les objectifs associés à la prévention des violations de *jus cogens* et des normes de droit international coutumier sont uniques. On peut soutenir que le fait de remédier comme il se doit à ces violations exige des réponses différentes et plus

typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.

[130] As Professor Koh wrote about civil remedies for terrorism:

Whenever a victim of a terrorist attack obtains a civil judgment in a United States court, that judgment promotes two distinct sets of objectives: The objectives of traditional tort law and the objectives of public international law. A judgment awarding compensatory and punitive damages to a victim of terrorism serves the twin objectives of traditional tort law, compensation and deterrence. At the same time, the judgment promotes the objectives of public international law by furthering the development of an international rule of law condemning terrorism. By issuing an opinion and judgment finding liability, the United States federal court adds its voice to others in the international community collectively condemning terrorism as an illegitimate means of promoting individual and sovereign ends.

(Harold Hongju Koh, “Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation” (2016), 50 *Tex. Int’l L.J.* 661, at p. 675)

[131] This proceeding is still at a preliminary stage and it will ultimately be for the trial judge to consider whether the facts of this case justify findings of breaches of customary international law and, if so, what remedies are appropriate. These are complex questions but, as Wilson J. noted in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959:

The fact that a pleading reveals “an arguable, difficult or important point of law” cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult

rigoureuses que les actions habituelles en matière de responsabilité délictuelle, compte tenu du caractère public et de l’importance des droits violés en jeu, de la gravité du manquement à ceux-ci, de l’incidence sur les objectifs internes et mondiaux en matière de droits et de la nécessité de créer un effet dissuasif à l’égard de toute violation ultérieure.

[130] Comme l’a écrit le professeur Koh au sujet des recours civils pour terrorisme :

[TRADUCTION] Chaque fois qu’une victime d’un attentat terroriste obtient un jugement civil devant un tribunal américain, ce jugement favorise l’atteinte de deux types d’objectifs distincts : les objectifs du droit de la responsabilité civile délictuelle traditionnel et les objectifs du droit international public. Le jugement accordant des dommages-intérêts compensatoires et punitifs à une victime de terrorisme remplit le double objectif du droit de la responsabilité civile délictuelle traditionnel, soit l’indemnisation et la dissuasion. Parallèlement, le jugement contribue à l’atteinte des objectifs du droit international public en favorisant l’élaboration d’une règle de droit international condamnant le terrorisme. En rendant une opinion et un jugement concluant à l’existence d’une responsabilité, la cour fédérale des États-Unis ajoute sa voix à celle des autres membres de la communauté internationale condamnant collectivement le terrorisme comme un moyen illégitime de parvenir à des fins individuelles et souveraines.

(Harold Hongju Koh, « Civil Remedies for Uncivil Wrongs : Combatting Terrorism through Transnational Public Law Litigation » (2016), 50 *Tex. Int’l L.J.* 661, p. 675)

[131] La présente instance est encore à un stade préliminaire, et il appartiendra en définitive au juge de première instance de se demander si les faits de la présente affaire justifient de conclure à des violations du droit international coutumier et, dans l’affirmative, quels sont les recours appropriés. Il s’agit de questions complexes, mais comme l’a souligné le juge Wilson dans *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959 :

Ce n’est pas parce qu’un acte de procédure révèle [TRADUCTION] « une question de droit contestable, difficile ou importante » que l’on peut radier certaines parties de la déclaration. Certes, j’irais jusqu’à dire que, lorsqu’une

and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law . . . will continue to evolve to meet the legal challenges that arise in our modern industrial society. [pp. 990-91]

[132] Customary international law is part of Canadian law. Nevsun is a company bound by Canadian law. It is not “plain and obvious” to me that the Eritrean workers’ claims against Nevsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed.

[133] I would dismiss the appeal with costs.

The following are the reasons delivered by

BROWN AND ROWE JJ. (dissenting in part) —

### I. Introduction

[134] At the British Columbia Supreme Court, Nevsun Resources Ltd. applied to strike 67 paragraphs of the Eritrean workers’ notice of civil claim (“NOCC”). The chambers judge dismissed Nevsun’s application, holding that the claim was not bound to fail (2016 BCSC 1856, 408 D.L.R. (4th) 383). His decision was upheld on appeal (2017 BCCA 401, 4 B.C.L.R. (6th) 91). The majority would also uphold the dismissal of Nevsun’s application to strike the pleadings of the workers.

[135] We would allow Nevsun’s appeal in part. We agree with the majority that the dismissal of Nevsun’s application should be upheld as it regards the foreign act of state doctrine, and we concur in the majority reasons from paras. 27 to 59. We would, however, allow Nevsun’s appeal on the matter of the use of customary international law in creating tort liability. As we will explain, we part ways from the majority on this issue in several respects: the characterization

déclaration révèle une question de droit difficile et importante, il peut fort bien être capital que l’action puisse suivre son cours. Ce n’est que de cette façon que nous pouvons nous assurer que la common law [. . .] v[a] continuer à évoluer pour répondre aux contestations judiciaires qui se présentent dans notre société industrielle moderne. [p. 990-991]

[132] Le droit international coutumier fait partie du droit canadien. Nevsun est une société assujettie au droit canadien. Il ne me semble pas « évident et manifeste » que les réclamations des travailleurs érythréens contre Nevsun fondées sur des violations du droit international coutumier sont vouées à l’échec. En conséquence, ces réclamations devraient suivre leur cours.

[133] Je suis d’avis de rejeter le pourvoi avec dépens.

Version française des motifs rendus par

LES JUGES BROWN ET ROWE (dissidents en partie) —

### I. Introduction

[134] Devant la Cour suprême de la Colombie-Britannique, Nevsun Resources Ltd. a sollicité la radiation de 67 paragraphes de l’avis de poursuite civile des travailleurs érythréens. Le juge en cabinet a rejeté la requête de Nevsun, estimant que la demande des travailleurs n’était pas vouée à l’échec (2016 BCSC 1856, 408 D.L.R. (4th) 383). Sa décision a été confirmée en appel (2017 BCCA 401, 4 B.C.L.R. (6th) 91). Les juges majoritaires confirmeraient eux aussi le rejet de la requête présentée par Nevsun pour faire radier les actes de procédure des travailleurs.

[135] Nous accueillerions le pourvoi de Nevsun en partie. Nous sommes d’accord avec les juges majoritaires pour dire qu’il y a lieu de confirmer le rejet de la requête de Nevsun en ce qui concerne la doctrine de l’acte de gouvernement étranger, et nous souscrivons aux motifs exposés par les juges majoritaires du par. 27 au par. 59. Nous ferions toutefois droit au pourvoi de Nevsun sur la question du recours au droit international coutumier dans la création



**TAB 46**

Young v. Tyco International of Canada Ltd. et al.

[Indexed as: Young v. Tyco International of Canada Ltd.]

92 O.R. (3d) 161

Court of Appeal for Ontario,  
Laskin, Simmons and Juriansz JJ.A.  
October 17, 2008

Conflict of laws -- Forum conveniens -- Plaintiff bringing wrongful dismissal action in Ontario after being dismissed in Indiana -- Plaintiff claiming that his employment in Indiana was temporary and was governed by Ontario agreement -- Defendants claiming that Ontario agreement was superseded by plaintiff's acceptance of permanent employment in Indiana -- Defendants bringing motion to stay action on ground that Ontario was forum non conveniens -- Motion judge erring in analyzing forum non conveniens factors in light of his acceptance of defendants' version of which agreement governed -- Record disclosing reasonable evidentiary basis for plaintiff's claim that Ontario agreement governed -- Proper approach being to analyze forum non conveniens factors by accepting that claim -- Record not clearly establishing that Indiana was more appropriate forum.

The defendants were related corporations. The plaintiff was employed by one of the defendants in Ontario for eight years. When his position as general manager disappeared because of downsizing, he and his Ontario boss agreed that he would perform temporary assignments in North America until a permanent position became available at another plant in Canada (the "2004 agreement"). While working at a plant in Indiana, the plaintiff experienced a number of grand mal seizures. He was fired for sexual harassment. The plaintiff brought an

intervene only if the motion judge errs in principle, misapprehends or fails to take account of material evidence, or reaches an unreasonable decision.

[28] Three principles should guide the motion judge's exercise of discretion. The first principle is that, on a forum non conveniens motion, the standard to displace the plaintiff's chosen jurisdiction is high. Before Ontario motion judges decline jurisdiction, "the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff": see *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, [1993] S.C.J. No. 34, at para. 33, per Sopinka J.

[29] The second principle is that the balancing of the relevant factors should aim to achieve the twin goals of efficiency and justice. Ritchie J. made this point 30 years ago in *Antares Shipping Corp. v. Capricorn (The)*, [1977] 2 S.C.R. 422, [1976] S.C.J. No. 79, at p. 448 S.C.R.:

In my view the overriding consideration which must guide the Court in exercising its discretion by refusing to grant such an application as this must, however, be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice.

[30] More recently, in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, [1993] S.C.J. No. 125, at para. 59, La Forest J. reiterated this principle when he said that the court's exercise of its discretion to decline jurisdiction must be guided by the mandates of "order and fairness, not a mechanical counting of contacts or connections". In other words, the motion judge's decision whether to decline jurisdiction turns not only on efficiency or convenience; it also turns on fairness or justice to the parties.

[31] The third principle is that because a forum non conveniens motion typically is brought early in the proceedings, the motion judge should adopt a prudential, not an aggressive, approach to fact finding. As Perell J. said in [page169] *Tisi v. Cornell Trading Inc.*, [2006] O.J. No.

3468, 2006 CanLII 29665 (S.C.J.), at para. 10, wherever possible the motion judge should not "make findings of fact about fundamental issues in the action that ought to be resolved at a trial". Of course, the motion judge should not determine the merits of the lawsuit: see *Incorporated Broadcasters*, at para. 54. Even beyond that, however, the motion judge should avoid drawing conclusions or making findings on important factual or legal disputes relating to the merits.

[32] Often, the motion judge will be faced with two competing versions of facts critical to the dispute: the plaintiff's version and the defendant's version. However, the motion judge may still be able to resolve the *forum non conveniens* issue without evaluating the relative evidentiary strength of these versions. For instance, the judge may be able to decide whether there is another clearly more convenient forum by relying exclusively on uncontested or agreed-upon facts: see, e.g., *Tisi*, at para. 10.

[33] But, on some motions -- and this is one of them -- the efficiency and fairness considerations at the heart of the *forum non conveniens* test will be tied inextricably to the factual issues in dispute. On these motions, the motion judge will have no choice but to address the competing versions put forward by the parties. In doing so, the motion judge should accept the plaintiff's version as long as it has a reasonable basis in the record. Accepting the plaintiff's version where warranted should not inhibit the motion judge from assessing all the evidence in the record and finding facts regarding the *forum non conveniens* factors themselves. Where the evidence is disputed the party relying on a fact supporting the application of a factor in its favour will bear the evidential burden of establishing that fact: see *Frymer v. Brettschneider* (1994), 19 O.R. (3d) 60, [1994] O.J. No. 1411 (C.A.), at para. 60.

[34] However, the important point is that at this preliminary stage of the action, the motion judge's assessment and weighing of the *forum non conveniens* factors should be based on the plaintiff's claim if it has a reasonable basis in the record, not on the defendant's defence to that claim. This approach

makes sense to me because the ultimate question is whether an Ontario court should take jurisdiction over the plaintiff's claim.

[35] My colleague, Rosenberg J.A., adopted this approach in the Incorporated Broadcasters case. There, the plaintiffs (appellants) were minority shareholders of a Manitoba corporation. The majority shareholder was a federally incorporated company. The plaintiffs brought an action in Ontario against the majority shareholder and related entities seeking an oppression remedy under the Canada Business Corporations Act, R.S.C. 1985, c. C-44. [page170] The defendants moved for a stay, arguing, among other things, that Manitoba, not Ontario, was the convenient forum.

[36] The motion judge granted the stay. He concluded that the lawsuit was about the internal management of a Manitoba corporation, and only a Manitoba court could give an oppression remedy under that province's Corporations Act, C.C.S.M. c. C225.

[37] Although this court upheld the stay, Rosenberg J.A. disagreed with the motion judge's approach. He noted that the plaintiffs were seeking an oppression remedy under the federal statute, not under the provincial statute. In his view, they were entitled to have the forum non conveniens issue decided on the basis of their claim. He wrote, at para. 54:

The appellants do not seek an oppression remedy under the Manitoba Corporations Act. They seek remedies under the CBCA. In my view, the appellants are entitled to have the jurisdiction and convenient forum issues determined on that basis. The motions judge may be right in his interpretation of the Manitoba and federal legislation, in which case the appellants' action will fail, but it seems to me that is a question to be determined at another time either under a Rule 20 or 21 motion or at trial. The merits of the claim should not, in my view, be decided at this preliminary stage.

(Footnote omitted)

And, at para. 57:



**TAB 47**

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Garcia v. Tahoe Resources Inc.*,  
2017 BCCA 39

Date: 20170126  
Docket: CA43295

Between:

**Adolfo Agustin Garcia, Luis Fernando Garcia Monroy,  
Erick Fernando Castillo Pérez, Artemio Humberto Castillo Herrera,  
Wilmer Francisco Pérez Martinez, Noé Aguilar Castillo, and  
Misael Eberto Martinez Sasvin**

Appellants  
(Plaintiffs)

And

**Tahoe Resources Inc.**

Respondent  
(Defendant)

And

**Amnesty International Canada**

Intervenor

Before: The Honourable Mr. Justice Groberman  
The Honourable Madam Justice Garson  
The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated  
November 9, 2015 (*Garcia v. Tahoe Resources Inc.*, 2015 BCSC 2045,  
Vancouver Docket S144726).

Counsel for the Appellants:

J. Fiorante, Q.C.  
R. Mogerman  
J. Winstanely

Counsel for the Respondent:

P. Reardon  
A. Sandhu  
L. Yang

Intervenors, Amnesty International Canada:

P. Champ  
J. Klinck

says that there are “virtually no reported cases” in which Guatemalan individuals have sued a foreign corporation in tort.

[103] Tahoe relies on the evidence of Mr. Bosque for the proposition that the kind of corruption addressed by the appellants’ experts is anecdotal and inapplicable to this kind of case.

[104] Although Mr. Bosque does not disagree that tort actions against foreign corporations are extremely uncommon in Guatemala, he explicitly disagrees with Ms. Zardetto’s opinion regarding corruption. He says that Guatemala has a functioning civil justice system and that the appellants “can be assured of a fair and impartial proceeding in Guatemala against Tahoe as any plaintiff can be in a Guatemalan court of law”. He estimates that a civil case may take 4–6 years from the time the claim is brought to the time the Court of Appeals releases its decision. As I understand his response to Ms. Zardetto’s description of the need for the CICIG, he suggests that corrupt judges are few in number.

[105] Tahoe characterizes the appellants’ expert evidence of corruption as anecdotal, not systemic. Tahoe says that courts should, as the judge did, reject such limited anecdotal evidence as a ground for refusing to recognize comity: *Standard Chartered Bank (Hong Kong) Ltd v. Independent Power Tanzania Ltd*, [2015] E.W.H.C. 1640 (Comm.) at para. 174.

[106] The appellants say that these expert opinions should have led the judge to conclude that, despite reforms, systemic weaknesses in the Guatemalan judicial system persist, and impunity for human rights violations remains a current and pervasive feature.

[107] The intervenor, Amnesty International Canada, notes that the context of this case is important. It disagrees with the judge’s characterization of the case as a personal injury case. Amnesty emphasizes that the context of this claim involves a transnational company embroiled in human rights violations. I do not understand Amnesty to disagree that this is a tort claim, nor to suggest international laws should

govern. I understand it simply to contend that, in considering the risk of not receiving a fair trial, the context of the dispute should be taken into consideration.

[108] The judge's analysis on this question of corruption in the Guatemalan legal system is found at paras. 65-66 of her reasons for judgment (set out above). She determined that the evidence of corruption referred to in the expert reports was relevant to criminal prosecutions against state officials and organized crime syndicates but not to personal injury claims such as the one before her. The judge accepted the appellants' expert evidence showing that "Guatemala has some problems with its legal system", but she concluded that Guatemala's justice system has been undergoing positive reform since the early 2000s and that "it functions in a meaningful way".

[109] I agree with the appellants and the intervenor that in characterizing the appellants' claim as a personal injury case, the judge was insufficiently attentive to the context in which the conflict arose. This claim is not akin to a traffic accident. Rather, it arose in a highly politicized environment surrounding the government's permitting of a large foreign-owned mining operation in rural Guatemala. The protest that led to the battery at issue in this case was not an isolated occurrence, as I have mentioned above. However, I am sensitive to Tahoe's submission that the expert evidence is anecdotal and does not establish specific risks of corruption. I agree that the appellants' expert evidence is of a general nature. The appellants have not produced detailed evidence showing instances where the Guatemalan judiciary has been corrupted by the power of foreign corporations. Indeed, a key point of the appellants' evidence is that tort cases between individuals and transnational corporations are virtually unknown in Guatemala. While it is logical to infer that, in a country that has significant issues with judicial independence, there is an increased risk of corruption in the politicized context of this case, doing so is a somewhat speculative exercise.

[110] In the UK and Canadian case authorities put before the judge where corruption was a determinative factor in the *forum non conveniens* analysis, detailed evidence was relied upon by the courts.

[111] In *889457 Alberta Inc v. Katanga Mining Ltd*, [2008] E.W.H.C. 2679 (Comm.), the judge concluded that the Democratic Republic of Congo (“DRC”) was not an available forum for the dispute because the evidence established that the normal infrastructure of a justice system did not exist there. The judge also found that even if the DRC was an available forum, he would have concluded that it was not the more appropriate forum because there was a real risk of corruption in the DRC judiciary. The judge based this conclusion on expert evidence which drew on “respected, independent and authoritative sources”. These sources included reports of various organizations such as: the Foreign Commonwealth Office; the Border and Immigration Agency of the Home Office; the Special Rapporteur to the UN General Assembly on the Independence of Judges and Lawyers; the US State Department; Transparency International; and the Global Witness and Human Rights Watch.

[112] In *Norex Petroleum Limited v. Chubb Insurance Company of Canada*, 2008 ABQB 442, the judge found that there was a risk the appellants would not obtain justice in Russian courts. The appellants’ expert evidence was that one of the defendant corporations was controlled by a powerful Russian oligarch. This same Russian oligarch had been a defendant in a recent English case where the court had declined to grant a stay in favour of the Russian forum because there was a risk that this oligarch would improperly influence the Russian proceedings.

[113] In contrast to the above cases, the expert evidence provided by Tahoe is less detailed and does not point to any instance where Tahoe or any other foreign corporation improperly influenced the Guatemalan judiciary. It does, however, show that corruption in the Guatemalan justice system is widespread and Guatemala does not have normative structures in place to ensure judicial independence.

### ***c. Legal Test for Risk of Unfairness in Foreign Judiciary***

[114] The test the judge applied was whether the foreign court was “capable of providing justice”. The judge concluded that to hold otherwise would be to ignore the principles of comity (at para. 105).

[115] The appellants say that the judge erred in describing the legal test. The appellants submit – and in oral submissions, Tahoe concedes – that the correct test is whether there is a real risk of an unfair process in the foreign court: *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd* (2011), [2012] 1 W.L.R. 1804 at 1828. In their factum, the appellants say:

39. The Supreme Court of Canada did not specifically formulate a test of fairness in *Van Breda*. UK courts considering this question have consistently held that an action in the English courts should not be stayed where there is a real risk of an unfair process in the foreign court. In *AK Investment* the Privy Council expressly rejected the proposition that the plaintiff must establish with certainty that justice would not be done in the foreign court in order to resist a stay of proceedings:

In *The Abidin Daver* [1984] AC 398, at 411, Lord Diplock said that the “possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained” and gave some examples, none of which is close to this case. He went on to say that a plaintiff in an English action seeking to resist a stay (that being a stay case) upon the ground that “even-handed justice may not be done to him in that particular foreign jurisdiction, must assert this candidly and support his allegations with positive and cogent evidence.” That was not a case in which this question arose for decision, but it is clear that Lord Diplock was speaking of evidence of risk, and that he was not requiring a higher standard, that justice would not be done.

The better view is that, depending on the circumstances as a whole, the burden can be satisfied by showing that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption. Of course, if it can be shown that justice “will not” be obtained that will weigh more heavily in the exercise of the discretion in the light of all other circumstances.

[Emphasis added.]

[116] The intervenor, Amnesty International Canada, endorses the *AK Investments* “real risk” articulation of the test.

[117] In considering whether the judge applied the correct legal test, I must consider the differences between the English and Canadian approaches to the *forum non conveniens* analysis.

[118] In England, a defendant must establish that its proposed alternate forum is more appropriate; if this burden is met, then a stay will ordinarily be granted *unless* the plaintiff can establish other circumstances which make the granting of a stay adverse to the interests of justice: *Spiliada Maritime Corp v. Cansulex Ltd* (1986), [1987] A.C. 460 at 478. One such circumstance is the real risk that the plaintiff will not obtain justice in the alternate forum: *AK Investment* at 1828. Consequently, in the English application of the *forum non conveniens* analysis, consideration of corruption and injustice in the alternate forum comes at a secondary stage with a reverse onus on the plaintiff to show that granting a stay would be adverse to the interests of justice.

[119] By contrast, the Canadian jurisprudence reflects a more unified approach to the application of the *forum non conveniens* analysis. Writing for the Court in *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 919-20, Sopinka J. said:

In my view there is no reason in principle why the loss of juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identifying the appropriate forum. The existence of two conditions is based on the historical development of the rule in England which started with two branches at a time when oppression to the defendant and injustice to the plaintiff were the dual bases for granting or refusing a stay. The law in England has evolved by reworking a passage from the reasons of Scott J. in *St. Pierre v. South American Stores (Gath & Chaves), Ltd.*, [1936] 1 K.B. 382, which contained two conditions. In its original formulation the second condition required the court to ensure that there was no injustice to the plaintiff in granting the stay. No doubt this was because the oppression test concentrated largely on the effects on the defendant of being subjected to a trial in England. When the first condition moved to an examination of all the factors that are designed to identify the natural forum, it seems to me that any juridical advantages to the plaintiff or defendant should have been considered one of the factors to be taken into account. The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other

hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.

[Emphasis added.]

[120] Writing for the Court in *Van Breda*, LeBel J. affirmed that *Amchem* provided the structure for the Canadian application of the *forum non conveniens* analysis and described the application as a weighing of “all relevant concerns and factors” (at paras. 104, 109). Thus, the Canadian approach to *forum non conveniens* is not a two-stage analysis as in England. All factors and concerns must be weighed together in one stage with the overall burden on the defendant to establish that the proposed alternate forum “is in a better position to dispose fairly and efficiently of the litigation”: *Van Breda* at para. 109.

[121] Given the differences between the English and Canadian applications of the *forum non conveniens* analysis, I find it unhelpful to frame the issue as whether the judge applied the correct legal test for assessing evidence of corruption and injustice. It is more appropriate to frame the issue as whether the judge correctly defined a factor which she was required to consider in the overall *forum non conveniens* analysis. In other words, should the judge have considered the “capability” of the alternate forum to provide justice, or should she have considered the “likelihood” that the alternate forum would provide justice (i.e., whether there was a real risk that justice would not be done)?

[122] The judge’s approach to the analysis reflects the English approach. Though the judge addressed the corruption evidence under the *CJPTA* s. 11(2)(a) “comparative convenience” factor, the judge’s reasoning shows that she viewed the question of whether the appellants could obtain justice in Guatemala as a secondary stage in the analysis. At para. 64 of her reasons, she said:

...As stated in *Connelly*, where the *forum non conveniens* analysis points to a clearly more appropriate forum, then the plaintiff must take the forum as he finds it even if it is in certain respects less advantageous to him unless he

can establish that substantial justice cannot be done in the appropriate forum.

[Emphasis added.]

[123] In my view, the judge erred in considering the issue of corruption and injustice in the Guatemalan judiciary as a secondary stage in the analysis with the burden on the appellants to rebut her *prima facie* determination that Guatemala was the more appropriate forum. In addition, the judge erred in defining the question as whether Guatemalan courts were “capable” of providing justice.

[124] There is no binding authority on this Court concerning the correct question to ask when considering evidence of corruption and injustice in a defendant’s proposed alternate forum. In light of the fact that the application of *forum non conveniens* focusses on whether an alternate forum is better equipped than Canada to dispose of the litigation fairly and efficiently, I find that it is inadequate to ask whether the alternate forum is “capable” of providing justice. On the other hand, the principle of comity requires that Canadian courts be cautious in determining that a foreign court is unlikely to provide justice. The “real risk” test articulated in *AK Investment* was formulated with these considerations in mind. Though the English analysis is structured differently, as I have noted above, I find the “real risk” standard helpful and I would adopt it. Where a plaintiff presents evidence of corruption and injustice in the defendant’s proposed alternate forum, the court must ask whether the evidence shows a real risk that the alternate forum will not provide justice. I note that two lower court decisions in Canada have considered the real risk that justice will not be done in the alternate forum when applying *forum non conveniens* : see *Norex Petroleum Limited v. Chubb Insurance Company of Canada*, 2008 ABQB 442 at paras. 115-116; *Sistem Mühendislik İnşaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic*, 2012 ONSC 4351 at para. 71.

[125] I am mindful of the fact that the evidentiary standard to establish “real risk” is a high bar in England. As Tahoe points out, sweeping, generalized evidence of corruption in the alternate forum does not meet that standard: *Ferrexpo AG v. Gilson Investments Ltd*, [2012] E.W.H.C. 64 (Comm.); *Mengiste v. Endowment Fund for*

*the Rehabilitation of Tigray*, [2013] E.W.H.C. 599 (Ch.). In the two-stage English application of the *forum non conveniens* analysis, it is necessary for the plaintiff to satisfy a high evidentiary threshold at the second stage because, at the first stage, the court made a finding that the alternate forum is *prima facie* more appropriate for the dispute. In Canada, however, it is not necessary to stipulate a specific evidentiary threshold for the risk of unfairness since it is just one factor of many to weigh in a unified *forum non conveniens* analysis. The quality of evidence regarding the risk of unfairness should dictate the weight that is attached to that factor. Broad assertions of corruption should be given limited weight, whereas detailed and cogent evidence of corruption should attract significant weight.

[126] In my view, the judge erred by considering the risk of unfairness as a secondary stage in the *forum non conveniens* analysis and by defining the question as whether Guatemala was “capable” of providing justice. As a result, she gave insufficient weight to the evidence of weakness and lack of independence in the Guatemalan justice system in her discretionary weighing of the factors, particularly given the context in which the alleged shooting occurred. The evidence of weakness in the Guatemalan justice system ought not to be ignored. A discretionary decision may be reversed where the lower court gives no, or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3. Based on the judge’s errors, it is open to this Court to reverse her discretionary decision. Though the appellants’ evidence regarding the risk of unfairness in Guatemala is of a general nature, I am of the view that the evidence factors against finding Guatemala is clearly the more appropriate forum. I place moderate weight on this factor given the quality of the appellants’ evidence.

#### ***v. Conclusion Regarding Stand-alone Civil Suit***

[127] As LeBel J. said in *Breeden*, the *forum non conveniens* analysis does not require that all factors point to the defendant’s proposed alternate forum, but it does require that the defendant establish that the alternate forum is *clearly* more appropriate. In this case, the judge found that Tahoe had established that Guatemala was clearly the more appropriate forum. However, in my view, the three

factors discussed above weigh against such a finding with regards to the stand-alone civil suit. The judge erred in finding that these three factors did not weigh against the suitability of Guatemala. The first factor is the limited discovery procedures available to the appellants in Guatemala; the second is the marked uncertainty as to how the expiration of the limitation period will be treated by Guatemalan courts; and the third is the real risk that the appellants will not obtain justice in Guatemala given the context of the dispute and the evidence of endemic corruption in the Guatemalan judiciary.

[128] I conclude that the judge did not give adequate consideration to the difficulties the appellants will face in bringing suit against Tahoe given the limited discovery procedures available in Guatemala. This factor weighs against a finding that Guatemala is the more appropriate forum.

[129] I find that the judge erred by concluding that the expiration of the limitation period for bringing a civil suit in Guatemala would not affect the appellants' claim. The expert evidence does not support such a conclusion. In my view, the uncertainty occasioned by the expiration of the limitation period is a juridical advantage factor that weighs heavily against a conclusion that Guatemala is the more appropriate forum. This is a significant factor because it casts doubt on whether the appellants will be able to advance a claim against Tahoe in Guatemala at all.

[130] I conclude that the judge erred by ignoring the context of this dispute and placing insufficient weight on the risk that the appellants will not receive a fair trial in Guatemala. That risk should not be ignored. In reaching this conclusion, I make no general pronouncement on Guatemala's legal system. Rather, I simply conclude that there is some measurable risk that the appellants will encounter difficulty in receiving a fair trial against a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state. This factor points away from Guatemala as the more appropriate forum.

[131] In the result, I conclude the judge erred in finding that Tahoe had established that Guatemala was clearly a more appropriate forum than British Columbia for adjudication of the appellants' claims.

**VIII. Disposition**

[132] I would admit the new evidence concerning the criminal proceedings against Rotondo, but I would not admit the new evidence concerning judicial corruption. I would allow the appeal and dismiss Tahoe's application for a stay of the British Columbia proceeding.

"The Honourable Madam Justice Garson"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Dickson"

**TAB 48**

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT KINGS BENCH**  
**Clive Sheldon KC sitting as a Deputy High Court Judge**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Friday 13<sup>th</sup> December 2024

**Before :**

**SIR GEOFFREY VOS, MASTER OF THE ROLLS**  
**LORD JUSTICE POPPLEWELL**  
**&**  
**LORD JUSTICE WARBY**  
-----

**Between :**

**Dhan Kumar Limbu & others**

**Claimants**  
**Appellants**

**- and -**

**(1) Dyson Technology Limited**  
**(2) Dyson Limited**  
**(3) Dyson Manufacturing Sdn Bhd**  
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**Defendants**  
**Respondents**

**Marie Louise Kinsler KC, Edward Craven & Thomas Fairclough** (instructed by Leigh Day) for the **Appellants**

**Charles Gibson KC, Adam Heppinstall KC & Freya Foster** (instructed by Baker & McKenzie LLP) for the **Respondents**

Hearing dates: 26<sup>th</sup> & 27<sup>th</sup> November 2024  
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**LORD JUSTICE POPPLEWELL:****Introduction**

1. This appeal concerns Nepalese and Bangladeshi migrant workers who have brought claims against three companies in the well-known Dyson group, alleging that they were trafficked to Malaysia and there subjected to conditions of forced labour, exploitative and abusive working and living conditions, and in the case of some of them, detention, torture and beating, in the course of manufacturing components and parts in the supply chain for the Dyson group. It is not about whether the claims are made out (it is accepted that they have a real prospect of success), but rather whether England or Malaysia is the appropriate forum in which the claims can and/or should be determined. The applicable principles are those established in the seminal decision of the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, and neither side suggested otherwise.
2. The case is a mixed case involving both service in and service out. The first and second defendants ('D1' and 'D2' or collectively 'Dyson UK') are English companies, which were served as of right here at their place of business, and sought a stay on *forum non conveniens* grounds. The third defendant ('D3' or 'Dyson Malaysia') is a Malaysian company, which was served pursuant to the grant of permission to serve out by Master Gidden as a necessary and proper party, pursuant to CPR PD6B para 3.1(3), which D3 sought to set aside on the *forum non conveniens* grounds that England was not the proper place in which to bring the claim (CPR 6.37(3)).
3. The judge below, Clive Sheldon KC, as he then was, sitting as a Deputy High Court Judge ('the Judge') conducted a hearing over three days in July 2023 with very extensive evidence served on both sides. He concluded that Malaysia was the more appropriate forum for the claims to be heard and that there was no real risk of the claimants being unable to access justice there. The claimants appeal on both aspects of his decision.
4. Such a decision involves the judge considering a range of different factors which may point to one or other jurisdiction as more appropriate, and evaluating the written evidence. That is an exercise in which views may reasonably differ, both in assessing the individual aspects of the evidence, and in assessing the relative weighting of the various factors. The principles applicable on an appeal by way of review from the exercise of such an evaluative assessment are well-established. Absent some procedural unfairness or irregularity, an

appeal court will only interfere where the lower court has made an error of principle, such as taking into account irrelevant matters or failing to take into account relevant matters, or has reached a conclusion which exceeds the generous ambit within which reasonable disagreement is possible and so is plainly wrong: see for example *Carroll v Chief Constable of Greater Manchester Police* [2017] EWCA Civ 1992 [2018] 4 WLR 32 at [42(13)]; *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 423, per Males LJ at [4]. Where such interference is justified, the court may make its own evaluative assessment afresh.

### The parties

5. The twenty-four claimants in this action are all nationals of Nepal or Bangladesh (or in one case the personal representative of the estate of such a national), who at various times between 2011 and 2022 were recruited from their home country and transported as migrant workers to two factories in Johor Bahru, a city at the southern end of the Malaysian Peninsular. Most worked at a factory operated by ATA Industrial (M) Sdn Bhd ('ATA'); two worked at the factory of a sister company, Jabco Filter System Sdn Bhd ('Jabco'). Nothing turns on the distinction between ATA and Jabco for the purposes of the present appeal and I will refer to them both simply as 'ATA/Jabco'. The claimants lived in associated accommodation provided by ATA/Jabco nearby. ATA/Jabco are not parties to the action, but the defendants have indicated an intention to join them as necessary and proper parties should the appeal succeed.
6. All but six of the claimants have since returned to their native countries. Five remain in Malaysia. One is in the United Arab Emirates. All are extremely impoverished and speak little or no English or Malay.
7. The defendants are three companies within the Dyson group of technology and manufacturing companies, which has a worldwide turnover measured in billions of pounds. D1 and D2 were incorporated in England (in 1985 and 1991 respectively), and their principal place of business has been in England at all times since their incorporation. D1 and D2 operate the Dyson group website. The group website identifies D1 as the group's UK trading company. D1 and D2 have at all material times operated from Dyson's UK office in Malmesbury, Wiltshire, which was the headquarters for the whole Dyson group until late 2019 (i.e. for the majority of the period covered by the claimants' claims). In late

2019, the Dyson group chose to move its corporate head office to Singapore. However, the evidence suggests that the Dyson UK office remains the primary operational control centre for the Dyson group with at least 3,500 employees based there including most of the group's senior management team and the key senior management and operational staff relevant to these claims. The UK office hosts a UK based sustainability team whose members are responsible amongst other things for developing and promulgating mandatory policies and standards to be observed in the supply chain for the Dyson group as a whole; implementing those standards and policies across the group; and monitoring, auditing, and ensuring compliance with those standards and policies. The group's chief legal officer is employed in the UK by D2.

8. D3 is a company incorporated and domiciled in Malaysia. It was D3 which contracted with ATA/Jabco's parent company for the manufacture of the Dyson components and products at the factories at which the claimants worked. The evidence did not reveal the size of D3 or the scale of its commercial activity, nor its corporate relationship with D1 and D2, save that it was said to be a "sister company".

### The claims

9. The claims are set out in detail in the Particulars of Claim, the body of which comprises allegations referable to all claimants, followed by a Schedule setting out the facts and losses specific to each. The claims were summarised at [4] to [13] of the Judgment, from which I gratefully borrow with some further detail.
10. It is alleged that each of the claimants was recruited to work at the factories by recruitment brokers or agents working for ATA/Jabco which left them subject to debt bondage. They were forced to work substantial overtime, above their 12-hour shifts, in breach of section 60 of the Malaysian Employment Act 1955 ('the 1955 Act'). They were refused annual leave, contrary to sections 60D and 60E of the 1955 Act. They were not paid the legal minimum wage, contrary to various Minimum Wage Orders. They were subjected to onerous production targets, and placed under considerable pressure to meet those targets and frequently punished if they failed to do so, including by way of intimidation and physical violence. They suffered unlawful deduction of wages contrary to section 20 of the 1955 Act.

11. They were required to live at ATA/Jabco accommodation, which was invariably insanitary, overcrowded and degrading. They were not able to leave the accommodation at will, and were forced to hand over their passports to ATA/Jabco personnel. It is alleged that although ATA/Jabco assured the claimants that their visas would be renewed, two of them were arrested and detained on the grounds that they did not have a permit. It is also alleged that one claimant, Mr. Limbu, who sought to expose the abusive working and living conditions to an assistant of Mr. Andy Hall, a British specialist in human and migrant rights, was arrested and assaulted by the Malaysian police when his provision of evidence came to light. It is alleged that this was facilitated by representatives of ATA/Jabco, and that a representative of ATA/Jabco threatened and intimidated Mr. Limbu into signing a statement saying that he had received a large sum of money from Mr. Hall for providing his information. It is alleged that another Claimant (Mr. Hossain), who had taken photographs of the factory and living conditions was also arrested and interrogated by police, having been taken there by ATA/Jabco personnel.

12. The defendants are alleged to exert a high degree of control over the manufacturing operations and working conditions at ATA/Jabco's factories. The defendants are also alleged to have promulgated mandatory policies and standards concerning the working and living conditions of workers in the Dyson group's supply chain, and implemented them through processes of training, supervision (including regular audits) and enforcement. The policy documents promulgated are identified as the following detailed documents issued by D1 and/or D2:

- (1) the Dyson Ethical and Environmental Code of Conduct, which prohibits forced labour, bonded labour, slavery, trafficking and withholding of personal ID documents, and imposes standards for working hours, wages, health and safety, and worker accommodation, which suppliers must establish management systems and processes to see are observed;
- (2) the Dyson Modern Slavery and Human Trafficking Statement 2020, promulgated on behalf of all Dyson group companies, which provides for risk assessments and audits to be carried out to ensure compliance within the supply chain; and sets out remediation mechanisms for non-compliance;

- (3) the Supply Chain Foreign Migrant Worker Recruitment and Employment Policy, which sets out minimum requirements for the recruitment and treatment of migrant workers by Dyson suppliers; and
- (4) the Dyson Supplier Accommodation Standard containing mandatory minimum standards and practical guidance in relation to accommodation for workers in the supply chain.
13. D1 and D2 are said to be responsible for promulgation and implementation of those policies based on a number of factors: their issue by D1 and/or D2; the inclusion in the Modern Slavery Statement to a specialist supply chain team based in part in the UK; and the advertisement for, and employment of, sustainability personnel by D1 and/or D2 with specific responsibilities for implementing, enforcing, monitoring and reporting on the supply chain policies. D3 is said to be responsible for promulgating and implementing the policies. This allegation against D3 is primarily advanced on the basis of the response by Baker & McKenzie LLP, the solicitors for D1 and D2, to letters before action, in which D1 and D2 alleged that D3 was responsible for setting the standards for worker welfare in supply chains in South East Asia, including ATA, and for implementing them by various means including audits and training in Malaysia. This reflects the evidence of the claimants' solicitor, Mr Holland, which was that the claimants intended to bring the claim against Dyson UK alone until these letters seeking to invoke D3's role, and that it was on the basis of this response that they sought to join D3 as a necessary and proper party. The claimants also rely on the fact that D1 and D2 advertised for four members of a sustainability team to be based at Dyson Malaysia.
14. As to knowledge, it is alleged that the defendants knew of the high risk of forced labour in Malaysian manufacturing from public sources; they must have known of the practices at ATA/Jabco through implementation of their audit and monitoring policies; and that Dyson UK were specifically told of the mistreatment at ATA/Jabco in a series of communications from Mr Hall from 9 August 2019.
15. On 25 November 2021, Dyson terminated its contractual relationship with ATA. In pre-action correspondence Baker & McKenzie explained that some of Mr Hall's complaints about working and living conditions had been substantiated.
16. The causes of action advanced against the defendants are threefold:

- (1) in negligence for breach of a duty of care to take reasonable and effective steps to ensure that the claimants did not suffer the economic loss and personal injuries resulting from the abuse;
- (2) liability in tort for false imprisonment (by ATA/Jabco at the factories and living accommodation), intimidation (by ATA/Jabco at the factories) and assault (by threats of violence and actual violence by ATA/Jabco at the factories and in the case of four claimants by the Royal Malaysian Police ('RMP')); ATA/Jabco or RMP are labelled 'the Primary Tortfeasors';
- (3) a restitutionary claim for unjust enrichment.

17. Each of the causes of action is governed by Malaysian law, which with one exception is said to be the same as that in England and Wales (I shall return to the extent to which there are issues about this).

18. As to the negligence claim, the circumstances capable of giving rise to parent company liability for harm suffered by individuals as a result of a foreign subsidiary's operations, which it is said can extend to harm caused by the subsidiary's supply chain contractor, include what have been referred to as *Vedanta* routes 2, 3 and 4, being three of the non-exhaustive sets of circumstances in which the Supreme Court in *HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3 [2021] 1 WLR 1294 held that such parent liability may exist. They are where the parent has provided defective advice and/or promulgated defective group-wide safety/environmental policies which were implemented as of course by the subsidiary; has promulgated group-wide safety/environmental policies and taken active steps to ensure their implementation; and has held out that it exercises a particular degree of supervision and control over its subsidiary, even if it in fact does not do so (see *Okpabi* at [26]-[27]). The breach is said to consist of (a) defects in the policies which contain systemic errors preventing their purported objective being carried out, and (b) failure to take steps to ensure implementation and enforcement of the policies.

19. As to the other tort claims, the joint liability of the defendants for the commission of those torts by the Primary Tortfeasors is said to arise because the defendants (a) assisted in the commission of the torts pursuant to a common design with the Primary Tortfeasors to commit the tortious acts and/or (b) procured the commission of those torts by inducement, incitement, or persuasion of the Primary Tortfeasors. The conduct said to amount to such

assistance, inducement, incitement or persuasion overlaps with that relied upon for the negligence claim, namely that it is, or is to be inferred from, a failure to enforce the policies or take steps to prevent the abuse in the face of constructive or actual knowledge of it.

20. As to the unjust enrichment claim, the enrichment is said to have occurred in the first instance in Malaysia by the saving of expenditure on products which, but for the abuse, would have cost more; and the receipt of the manufacturing services performed by the claimants at the factories. The claims are for the enrichment of the defendants through the consequential increased trading profits, which will have been enjoyed at their places of business.
21. As to remedies, the claimants claim damages which include quantified economic losses such as for insufficient wages; damages for deprivation of liberty and personal injuries; and aggravated and/or exemplary damages. In relation to the unjust enrichment claim there are personal and proprietary remedies sought in respect of the profits made as a result of the abuse.

### **The law applicable to the applications and the appeal**

22. There was very little dispute between the parties as to the applicable legal principles. In a service in case, the burden is on the defendant to show that there is another available forum which is clearly and distinctly more appropriate. The burden reflects the fact that in such a case the claimant has served the defendant as of right which is an advantage which will not lightly be disturbed (*Spiliada* at p. 476F, 477E). In a service out case, the burden is on the claimant to show that England is clearly the appropriate forum, which is simply the obverse of the position in a service in case (*Spiliada* at p. 481E). In both cases *appropriate* forum means that in which the case may be tried more suitably for the interests of all the parties and the ends of justice (*Spiliada* p. 476C, *Lungowe v Vedanta Resources Plc* [2019] UKSC 20 [2020] AC 1045 at [66]). In determining the appropriateness of the forum, the court looks at connecting factors to determine with which forum the action has the most real and substantial connection (*Spiliada* at p. 478A). These include not only factors affecting convenience or expense, but also other factors such as governing law, the place where the parties reside or carry on business, and where the wrongful acts and harm occurred (*Spiliada* p. 478A-B, *Vedanta* at [66]). The risk of multiplicity of proceedings giving rise to a risk of inconsistent judgments is only one factor, although a very important

one (*Vedanta* at [69]). In applying these connecting factors to cases involving multiple defendants, their relative status and importance in the case should be taken into account, such that greater weight is given to the claims against those who may be described as a principal or major party or chief protagonist: *JSC BTA Bank v Granton Trade Limited* [2010] EWHC 2577 (Comm) per Christopher Clarke J at [28].

23. For both service in and service out cases, if the court concludes that the foreign court is more appropriate by reference to connecting factors, applying the relevant burden of proof, the court will nevertheless retain jurisdiction if the claimant can show by cogent evidence that there is a real risk that it will not be able to obtain substantial justice in the appropriate foreign jurisdiction (*Vedanta* at [88]). Cogent evidence does not mean unchallenged evidence (*Vedanta* at [96]). This is often conveniently treated as a second stage in the analysis because it usually calls for an assessment of different evidence, but it does not involve a different question: if there is a real risk of denial of justice in a particular forum it is unlikely to be an appropriate one in which the case can most suitably be tried in the interests of the parties and for the ends of justice: *Vedanta* at [88]. In this case the parties and the Judge adopted that two-stage approach, labelling the first stage as “appropriate forum” and the second stage as “access to justice”. I will adopt the same structure, whilst keeping in mind that second stage factors may also be relevant to the first stage in what is juridically a single holistic exercise in seeking to identify where the case can most suitably be tried in the interests of the parties and for the ends of justice.

### **The defamation proceedings**

24. Also relevant are defamation proceedings brought by D1 and D2 in the High Court. Those proceedings are accurately described at [19] to [26] of the Judgment, from which I again gratefully borrow in giving a less detailed summary of the position at the time of the hearing before the Judge. I shall come to subsequent developments in the defamation proceedings in the course of dealing with one of the grounds of appeal.
25. The defamation proceedings were commenced on 25 February 2022, some three months before the issue of the Claim Form in the present proceedings, by D1 and D2 (and originally by Sir James Dyson, the eponymous founder of the Dyson group) against the broadcasters of a Channel Four television programme aired on 10 February 2022. The broadcast related to abuse of workers at ATA factories in Malaysia generally, and that of Mr Limbu as a

whistleblower, and raised questions over why it hadn't been picked up by Dyson. D1 and D2 alleged that the natural and ordinary meaning was that they were complicit in the systemic abuse and exploitation of workers at ATA; that they were complicit in the persecution and torture of Mr Limbu; and that they claimed to act in a responsible and ethical way, but when serious abuses of workers were brought to their attention these abuses were not properly investigated, but were ignored and tolerated for a prolonged period of time while they tried to cover them up and shut down public criticism. The claim by D1 and D2 relied upon the promulgation and implementation of the policies which are identified in the current proceedings. At the time of the hearing before the Judge, a defence had not yet been served by the broadcasters, but in correspondence responding to a letter before action they had indicated that they would advance a defence that the imputations conveyed by the statements complained of were true or substantially true. It is not necessary to give further details of the claim to make the point, which was not in dispute, that there was a very substantial overlap between the factual issues raised in the defamation proceedings and those in the current proceedings, not merely in relation to the allegations of abuse but also in relation to D1 and D2's knowledge and complicity, and the promulgation, implementation, supervision and enforcement of its policies.

## The Judgment

26. Before the Judge, the defendants offered various undertakings which were recorded in the order ('the Undertakings'), including undertakings by D1 and D2 to submit to the jurisdiction in Malaysia if the claimants brought "these claims" there; for the purposes of the Undertakings "these claims" were defined as those particularised in the Particulars of Claim. Paragraph 3 of the Undertakings included the following:

"3. Each of the First, Second and Third Defendants has undertaken to the Court that, if any of the Claimants bring these claims against the Defendants (or any of them) in Malaysia, in respect of those claims:

...

c. The Defendants will pay the reasonable costs necessary to enable the Claimants to give evidence in Malaysian proceedings including (if necessary) affidavit affirmation fees and other costs necessary for the Claimants to give remote evidence including travel and accommodation costs, costs associated with the provision/set-up of suitable videoconferencing technology, translation fees, and other costs associated with the logistics of giving evidence remotely;

...

e. The Defendants will pay for the Claimants' share of the following disbursements to the extent reasonably incurred and necessary: (i) Court interpretation fees, (ii) Transcription fees, and (iii) Joint expert evidence;

...

f. The Defendants will not seek to challenge the lawfulness of any success fee arrangement entered into between the Claimants and their Malaysian lawyers."

27. In addressing appropriate forum at the first stage, the Judge identified what he considered the key connecting factors under six numbered headings, and addressed each at [84] to [121], before summarising his conclusions at [122]-[123]. His headings and overall conclusions were as follows.

- (1) Practical convenience for the parties and the witnesses: this is a neutral factor between England and Malaysia.
- (2) A common language for the witnesses: this too is a neutral factor.
- (3) The system of law governing the claims: the fact that this is Malaysian law is a factor which strongly favours Malaysia.
- (4) The place where the "issues" in the case took place: this is a factor which strongly points towards Malaysia as the proper forum because the "centre of gravity in this case is plainly Malaysia".
- (5) The location and availability of documents: this factor slightly favours Malaysia.
- (6) The risk of multiplicity of proceedings and inconsistent judgments:
  - (a) so far as contribution claims against ATA/Jabco and RMP are concerned, this factor is a relatively slight one in favour of Malaysia: there is no real risk of inconsistent judgments in respect of contribution proceedings against ATA/Jabco; there is such a risk in relation to contribution proceedings against RMP (although no such claim has yet been intimated by Dyson) because the claim would not be justiciable in England, but this is a relatively minor part of the claim.
  - (b) so far as the defamation proceedings are concerned, the multiplicity of proceedings and risk of inconsistent judgments if the claims proceeded in Malaysia was a

significant factor in favour of England, but its weight was diminished by the fact that there was a real risk that that would also arise if the current claim proceeded in England, because it was most unlikely that the defamation proceedings and these proceedings would be case managed together or even with a real eye on one another.

28. The Judge summarised his stage 1 conclusion in the following terms at [122] (the emphasis is that of the Judge):

“Taking all of these factors into account, my conclusion at the end of Stage 1 is that England is not the natural or appropriate forum and that Malaysia is another available forum which is *clearly and distinctly more appropriate*. The centre of gravity in this case is Malaysia: that is where the primary underlying treatment about which the Claimants complain took place, and is therefore the forum with “the most real and substantial connection” per Lord Goff in *Spiliada* at 478A. Malaysian law is also the governing law, and there are good policy reasons for letting Malaysian judges consider the novel points of law that are being raised in this claim within the context of their jurisprudence, rather than letting an English Court second guess what they might decide. In my judgment, these factors are not “dwarfed” by countervailing factors (per Lord Mance in *VTB*). The risk of irreconcilable judgments resulting from the defamation proceedings is an important factor, but it does not tilt the balance in favour of the English Court being the proper forum to determine the Claimants’ claim.”

29. In relation to stage 2, the Judge had a considerable body of detailed evidence from well-qualified deponents on both sides as to the practice and procedure in Malaysia, and the availability and funding of suitable representation. He resolved a number of issues by reference to the cogency of the conflicting evidence. The principal determinations which remain relevant to the issues in the appeal are the following. The claimants would have a reasonable and well-founded fear for their safety if they gave evidence in Malaysia and accordingly any trial in Malaysia would involve them giving evidence remotely. The Malaysian court would permit them to do so, and the cost of making arrangements for them to do so was covered by the Undertakings. There was no real risk that the claimants could not find suitably qualified lawyers who would be prepared to conduct the case pursuant to a conditional fee agreement (‘CFA’) with a small upfront basic fee of about 1000-1500 MYR (the equivalent of about £200). Central to the Judge’s reasoning in rejecting the evidence adduced by the claimants on this issue was his view that the deponents had not recognised that “substantial justice” does not require that a party receive the same ‘Rolls Royce’ service (or as the Judge preferred to call it, ‘Tesla’ service) as would be available here, and that it was therefore irrelevant that the representation available would be of a

lesser standard. Contrary to the claimants' argument, there was no real risk that such a partial CFA would be unlawful. There were certain disbursements for which funding would have to be provided otherwise than by the CFA lawyers themselves. These were largely covered by paragraphs 3(c) and (e) of the Undertakings. It was accepted that there was a real risk that there would be a shortfall. Based on (a) the defendants' model of how the proceedings would be case managed, involving a split trial with three test cases and three contested disclosure applications, and (b) the defendants' schedule of disbursements not covered by their undertakings, the shortfall which would need to be funded from elsewhere was 1,916 MYR (£328). It was accepted on behalf of the defendants that the claimants themselves could not afford to make any financial contribution to the pursuit of a claim in Malaysia. The small shortfall would be made up by NGOs and there was no real risk that they would not do so. So far as the Undertakings were concerned, there was nothing improper in the defendants offering them: the giving of undertakings is not uncommon in jurisdictional disputes, and there was no conflict of interest in the Undertakings relating to the costs of pursuing the claims against them. Accordingly the claimants' stage 2 argument failed.

### The grounds of appeal

30. The claimants advanced five grounds of appeal in respect of stage 1 and four grounds in respect of stage 2:

**Ground 1(a)** The Judge failed to adopt the correct approach to the applications by D1 and D2, which was to address the factors relevant to the issue of appropriate forum in respect of the claim against them separately from, and before, his consideration of the factors relevant to the appropriate forum in respect of the claim against D3; and as a result he failed to take any (or any sufficient) account of the key connecting feature that D1 and D2 are domiciled in England and have been served here as of right.

**Ground 1(b)** In considering "the centre of gravity" of the case the Judge failed to have any (or any sufficient) regard to the fact that the real dispute between the parties (and hence the likely focus of any trial) is principally concerned with the role, acts and alleged breaches of duty and enrichment in England of D1 and D2.

**Ground 1(c)** The Judge erred in law in his treatment of the Malaysian law factor by taking into account “policy reasons” for letting Malaysian judges decide such questions, contrary to *Lubbe v Cape Plc* [2000] 1 WLR 1545.

**Ground 1(d)** The Judge was plainly wrong to consider that there was a real risk of irreconcilable findings in relation to the defamation proceedings even if the current proceedings proceed in England on the basis that it was most unlikely that the High Court would case manage the proceedings to avoid or reduce the risk of such a possibility.

**Ground 1(e)** The Judge erroneously failed to have any regard to the uncontested fact that the defendants’ defence of the claims would be coordinated and conducted from England by English employees and officers of D1 and D2.

**Ground 2(a)** The Judge was wrong to conclude that there was no real risk the Claimants and NGOs would be unable to fund the disbursements necessary to pursue their case in Malaysia. In particular the Judge was wrong (i) to rely on the Undertakings; (ii) to accept the defendants’ calculations of the amounts of the necessary disbursements; and (iii) to conclude that there was no real risk of NGOs failing to fill any gap.

**Ground 2(b)** The Judge was wrong to conclude that the claimants would be able to obtain representation from suitably qualified and resourced lawyers in Malaysia under a partial CFA because there is at least a real risk that (i) the proposed CFA arrangement would be unlawful; and (ii) the claimants would be unable to instruct suitably qualified and resourced lawyers prepared to represent them on such a basis.

**Ground 2(c)** The Judge wrongly failed to have any regard to the fact that the claimants’ inability to attend a trial in person in Malaysia presents a real risk of injustice to the Claimants irrespective of the possibility of remote hearings.

**Ground 2(d)** The Judge wrongly failed to have any regard to the real risk that the claimants will not be able to obtain disclosure of documents in Malaysia which are essential to establishing their case against the defendants.

## Discussion

31. I start with the question whether the Judge made an error of principle or was plainly wrong in the sense necessary before this court will interfere with his evaluative assessment. I will take each ground in turn.

*Ground 1(a) The Judge failed to address the factors relevant to the issue of appropriate forum in respect of the claim against them separately from, and before, his consideration of the factors relevant to the appropriate forum in respect of the claim against D3; and as a result he failed to take any (or any sufficient) account of the key connecting feature that D1 and D2 are domiciled in England and have been served here as of right.*

32. Ms Kinsler KC treated the two parts of the ground as separate points, with the second arising independently of the first as well as consequentially.

33. I would reject the first part of the argument. In a mixed case such as the present, the court has to look holistically and in the round at the question of appropriate forum for both the service in and service out applications. That is not, as Ms Kinsler submitted, to ignore the burden of proof in the service in application, which is the obverse of the burden in the service out application (*Spiliada* at p. p481E); nor is it to elevate the risk of conflicting judgments to the status of a decisive factor when it is only one factor, albeit a very important factor. It is because the exercise is to identify where *the case* can most suitably be tried in the interests of the parties and for the ends of justice, as Lord Goff formulated the basic principle in *Spiliada* at p. 476C and as Lord Briggs emphasised in *Vedanta* at [68]: “... the court is looking for a single jurisdiction in which the claims against all of the defendants may most suitably be tried.” Moreover it will usually be impractical to compartmentalise the two applications in the way Ms Kinsler suggested. If the stay application by D1 and D2 were to be taken first and separately, it would not be capable of resolution on its own, because one very important factor is multiplicity of proceedings and the risk of inconsistent judgments, which simply could not be applied whilst it was unresolved whether the application by D3 would result in the claims against it proceeding in England or Malaysia.

34. However, I would accept the second part of the argument, that the Judge failed to take any account of the important connecting feature that D1 and D2 are domiciled in England and have been served here as of right. The domicile of the parties was not one of the Judge’s headings and did not feature in his conclusory paragraphs. It is, however, an important

factor. The reason it is an important connecting factor in relation to jurisdiction is because presence here is the basis for establishing the court's jurisdiction, and domicile here connotes a degree of permanence and allegiance to the country's institutions, including its courts, which means that the party can reasonably expect, and be expected, to meet claims against it in such courts in the absence of sufficient countervailing factors. That is why within the EU domicile remains the foundational factor for allocating jurisdiction in civil and commercial matters, subject to derogations. The importance of presence or domicile is at the heart of the difference in the burden of proof between service in and service out cases. In the latter case the assertion of jurisdiction is prima facie "exorbitant", whereas in the latter it is prima facie "as of right". That is why, as Lord Goff emphasised in *Spiliada* at pp. 476F, 477E, the burden in a service in case is on the defendant to point to a distinctly and clearly more appropriate forum, because the advantage to a claimant of pursuing a defendant in his place of domicile will not lightly be disturbed.

35. Mr Gibson KC advanced two arguments in response. The first was that the Judge had taken this into account. He had recorded the reliance on Dyson UK's domicile when summarising the claimants' submissions, and had said elsewhere that he had taken all the submissions into account. I cannot accept this argument. Had the Judge attached any significance to Dyson UK's domicile as a factor he would have been bound to have said so in the course of his lengthy and detailed reasoning and his conclusions. He did not do so, and it did not fall within any of his headings.

36. Mr Gibson's second argument was that the domicile of D3 in Malaysia provides an argument of equal and opposite weight to that of Dyson UK's domicile in England, which neutralises domicile as a factor pointing towards England any more than towards Malaysia. However, the logic of the point founders on the fact that the claims against Dyson UK and Dyson Malaysia do not fall to be treated as of equal importance in this regard. The claim against D1 and D2 is the primary claim. The claim was intended to be pursued solely against Dyson UK. D3 was only added as a defendant in response to Dyson UK's pre-action correspondence. Although the claim against Dyson Malaysia in many ways mirrors that against the Dyson UK defendants, that is solely on the basis of D1 and D2's assertion that D3 was responsible for promulgating and implementing the policies, although the relevant policy documents which have been identified, not only by the claimants, but also by the defendants themselves in correspondence and in the defamation proceedings, are

those promulgated by D1 and D2, not D3. D3 is a group company for whom the litigation will be coordinated and conducted, whether it takes place in England or Malaysia, by the English officers and employees of Dyson UK from England, where the group chief legal officer is based. This is common ground. The reality is that Dyson UK is the principal protagonist and Dyson Malaysia a more minor and ancillary defendant to the claim against D1 and D2. I would therefore conclude that the Judge's failure to take into account the domicile of D1 and D2 in England as a factor in favour of retaining English jurisdiction is an error of principle.

*Ground 1(b) In considering "the centre of gravity" of the case the Judge failed to have any (or any sufficient) regard to the fact that the real dispute between the parties (and hence the likely focus of any trial) is principally concerned with the role, acts and alleged breaches of duty and enrichment in England of D1 and D2.*

37. The "centre of gravity" is not itself a separate test and was used by the Judge as a heading under which to address various links between the issues in the case and England or Malaysia. It was under this heading that he addressed the location of conduct or events relevant to issues of duty, breach, harm and remedy, insofar as he addressed them at all.
38. In his conclusory paragraph [122] the Judge treated the *sole* reason why the centre of gravity was Malaysia as being that that was where there occurred the primary underlying abusive treatment about which the claimants complain. In the discussion under his fourth heading at paragraphs [102] to [104], in which he identified the "centre of gravity", he referred to this conduct as fundamental to the claim, although he also mentioned in this context at [102] that Malaysia was where the harm occurred. This one-sided approach failed to take account of a number of factors which in the Judge's taxonomy fell to be addressed under this heading of centre of gravity. The case against Dyson UK was the primary claim and it was necessary to focus particularly on the issues which would arise in relation to that claim. The promulgation of the policies took place in England and their relevance to the *Vedanta* routes to whether there existed a duty of care in negligence, including the allegation that they are flawed, points towards England. The allegation of breach by Dyson UK in failing to take steps to see that the policies were implemented in Malaysia, and failing to respond adequately to what was or ought to have been known about the abuse, which is at the heart of the allegations of breach for both the negligence and other tort claims, is an allegation of a failure occurring amongst the management in England

and is alleged primarily to have occurred in England, although it will also focus to some extent on conduct in Malaysia. The complaints made by Mr Hall were made to Dyson UK and the alleged failure to take steps to act on them is primarily a failure of English personnel in England. The unjust enrichment of D1 and D2 ultimately took effect in England at their centre of trading, and the proprietary remedies claimed are of property rights over profits and products located in this country.

39. As Mr Gibson submitted, there are undoubtedly features under this heading which point to Malaysia. The suffering of loss and damage by the claimants is one; the existence and terms of audits in Malaysia is another; so too is the place where the alleged abuse occurred, as the Judge identified, although the Judge failed to recognise that there was at least a real prospect of the underlying abuse not being substantially in issue. The defendants envisage, in whichever jurisdiction, test cases for three claimants, whose treatment is likely to be influential on the outcome for all; that is the purpose of test cases. In pre-action correspondence, by which time D1 and D2 purported to have investigated the underlying allegations at least to the extent reported by Mr Hall, the focus of the response was not on the truth or otherwise of those allegations, but rather the extent to which any liability could attach to Dyson UK. A letter from solicitors acting for the Channel Four broadcasters dated 9 March 2022 recorded that Dyson UK had accepted Mr Limbu's account regarding poor working conditions and allegations of ATA corruption; that they had been provided with details of his account, including by Baker & McKenzie actually interviewing him in October 2021; and that at no time had D1 or D2 sought to contradict his account. It seems to me likely that Mr Limbu would be one of the lead/test claimants. The Judge was right to observe that the defendants had not admitted the underlying allegations of abuse and that he could not assume that they would. But nor could he safely assume that they would form the fundamental issue in the test cases or the proceedings as a whole. It was more likely that the main focus of the trial would be where it had been put by D1 and D2 in pre-action correspondence, both in these proceedings and the defamation proceedings, namely on Dyson UK's role and activity in England.

40. The failure by the Judge to take into account these other aspects of the location of conduct or events relevant to duty, breach, harm and remedy, led to a mistaken assessment of the centre of gravity which he premised, primarily, just on the location of the alleged underlying abuse. Had he had taken all these other matters into account he would have

been bound to treat the centre of gravity, in the sense used by him, as pointing towards England, or at least as no more than neutral. This was, in my view, a further error of principle.

*Ground 1(c) The Judge erred in law in his treatment of the Malaysian law factor by taking into account “policy reasons” for letting Malaysian judges decide such questions, contrary to Lubbe v Cape.*

41. I would reject the argument that the Judge made any error of principle on this ground. In *Lubbe v Cape*, Lord Bingham at p. 1561E-G and Lord Hope at p. 1567A-D made clear that resort could not be had to general public policy or public interest arguments which were outwith the scope of the *Spiliada* principles because they were not related to the private interests of the parties or the ends of justice in the particular case. The Judge’s reference to “policy reasons” in the context of the desirability of a Malaysian court deciding novel points of Malaysian law was not resorting to any general public policy arguments of that kind. He was saying no more than that there were good reasons for issues of foreign law to be decided by the foreign court, which is the underlying policy behind the relevant system of law being a relevant connecting factor in the *forum non conveniens* assessment: see Lord Mance in *VTB Capital Plc v Nutritek International Corpn* [2013] UKSC 5 [2013] 2 AC 337 at [46].

*Ground 1(d) The Judge was plainly wrong to consider that there was a real risk of irreconcilable findings in relation to the defamation proceedings even if the current proceedings proceed in England on the basis that it was most unlikely that the High Court would case manage the proceedings to avoid or reduce the risk of such a possibility.*

42. I agree that in this the Judge made a serious error of principle and was plainly wrong. Group litigation in this country, whether subject to a Group Litigation Order or not, is subject to particularly extensive and flexible case management, which may involve not only split trials and lead cases, but the determination separately of particular sets of issues (see *Municipio de Mariana v BHP Group (UK) Ltd* [2022] EWCA Civ 951 [2022] 1 WLR 4691 at [134]-[142]). Similarly, defamation proceedings are carefully case managed and rarely proceed directly from claim form to full trial without identification of particular issues as suitable for separate resolution, such as the meaning of the words complained of. I would find it very surprising if, in circumstances where the defamation proceedings and these

the forum in which the litigation takes place, is a significant connecting factor with that forum. A further indication that the Judge did not have this point in mind at [94] is that he regarded the element as neutral between the different fora given the location of the witnesses and parties.

48. This too, therefore, was an error of principle.

*Ground 2(a) The Judge was wrong to conclude that there was no real risk the Claimants and NGOs would be unable to fund the disbursements necessary to pursue their case in Malaysia. In particular the Judge was wrong (i) to rely on the Undertakings; (ii) to accept the defendants' calculations of the amounts of the necessary disbursements; and (iii) to conclude that there was no real risk of NGOs failing to fill any gap.*

49. I start with the Undertakings. In the experience of the court they are unprecedented, and the researches of counsel have not identified anything similar (we were referred to *Société Nationale Industrielle Aerospatiale v Lee Kui JAK* [1987] AC 871, an anti-suit injunction case, in which the undertakings were not remotely comparable). As a mechanism for ensuring that the impoverished claimants are thereby enabled to meet disbursements necessary to conduct the claims in Malaysia, they seem to me to suffer from six serious flaws.

50. First, the Judge was wrong to suggest that they did not involve a conflict of interest. The interest of the claimants is that costs reasonably incurred in having to make disbursements of the kind identified in paragraph 3c and 3e of the Undertakings are funded in advance. The interest of the defendants is to take every step legitimately available to them to defeat the claims. Their conduct of the litigation to date fully justifies the Judge's assessment that they will be "tough" and "difficult" opponents. Mr Gibson accepted that Dyson would take all steps available to it to defeat the claim provided they were lawful and ethical. Mr Gibson suggested that it would not be in the interests of Dyson for the claimants to be underfunded because that would enable the Claimants to come back to England and lift the stay. To my mind that was wholly unrealistic. Contested applications for the lifting of the stay in England would not be an appropriate way of resolving disputes arising on particular facts about the scope or application of the Undertakings in Malaysia. A dispute shortly before the trial, for example, about whether travel costs for a claimant to give evidence remotely were or were not reasonably necessary, would not allow justice to be done by requiring the

claimant to pursue a contested application to lift the stay in England, for which in any event they would have no funding.

51. Nor did I find any more realistic Mr Gibson's submission that the defendants could be expected to abide by "the spirit" of the Undertakings. Undertakings mean what they say and anyone with experience of commercial litigation knows that such undertakings are carefully crafted to define their extent. Dyson would be entitled to object if any request was outside the scope of the Undertakings on their proper construction, and it would be a legitimate pursuit of their interests to insist upon the letter of their Undertakings. They could not be expected to comply with some ill-defined "spirit" of the Undertakings which was not covered by their wording.
52. Secondly, disputes about whether costs were reasonable and necessary (it is to be noted that paragraph 3c and 3e of the Undertakings requires both) would need to be resolved in advance, and the claimants would be delayed in being able to make the disbursement until any such dispute were resolved. This itself would provide Dyson with a tactical advantage.
53. Thirdly, requests for disbursements in advance would likely require the claimants to waive legal professional privilege if reasonableness and/or necessity were to be challenged and investigated. This would be grossly unfair and give Dyson an improper litigation advantage. Mr Gibson sought to meet this difficulty by suggesting that if privilege were claimed, Dyson would simply have to pay whatever was sought however unreasonable or unnecessary it might be if it were investigated. That is not what the Undertakings say.
54. Fourthly, there is no satisfactory mechanism for resolving disputes as to what is reasonable or necessary. Mr Gibson submitted that the matter could be resolved by the Malaysian court. It is difficult to see why this is so: the Undertakings are given to the English court (and there has been no undertaking to give the same undertakings to the Malaysian court). There is no Malaysian law evidence suggesting that the Malaysian court would adjudicate upon undertakings given by a foreign defendant to a foreign court. It is obviously unsatisfactory for the English court to have to police the conduct of Malaysian proceedings. But in any event, whether such issues fall to be resolved in England or Malaysia, it is probable that the claimants will not have the means to fund the resolution of any such dispute. The premise on which the Undertakings were given, in relation to the specific disbursements they cover, was that such disbursements would not be funded by Malaysian

prediction of case management, simply does not take account of contingencies which are almost inevitable in litigation of this kind.

57. That leads on to the sixth flaw. The Undertakings are confined to disbursements in relation to the claims as currently particularised (“these claims”). It is highly likely that there will be amendments given that in a case of this kind the importance of disclosure of documents internal to Dyson is, as Lord Briggs JSC put it in *Vedanta* at [44], blindingly obvious. It would obviously be unsatisfactory and unfair if disbursements are only covered to the extent they fall within the current version of the Particulars of Claim which has of necessity been drafted on the basis of what the defendants have so far chosen to reveal and without sight of what will no doubt be many relevant documents; yet that is the extent of the Undertakings. And what if new claimants emerge who wish to join the group? If they are not covered by the Undertakings at all, which they are not, must they start their own separate proceedings here?

58. For all these reasons, the Judge was in my view plainly wrong to say that there was no conflict of interest, and to treat the Undertakings as a satisfactory mechanism to meet the disbursements which they covered, let alone other disbursements which the claimants might need to fund as the proceedings developed.

*Ground 2(b) The Judge was wrong to conclude that the claimants would be able to obtain representation from suitably qualified and resourced lawyers in Malaysia under a partial CFA because there is at least a real risk that (i) the proposed CFA arrangement would be unlawful; and (ii) the claimants would be unable to instruct suitably qualified and resourced lawyers prepared to represent them on such a basis.*

59. I would accept Mr Gibson’s submissions that the Judge was entitled to reach the conclusions which he expressed on these issues, for the reasons he gave, as part of his evaluative assessment of the evidence. Addressed as a stage 2 issue, there is no basis for interfering with the Judge’s conclusion. However there is an aspect of the Judgment on these matters which is relevant to the overall assessment of the appropriate forum in which the case may most suitably be tried. As Mr Gibson was keen to emphasise, the Judge’s rejection of the evidence of the claimants’ witnesses was based on his conclusion that they failed to recognise that it would not amount to *substantial* injustice if the service provided by such lawyers was of a lesser standard than a ‘Tesla’ service. In a case such as the present,

where there is a huge imbalance between the impoverished and vulnerable claimants and the well-resourced and commercially experienced defendants, and the allegations are of very serious human rights abuses, there is a particular need to ensure equality of arms in the conduct of litigation if justice is to be served. Indeed Mr Gibson accepted that equality of arms was a consideration. If the defendants can be expected to have the very high standard of legal service in Malaysia which their resources permit, but the claimants only a lesser standard, whereas in England the claimants will also be represented by experienced and well-resourced solicitors, as the evidence establishes that they will, that is a factor, although only one factor, which favours England as a more appropriate forum. This is not something which gives rise to a real risk of substantial injustice at *Spiliada* stage 2. However, it is a consideration in the overall assessment of the appropriate forum in which the case may most suitably be tried, because inequality of arms in one of the two fora is a factor pointing to the other as more appropriate.

*Ground 2(c) The Judge wrongly failed to have any regard to the fact that the claimants' inability to attend a trial in person in Malaysia presents a real risk of injustice to the Claimants irrespective of the possibility of remote hearings.*

60. Mr Craven did not suggest that the fact that witnesses are only able to give evidence remotely, or that parties or their representatives are only able to “attend” the trial remotely, is something which necessarily and of itself must involve substantial injustice. Rather, he submitted, it did so in the particular circumstances of this case because the vulnerable claimants would need to give evidence through translators, and have translators if they were to follow the proceedings; and it involved an inequality of arms in circumstances in which the representatives of the defendants would be able to attend in person and follow the proceedings; and their witnesses would be able to give evidence in person. I would accept that this is another inequality of arms factor which is relevant and favours England as a more appropriate forum.

*Ground 2(d) The Judge wrongly failed to have any regard to the real risk that the claimants will not be able to obtain disclosure of documents in Malaysia which are essential to establishing their case against the defendants.*

61. Mr Craven did not press this point with any vigour and he was right not to do so. On the evidence before him the Judge cannot properly be criticised for treating disclosure from the defendants as equally available and effective in the Malaysian courts as in this jurisdiction.

### *Conclusion thus far*

62. For the above reasons I would treat the Judge as having made a number of errors of principle such that this court can and should exercise its own evaluation of the *Spiliada* factors and reach its own conclusion.

### **This court's evaluative assessment**

#### *Funding*

63. It is accepted by the defendants that in order to pursue these claims in Malaysia there are certain disbursements which the claimants would have to fund from sources other than the lawyers prepared to act on their behalf under a partial CFA. Those disbursements are unlikely to be as limited as are envisaged by the Undertakings for the reasons I have explained, but even if they are, they are substantial. The evidence in relation to NGO funding suggests that they are not such as could reasonably be expected to be funded by NGOs. That is no doubt why the Undertakings were offered. The claimants are very poor and do not have the means to pay them, as was common ground. The Undertakings do not provide a satisfactory means of funding them, for the reasons I have identified. Accordingly the claimants will not be able to bring the claims in Malaysia. At the lowest there is a serious risk that that is the case. Whether this is addressed as a stage 1 or stage 2 issue, it points overwhelmingly in favour of England as the distinctly more appropriate forum. This is not in any sense a criticism of the Malaysian justice system, for which this court has the highest regard, but arises out of the particular and unusual features of the case.

64. That England is clearly and distinctly more appropriate is reinforced by a consideration of the other connecting factors.

#### *The domicile of the parties*

65. This favours England, for the reasons I have already explained. It is the domicile of Dyson UK which is the principal protagonist, with Dyson Malaysia a more minor and ancillary defendant to the primary claim against D1 and D2.

defamation proceedings, which the defendants would have had the opportunity to address in evidence had it been raised. I note that by the time of the broadcast on 10 February 2022 Leigh Day had already sent a letter before action in relation to the claims in these proceedings to Dyson UK to which Baker & McKenzie had responded, which casts doubt on whether the defamation proceedings can properly be considered the source for any familiarity or expertise in relation to the claims. In any event this is a far cry from the familiarity and expertise which applied to the Cambridgeshire factor in *Spiliada*. I would not attach any significance or weight to this supposed factor.

### *Equality of arms*

75. Both in terms of the standard of legal representation and the ability of the claimants to attend and give evidence in person, equality of arms favours England.

### *Conclusion*

76. The inability of the claimants to fund proceedings in Malaysia, and an assessment of the relevant connecting factors, make England clearly and distinctly the appropriate forum in which the case should be tried. I would allow the appeal.

### **LORD JUSTICE WARBY:**

77. I agree. I would add only these few observations in connection with the judge's approach to the risk of irreconcilable findings. Concurrent actions involving overlapping issues and parties are a common feature of the litigation landscape. The English court will not take a blinkered approach to the case management issues that inevitably arise. It will strive to avoid or minimise duplication of effort and cost and, in particular, any risk of inconsistent outcomes or findings. That is no less true where one of the actions is for defamation. These are often accompanied by other, related actions. Various case management techniques have been deployed over the years, including an interim stay of proceedings, orders for sequential trials, and transfer from one Division to another. The Civil Procedure Rules laid new emphasis on the court's case management role. Its ability to perform that role flexibly in defamation cases was enhanced in 2014 when Parliament abolished the presumption that these would be tried by jury. Even before that a concurrent trial by judge alone of common factual issues in two separate libel claims was directed and successfully conducted: see

**TAB 49**



**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**

**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.”

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.

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

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,

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

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

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Court File No.: CV-24-00-714148-0000

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT TORONTO

**ORAL HEARING COMPENDIUM OF THE PLAINTIFFS/  
APPELLANTS VOLUME 2 OF 2**

**CFM LAWYERS LLP**  
400-856 Homer Street  
Vancouver, BC V6B 2W5  
Tel: (604) 689-7555

**Joe Fiorante, K.C.**  
(LSBC #9197/LSO # 863420)

jfiorante@cfmlawyers.ca

**Jen Winstanley (LSBC #508967)**

jwinstanley@cfmlawyers.ca

**PHILLIPS BARRISTERS  
PROFESSIONAL CORPORATION**  
36 Toronto Street, Suite 1120 Toronto,  
ON M5C 2C5

**W. Cory Wanless (LSO No.: 57288M)**  
cory@phillipsbarristers.ca

**Patti Shedden (LSO No.: 46210W)**

patti@phillipsbarristers.ca

Tel: 647-261-4486

Lawyers for the Plaintiffs/Appellants