The English CPR's gate-keeping rules, foreign claimants and access to justice.

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The English CPR's Gate-Keeping Rules, Foreign Claimants and Access to Justice

Abstract

Foreign victims of wrongful acts ostensibly committed by companies domiciled in the United Kingdom and or their subsidiaries are increasingly turning to UK courts for redress. Many of these actions encounter jurisdictional challenges right at the start of proceedings. The challenges, in their various iterations, invariably throw up two fundamental questions namely, whether the English courts have jurisdiction to hear the claims, and if so, whether England is the most appropriate or suitable forum. Ensuing proceedings have often been elaborate, extensive, time consuming and resource-intensive, leading to questions about whether the current rules on jurisdiction facilitate or stifle access to justice. This piece attempts a review of the relevant civil procedure rules on jurisdiction of English courts over cases involving foreign claimants - mainly victims of mass wrongs resulting from the activities of English domiciled companies and their foreign subsidiaries post Brexit. It highlights problems with the current approach to resolving jurisdictional challenges around service of claims outside England. To stem the tide of the use of masses of documents, long witness statements, detailed analysis of the issues, and long arguments, a rule change is proposed. It is further proposed that the substantive justice criterion currently considered as part of the requirements for deciding whether England is the proper place to try a case should become an overarching consideration even where jurisdiction is not established.

Key words: English Civil Procedure Rule, Foreign Claimants, Gate-keeping rules, Access to justice

The English Civil Procedure Gate-Keeping Rules, Foreign Claimants and Access to Justice

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Outline

- Context
- Gatekeeping Rules and Evidential standards
- Three major problems with current system
  - Time
  - Cost
  - Outcome
- What do we do about them?

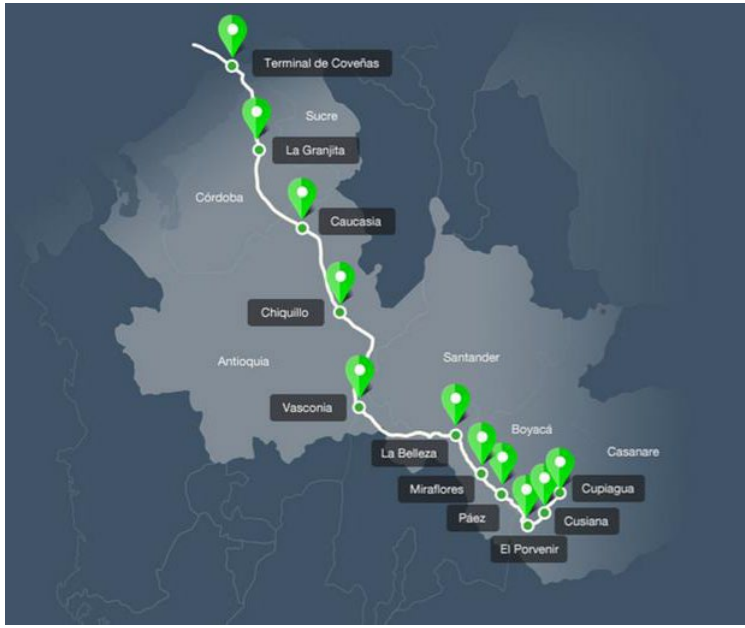
Context – Foreign parties

- Involvement of foreign parties in English litigation – a common feature.

- Recent/growing trend – foreign victims of mass wrongs suing in England.
  - Claims relate to wrongs sustained outside England
  - Actions are often brought against entities domiciled in England (parent companies) and foreign subsidiaries.
  - Cases raise issues of health and safety violations, human right abuses and environmental pollution

Context - Examples

- **Environmental Pollution –**
  - *Municipio de Mariana and others v BHP Group plc (2021) – collapse of Fundao Dam in Brazil -**200,000** individuals, **530** businesses, **25** municipalities etc.*
  - *Okpabi v Royal Dutch Shell (2020) - **40,000** Nigerian claimants*
  - *Vedanta Resources Plc v Lungowe (2019) -**1825** Zambian claimants*
  - *Motto v Trafigura Ltd - **30,000** Ivorian claimants*
  - *Ocensa Pipeline Group Litigation involving **109** Columbian claimants*
  - *Bodo Community v Shell involving **15,000** claimants.*



- **Human Rights abuses**
  - *AAA v Unilever plc.,* 218 Kenyan employees

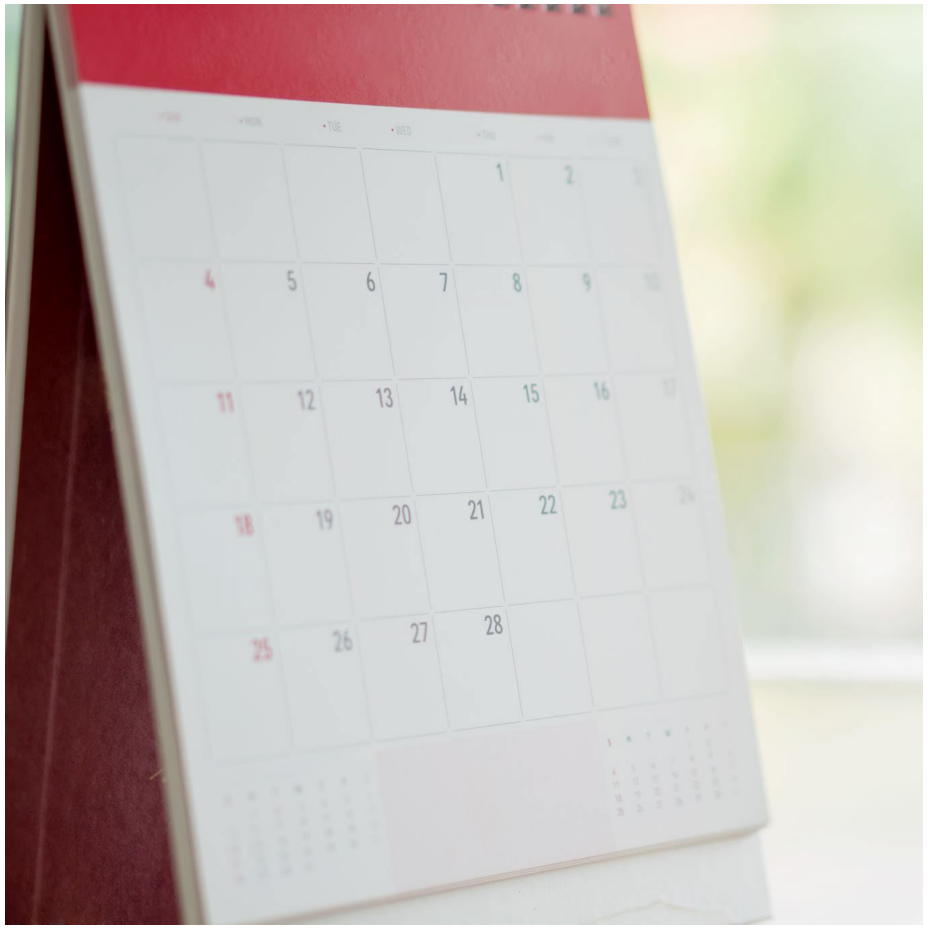
- **Health and Safety cases**
  - *Ngcobo v Thor Chemicals Holdings Ltd ; Lubbe v Cape plc.*

Gatekeeping Rules and Evidential Standards

- Current Rules : CPR Part 6, Rules 6.36, 6.37 and Practice Direction (PD) 6B, para 3.1.
- Three conditions to be met - ***Four Seasons v. Brownlie SC*** (2017), para 3):
  - Jurisdictional gateways - claim must fall under one of the gateways under CPR PD 6B paragraph 3.1.
  - There are serious issues to be tried.
  - England is the appropriate forum for trial (Spiliada)
    - Most real and substantive connection
    - Case can be suitably/appropriately tried
    - Interests of all parties
    - Ends of Justice

Three problems with current system

- **Time :** The length of time these applications (in their various guises) take to resolve.
- **Cost :** The level of investment parties pour into these applications – justifiable?
- **Outcome**/Consequences of current process?



Time

- Emerging trend: these jurisdiction applications take long time to resolve
- Examples: -
  - *Vedanta Resources Plc v Lungowe* - challenge July 2015 resolved four year later by the Supreme Court
  - *Okpabi v Royal Dutch Shell – action commenced 2015 – application resolved in 2019*
  - *FS Cairo (Nile Plaza) LLC v Lady Brownlie* – Accident in 2010. Claim issued December 2012; challenge – May 2013 – Finally resolved by the SC in 2021
- Jurisdiction disputes - preliminary…

Cost

- ***HRH Okpabi v Royal Dutch Shell Plc (CA) para17:***

*At the hearing before the judge the parties' "skeleton arguments" ran to **259** pages, plus **17** additional pages of detailed criticism of the other side's case and **61** pages of post-hearing notes. RDS deployed **13** lengthy witness statements and **three** expert reports; and the claimants served **15** witness statements and **two** expert reports. The total length of the witness statements ran to over **2,000** pages of material, quite apart from the eight files of exhibits…"*

- ***Vedanta Resources Plc v Lungowe S.C, para 10:***

*The extent to which these well-known warnings have been ignored in this litigation can be measured by the following statistics about the materials placed before this court. The parties' two written cases (ignoring annexes) ran to **294** pages. The electronic bundles included **8,945** pages. No less than **142** authorities were deployed, spread over **13** bundles, in relation to an appeal which, on final analysis, involved only one difficult point of law.*

Consequences of Current process

- *VTB Capital plc v Nutritek International Corpn (per Lord Neuberger)*
  - ***Self-defeating** – doing as much as will be done in the actual hearing…*
  - ***Disproportionate** – incurring enormous cost on a simple and uncontroversial issue*
  - ***Unnecessary exertion** for a relatively straightforward issue*
  - ***Access to justice concerns**:*

    "There is also a real danger that, if the hearing is an expensive and time-consuming exercise, it will be used by a richer party to wear down a poorer party, or by a party with a weak case to prevent, or at least to discourage, a party with a strong case from enforcing its rights." (Para 82)
- Evidence of judicial frustration with the process…Judicial admonition on 'proportionality' has largely not been followed.

Why parties do what they do?

- **The process**: three major issues rolled into a single application!
- **Potential outcomes** – serious implications for parties:
  - A leap forward!
  - A taste of judicial perspective on case
  - End of the road?
- Parties seek to put their **‘best case’** forward… just in case…

Proposed solutions

- ***Okpabi v Royal Dutch Shell Plc (H.C), para 10:***

*It would be regrettable if the only way that compliance could be ensured were to be by the court **imposing a strict limit** on the number of witness statements that could be lodged, and also restricting their length. Experienced legal advisers ought not to need such strictures in order to concentrate their minds. However, a fundamental change of approach is required by the parties in cases such as these for applications of this nature.*

Proposed solutions

- ***Vedanta Resources Plc v Lungowe, (SC) para 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.*

Rule change?

- Regulatory changes -
  - A rethink of what the rules are meant to achieve - a purposive approach?
  - Review of the requirements – too much too early?
  - Review of the evidentiary standards?
- Operational changes –
  - Proportionality
  - Imposing time limit
  - Cost implications
- Role of Parties?

Impact on Access to justice

Gate-keeping rules burdensome?

Implications of cost and time concerns for foreign parties.

The Spiliada test (second part – substantial justice)

Should the key question not be whether there is a real risk that substantial justice would not be obtainable in the foreign jurisdiction?

The cogent evidence standard

Conclusion

Whilst there is merit in ensuring that foreign parties are brought before English courts for good cause and on the basis of a substantive connection with England, the means by which that process is achieved need not be burdensome, costly or time consuming.