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The Nchanga Copper Mine Group Litigation

Case Nos: HT-2015-000292
HT-2019-000312
HT-2020-000033

Neutral Citation Number: [2020] EWHC 749 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date of judgment: 27 March 2020

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

DOMINIC LISWANISO LUNGOWE
& 3,729 OTHERS

Claimants

-and-

VEDANTA RESOURCES PLC

First Defendant

-and-

KONKOLA COPPER MINES PLC

Second Defendant

- -

Judgment

- -

Richard Hermer QC and Kate Boakes (instructed by **Leigh Day**)
for the Claimants in actions HT-2015-000292 and HT-2020-000033
Phillippa Kaufmann QC (instructed by **Hausfeld & Co LLP**)
for the Claimants in action HT-2019-000312
Charles Gibson QC, Geraint Webb QC and Ognjen Miletic
(instructed by **Herbert Smith Freehills LLP**) for the First Defendant
Ciaran Keller and Catherine Jung (instructed by **Taylor Wessing LLP**)
for the Second Defendant
Hearing date: 27 February 2020

- -

Mr Justice Fraser:

Introduction

1. These proceedings are currently constituted as three separate sets of legal proceedings, all brought against Vedanta Resources plc, the First Defendant ("Vedanta") and Konkola Copper Mines plc ("KCM"). KCM operates the Nchanga Copper Mine in the Chingola region of Zambia. Chingola is a province which is also sometimes called the Copperbelt Province, due to the rich copper deposits of the area. The province adjoins the Katanga province of the Democratic Republic of Congo, which enjoys similarly rich levels of minerals. Vedanta is a UK domiciled company that is the holding company for a number of other companies, including KCM which is one of its subsidiaries. KCM is a very valuable part of the Vedanta group.

2. Chingola is home to the Nchanga Copper Mine. Although this mine was, in the middle of the 20th century, a deep-shaft mine, it is now home to an open-cast mining operation. The Nchanga Copper Mine is the second largest open-cast mine in the world. Open-cast mining involves extraction of the relevant deposits directly from the surface, leading to topographical changes to the ground of increasing depth. The method is used not only for copper, but also for coal, diamonds and other valuable minerals around the world.

3. The application to which this judgment relates was issued by Vedanta on 14 February 2020. Vedanta seeks by its application to have a Group Litigation Order, or GLO, made in respect of these three separate sets of proceedings brought against both it and KCM by a large number of claimants. All of the claimants are residents in the Chingola region in the vicinity of the Nchanga Copper Mine. It is the effect upon those residents of the mining activities that lies at the heart of this litigation. The claims involve claims both of personal injury and widespread environmental damage due to pollution and the activities of the mine.

4. Proceedings were brought in England, originally in 2015, using Vedanta as what is called an "anchor defendant", and thereby also seeking to proceed against KCM in this jurisdiction. That expression is used to refer to one defendant, amongst a number of others, that is domiciled within the jurisdiction. In summary terms only, if claims are brought in relation to matters arising outside the jurisdiction against multiple defendants, and one of the defendants is properly an anchor defendant, then the English courts have jurisdiction over all of the claims against all of the defendants, including those not domiciled in the jurisdiction, even in relation to matters that have occurred outside the jurisdiction. This is what occurred in this case.

5. The defendants both contested the jurisdiction of the English courts, based on a number of different grounds. This matter was resolved in the claimants' favour by Coulson J (as he then was) in the first judgment in Action HT-2015-000292, his judgment being found at [2016] EWHC (TCC) 975. The defendants obtained permission to appeal, and that appeal was dismissed by the Court of Appeal; the judgment for that is to be found at [2017] EWCA Civ 1528. The defendants obtained permission to appeal to the Supreme Court; that appeal too was dismissed, the judgment for that being found at [2019] UKSC 20. The date of that latter judgment is 10 April 2019.

6. However, since that resolution of those jurisdiction issues at the highest judicial level, there have been a number of other developments in terms of litigation arising from the Nchanga Copper Mine. It is those developments that have led Vedanta to seek the making of a GLO. In order properly to consider the contested issues on this application, and to understand the way that the GLO Issues themselves have come in to being, it is necessary to recite more procedural background that would normally be the case (and more than would normally be desirable). The parties were told by the court, at the hearing of the application on 27 February 2020, what the outcome of the application was. That outcome was that a GLO would be made, with the identity of the Managing Judge to be decided by the President of the Queen's Bench Division ("QBD"). The President had already given me permission in principle to make a GLO, were the court to conclude, having heard the application, that a GLO was both required and justified. The permission of the President is expressly required for the making of a GLO in the QBD, pursuant to paragraph 3.3(1) of Practice Direction 19B – Group Litigation. The parties were also told, when the outcome of the application was given on 27 February 2020, that detailed written reasons would be provided in due course. This judgment is those reasons.

Procedural background

7. The subject matter of the different sets of proceedings concerns damage caused by pollution and other detrimental effects from the operation of the mine. Leigh Day, a well known firm of solicitors, act for different groups of overseas claimants in overseas tort claims in proceedings in this jurisdiction and have done for a number of years. The majority of the claimants are subsistence farmers who rely on the land and the local waterways to sustain basic agrarian livelihoods. They live along the Mushishima and Kakosa streams and the Kafue River, into which those streams flow. Their income is likely to be below the average income in Zambia, which is one of the world's poorest countries. It is unlikely that many of them will have travelled outside this part of Zambia. Some claimants are children. None of the claimants could be said to have any financial depth whatsoever; on the contrary, they are very poor.

8. In another case, ***Okpabi and others v Royal Dutch Shell plc and Shell Petroleum Development Co of Nigeria Ltd*** [2017] EWHC 89 (TCC), the defendants in that case described this method of advancing overseas tort claims in England, adopted by Leigh Day, as a "business model", a term that was not intended to be complimentary. As explained in that judgment at [34] to [36], whether it is complimentary or not, it is entirely within the rules and indeed since the Supreme Court judgment in this specific case, expressly permissible for overseas claims to be brought here in this way. However, as a business model, if it was something unique to Leigh Day, it is no longer. This can be seen from this case.

9. In 2015, two different sets of proceedings were issued on behalf of large numbers of claimants resident in Zambia in the vicinity of the Nchanga Copper Mine. One set of proceedings was HT-2015-000292, in which those claimants were represented by Leigh Day. These were proceedings specifically issued in the Technology and Construction Court, or TCC. The other set of proceedings was HQ-2015-P03123. In that action, which was not issued in a specialist list but in the general Queen's Bench Division, the claimants were represented by another firm of solicitors, Hausfeld & Co LLP ("Hausfeld"). The subject matter of the litigation was broadly the same in both

sets of proceedings. The nature of the claimants was the same, and the two defendants were the same. Essentially, two separate firms of solicitors had each travelled to Zambia and were both instructed by large numbers of claimants generally, in respect of the same causes of action.

10. There was an array of difficulties with these two different sets of proceedings, not least that they were in different parts of the QBD. Having two sets of solicitors advancing two sets of proceedings on the same subject matter in this way is far from ideal, but there was another more significant difficulty. This was that, so far as the defendants were concerned, some of the same claimants appeared in *both* sets of proceedings. In other words, some claimants appeared (or were said) to have instructed two different sets of English solicitors to act for them on the very same matters, and each firm had issued different proceedings on their behalf.

11. This matter was brought to the attention of the court, at the same time as both defendants were also seeking to challenge the jurisdiction of the court (the matter which was eventually resolved by the Supreme Court). Following a CMC before me, the two different sets of solicitors sensibly resolved the matter between themselves. This matter was referred to at [9] in the judgment of Coulson J (as he then was) at [2016] EWHC (TCC) 975. I was told on 5 February 2020 that this was achieved by Leigh Day and Hausfeld travelling to Zambia and inviting the communities then involved as claimants, in both sets of 2015 proceedings, to choose one of those firms to act for them. They did so, chose Leigh Day and in any event those claimants in proceedings HQ-2015-P03123 who were not already (by duplication) claimants in HT-2015-000292 became part of that latter action. It was in that latter action that jurisdiction was then contested, and followed the course I have described above.

12. On 10 April 2019 the Supreme Court handed down its judgment. The action could then proceed. However, the following two matters then occurred in parallel after that in 2019. Hausfeld re-emerged onto the scene, and issued proceedings HT-2019-000312, but this time in respect of other communities, also said to be affected by similar matters arising from the Nchanga Copper Mine, and against the same two defendants. They did not however serve those proceedings. Leigh Day and the two defendants also agreed a formal stay in the only surviving 2015 proceedings, HT-2015-000292, in order to try and compromise them. This stay was, as one would expect, approved by the court.

13. That stay and the process adopted by the parties to try and settle the claims (excluding the Hausfeld proceedings of August 2019) did not, however, lead to a compromise. Up to this point, both defendants had been represented by the same solicitors, Herbert Smith Freehills LLP ("Herbert Smith") and by the same counsel team. However, on 21 May 2019 KCM appointed a provisional liquidator in Zambia. On 22 October 2019 Herbert Smith applied to come off the record for KCM, based on the liquidation and the difficulty of obtaining proper and timely instructions. This was approved by the court. On 7 January 2020 the liquidator appointed Taylor Wessing to act on KCM's behalf. In early 2020, Leigh Day also issued fresh proceedings against both defendants in relation to other claimants, HT-2020-000033.

14. The court held a CMC on 5 February 2020. The two defendants attended by separate solicitors (Herbert Smith, and Taylor Wessing, respectively) and different counsel.

Leigh Day attended with the same counsel for all the claimants it represented, namely in actions HT-2015-000292 (who might be seen as the veterans of the Supreme Court) and HT-2020-000033 (fresh claimants but represented by the same veterans). However, Hausfeld did not appear, even though they had been put on express notice by Vedanta that the CMC was to occur, and even though both defendants had indicated in correspondence that they wished to obtain a GLO in relation to all *three* sets of proceedings. Hausfeld did however send a letter that stated it would abide by certain findings in the claims advanced by Leigh Day, and would otherwise not take any steps in its own proceedings.

15. Paragraph 4 of PD19B entitles the court to make a GLO of its own initiative. However, there were two difficulties with doing so in relation to the Hausfeld proceedings on 5 February 2020. Firstly, those proceedings had not even been served. Secondly, the Hausfeld claimants were not represented at that hearing. Given general fairness, and in particular what had happened in 2015, it seemed to me that at the very least either defendant ought to issue a formal application and serve it upon Hausfeld, so that the matter could be properly considered with all potentially affected parties represented on that application. This was done notwithstanding paragraph 3.1 of PD 19B entitles the court to make a GLO even before any relevant claims have been issued.

16. I therefore directed Vedanta to issue an application for a GLO, if so advised, by 14 February 2020 and set down another date for a further CMC on 27 February 2020. I did make extensive directions, including setting down a trial date in October 2021, and some other differences were resolved including the depth of information from the claimants that would be required in schedules of information. Hausfeld issued its own application, also returnable on 27 February 2020, seeking a formal stay of its proceedings. Those proceedings were however served prior to that hearing, but only upon Vedanta.

The parties' position on 27 February 2020 on the application for a GLO

17. There were various changes of position on behalf of some of the parties in the days immediately before the hearing. As at the hearing of the CMC at 10.30am on 27 February 2020 itself, their position in summary was as follows.

1. The Leigh Day claimants – and this was consistent from 5 February 2020 – did not oppose the making of a GLO in principle. Indeed, as of 5 February 2020 Leigh Day had proposed a draft Order that was, in all but name, a GLO in any event. It had even included provision for the appointment of a "Managing Judge". However, Leigh Day did not want to prejudice or lose the trial date in October 2021. They were essentially neutral as to how and when the Hausfeld claims were dealt with, as long as it did not affect the timely progress of their claims.

2. The Hausfeld claimants resisted, somewhat strenuously, being dragged in, as they saw it, to litigation between Leigh Day and the defendants. In reality they, wished merely to stand on the side lines until that battle was done and then to re-activate their action. However, in order to present this in a more sophisticated way than seeking a formal stay, they had withdrawn their application for a stay at about 4.30pm on 26 February 2020, the day before the hearing. They thereafter joined with Leigh Day in proposing an order, agreed between them, which on its face appeared to be a GLO, but in reality (as a result of how the GLO issues were structured in Schedules 1A, 1B and 1C, which effectively kept issues regarding the Hausfeld claimants as separate)

gave Hausfeld the same benefits as though a stay of those proceedings had been ordered.

3. Both the defendants wanted a GLO made in all three sets of proceedings. That had been their position since they had realised, on 5 February 2020, that the proceedings were going to advance at a pace somewhat faster than they felt suited their interests. They had initially opposed any trial taking place in 2021 and explained that they felt such a timescale could not be achieved. The court did not accept those submissions which were not realistic. They did also rely on 27 February 2020 on the degree of agreement they had reached with Leigh Day for the hearing on 5 February 2020 on the nascent GLO-style order at that stage, and the issues agreed between the three parties for that occasion, those parties being both defendants and the Leigh Day claimants. It was only, or so it seemed, the (extremely reluctant) involvement of Hausfeld that had complicated this, as Leigh Day had decided to align itself with Hausfeld in the draft order submitted by all the claimants.

18. As does sometimes occur in this type of litigation, co-operation between the parties was not entirely unlimited. As might be guessed from the quasi dis-instruction by KCM of Herbert Smith and its existing counsel, who had been tasked with conducting the litigation for over four years including the issues that went to the Supreme Court, and also from the appointment of the provisional liquidator, the path of the litigation has not been entirely smooth. There may well also be the occasional twist in the road ahead. Equally, however, there seems to be no sensible reason why these two defendants – or indeed the court – should have to deal with two almost identical and very sizeable actions, one after the other, the first dealing with the Leigh Day claims, and then the Hausfeld claims after that. Such an approach seems to be the antithesis of the over-riding objective.

19. The Hausfeld solution to this antithesis did not have much to attract it. The defendants wanted, and in my judgment are entitled, to have those claims brought against them resolved. The system of justice ought not to be required to devote the time of a judge to resolving all the Leigh Day claims, and then do the same all over again with the Hausfeld claims. The provisional liquidator for KCM can, one assumes, potentially be working to a timetable somewhat more compressed than having very sizeable and hotly disputed claims against that company resolved sometime in 2022 or even 2023. Further, there is simply no justifiable reason, in my judgment, given the great similarity of issues, why the court should quietly shelve those very substantial claims in HT-2019-000312, simply because the claimants in that action have instructed a different firm of solicitors.

20. There were some rather alarming submissions made on behalf of both the Leigh Day, and the Hausfeld, claimants, to support their arguments that if a GLO were made, it ought to keep the two different "strands" – Leigh Day on the one hand, and Hausfeld on the other – separate. I was told that there would be a saving of costs to keep the two strands separate. I fail to see how this can be so, and is rather the opposite of what is likely to occur. I was told it would complicate the terms of the Conditional Fee Agreements ("CFA") Hausfeld had with its claimants. That may be the case, but there was no clear evidence to this effect in any event. Hausfeld must have known, after the Supreme Court judgment but before the proceedings were issued in August 2019, that there would be some prospect of its action becoming involved with the existing one

brought by Leigh Day. The events of 2015 make that glaringly obvious. The terms of the CFAs are neither here nor there, based on the lack of full evidence on this subject.

21. I was also told on behalf of Hausfeld that experts could not begin properly to prepare their evidence about the different communities, until the specific individuals within those communities who would be used for Lead Cases had been identified. With respect, that submission has no basis in reality. Any expert considering potential pollution of these communities and its effect upon them is not going to confine themselves to the particular handful of dwellings of the specific Lead Cases and ignore the effect upon that specific community in which those dwellings are located. Although there are different communities involved, the source of the pollution is said to be the same – the mine – and visits to the region can more efficiently be organised if all the claims are dealt with together.

22. I was also told that the court would be acting *ultra vires* if it ordered Leigh Day to act for any of the Hausfeld claimants. There was a suggestion that there may be a conflict of interest, and I was also told that the order proposed by Leigh Day and Hausfeld jointly, and opposed by the defendants, was a "hybrid" type of GLO and was the best option to adopt. It was also said that even if I made a GLO, the groups of claimants in the different sets of proceedings would still be entitled to instruct separate counsel to appear at the trial, even if the trial was conducted of matters arising in lead cases from each of the three different sets of proceedings.

23. Underpinning these submissions however, in my judgment, was the commercial advantage to each firm of solicitors of keeping all the interests of all of its own claimants entirely separate from the other firm, and advancing their claims in a way that would permit these actions, highly similar if not identical in terms of facts and causes of action, separate from one another. In my judgment, that is not a good reason and should not influence sensible case management. It is also contrary to the ethos of group litigation, which seemed to be ignored in the type of submission made. It is for this reason that I consider this analysis ought to be recorded in a written judgment in some detail, for assistance in other group litigation in the future should such issues arise again.

24. The parties also had certain views about the identity of the Managing Judge, and their best area of expertise. Such matters do not need to be recorded here and are in any event not relevant. The parties can and should be wholly confident that the President of the QBD is ideally placed to take all relevant considerations into account in deciding whom to appoint as the Managing Judge of this group litigation. On that point, however, the President will have far greater flexibility in terms of who she may appoint if this litigation does not proceed in a specialist list. Such lists have only small numbers of judges and the mainstream QBD has far more. Group litigation often proceeds in the mainstream QBD regardless of its subject matter, as recent cases have shown. Further, as demonstrated by what occurred in 2015, it was considered then by at least one of the firms of claimants' solicitors that the subject matter was mainstream QBD litigation. I therefore transferred the proceedings from the Technology and Construction Court to the Queen's Bench Division pursuant to CPR Part 30.5(2) as part of the terms of the GLO itself.

Analysis

25. The order suggested by Leigh Day and Hausfeld jointly on behalf of their respective claimants in the different actions is not, in my judgment, properly described as a hybrid order. It had more similarities to Frankenstein's monster. There is nothing especially unusual or unique about the type of claims advanced in these three different sets of proceedings against these two defendants, other than they have been issued at different times and one of the sets of proceedings was issued by different solicitors to the other two sets. There is no good reason for making any continuing distinction between claims brought by claimants represented by Leigh Day in the 2015 and 2020 sets of proceedings, and those represented by Hausfeld in the 2019 proceedings.

26. There are different communities involved, but the alleged pollution has all emanated from the same mine. The same type of damage is alleged in each action, and the communities all use the same waterways including the Kafue River, the main river in that area. The periods are broadly the same. Vedanta described the issues in the three sets of proceedings as "classic GLO issues" and I entirely agree with that description.

27. There is limited authority on the type of points that arise on this contested GLO application but firstly it must be remembered what group litigation is. This is fully explained in CPR Part 19. It is for claims that give rise to common or related issues of fact or law; CPR Part 19.10. Those issues are called the "GLO issues".

28. The issues that arise in these three separate sets of proceedings are, in my judgment, all the same for the purposes of the group litigation and hence ideally suited to the making of a GLO. Having given my answer in principle on 27 February 2020, I invited the parties to compile an agreed list of such issues. Whether some of them misunderstood my ruling, or whether they wished to maintain what I consider to be an artificial and wholly unjustified continuing distinction between issues in the Leigh Day proceedings and the Hausfeld proceedings, the competing drafts submitted did not achieve what was required. I have therefore drafted the GLO issues myself and these are appended to the GLO, as is required by CPR Part 19. They are also at Appendix 1 to this judgment. Upon reflection, Issue 17 could more appropriately be worded as "the principles applicable to the assessment of quantum…", but because the order has already been sealed, I have left that issue as it appears attached to the GLO. The Managing Judge can always amend such issues as he or she sees fit in any event.

29. There will inevitably be some claimant-specific issues that arise in respect of each particular claimant, predominantly if not entirely quantum related (although there may arguably be some claimants whose actions are barred because they have previously engaged in litigation in Zambia on the same facts). However, this arises in most group litigation. Such individual claimant-specific issues do not prevent the making of a GLO, nor does it mean that the court is acting *ultra vires* if a lead solicitor and counsel team instructed by that lead solicitor advances and resolves the GLO issues.

30. The real issue here is the relationship between the two competing firms of claimants' solicitors, Leigh Day and Hausfeld. Again, that is presaged by both the Practice Direction and CPR Part 19 itself. The following are relevant:
1. CPR Part 19.13 states:
"Directions given by the management court may include directions: -

(c) appointing the solicitor of one or more parties to be the lead solicitor for the claimants or defendants."

2. The editorial notes state at 19.13.2:

"Subsection (c): the appointment of lead solicitors is invariably necessary: the rule is intended to be a reserve power as the court will only rarely become involved in appointment of solicitors (see Part 42)".

3. PD19B at 2.2 states:

"It will often be convenient for the claimants' solicitors to form a Solicitors' Group and to choose one of their number to take the lead in applying for the GLO and in litigating the GLO issues. The lead solicitor's role and relationship with the other members of the Solicitors' Group should be carefully defined in writing and will be subject to any directions given by the court under CPR 19.13(c)."

31. There are three previous cases where such matters have been considered before. I shall deal with them in chronological order.

32. The first in time is ***Greenwood and others v Goodwin and others*** [2013] EWHC 2785 (Ch), a decision of Hildyard J. The first four defendants were individuals who were directors of the fifth defendant, the Royal Bank of Scotland Group. In that case, the basis of the claims was inaccuracies in prospectuses relating to a rights issue by the Royal Bank of Scotland. There were potentially four different groups of claimants in three, potentially four, separate actions. Each claimants' group was referred to in the judgment using the initials of their solicitors. At the 1st CMC Hildyard J had to decide whether to make a GLO. He explained the following:

"[8] The SL group's opposition to being brought, as it were, within the fold is, as I perceive it, principally based on the concern lest the making of a GLO would bring with it, almost as a matter of course, the need for three things which are objected to. First, the appointment of a lead solicitor who would in effect run the proceedings on behalf of all claimants and who would, in addition to managing the group register, in effect control those proceedings even if that is without prejudice to other claimants having their own representation behind the scenes….."

33. He made a GLO and stated at [15] that he would not determine what obligations the lead solicitor would have in that case at that time, other than the register obligations. At [18] he identified that he would leave such matters to a further hearing where he could consider proper evidence of the impact on funding arrangements, as there was none before him on that occasion.

34. The next case in time is ***Hudson v Tata Steel UK Ltd*** [2017] EWHC 2647 (QB), a decision of Turner J. The issues in that case concerned claims brought by employees of what had been the British Steel Corp for exposure to harmful fumes and dust causing industrial diseases. Two different firms had been appointed as lead solicitors, and Turner J was the managing judge in other similar group litigation, called the British Coal Coke Oven Workers Litigation. The judgment referred to here concerned an application by another firm, Collins Solicitors of Watford ("Collins") to be added as a lead firm, an application said by the judge to be "strongly resisted by the lead solicitors" at [3]. It appears that relations between the existing lead solicitors and Collins were not harmonious.

35. In refusing the application Turner J stated the following:

> "[15]. The disagreement between the respective firms has already begun to deteriorate from a mere divergence of objective professional opinion to the stage of personal recrimination. Mr Collins has recently cast aspersions on the sincerity of Mr Maddocks of IM in his witness statement of 17 October 2017 in which he asserts that what Mr Maddocks said in a an earlier witness statement with regard to the history of communications between the parties was not merely "wrong" and "incorrect" but "at best disingenuous".
>
> [16]. It would be neither necessary nor appropriate for this court to adjudicate on the substantive merits of these disputes. There is insufficient material upon which to embark on such an exercise. The important point is that the GLO framework requires firm and consistent organisation. Internal clashes between lead solicitors on significant matters of case management and control and flavoured by personal animosity are antipathetic to the orderly progress of the litigation as a whole. Judging by the areas of dispute so emphatically ventilated by the existing lead solicitors and Collins before me, the granting of this application would be more likely to produce a long-running forensic Punch and Judy show than a focussed and coherent pathway to a just resolution of the claims to be achieved at proportionate cost.
>
> [17]. I also take into account the long and successful history of IM and HJ working together efficiently in the very similar British Coal Coke Oven Workers Litigation. Inevitably, they have not succeeded in every application they have made in the course of that GLO but at least they have never fallen out about what applications to make in the first place."

36. In his conclusion at [23] he stated:

> "[12] I am entirely satisfied that it would be wrong to permit Collins to be appointed as lead solicitors in this GLO. The GLO structure, combined with the involvement of the existing lead solicitors, ensures that the parties are on an equal footing. Expense will be increased rather than saved by expanding the number of lead solicitors. Matters are likely to proceed with greater expedition without impairing the demands of fairness by maintaining the status quo. An increase in the number of lead solicitors would also be likely to increase the demands on the court's own resources."

37. The third case is ***Crossley v Volkswagen Aktiengesellschaft and others*** [2018] EWHC 1178 (QB) which is a decision of Senior Master Fontaine. This group litigation concerned claims arising from what has been said to be tampering or improper interference by car manufacturers with emission testing, so as to give false or incorrect readings in respect of emissions from diesel cars. The issue in this judgment was which firm or firms of solicitors should be members of the Steering Committee. As made clear at [11], the judgment concerned the making of directions by the court regarding the relationship between the solicitors acting for a large number (in that case) of claimants. At [12] the following summary is given, stating the ratio of Hildyard J in ***Greenwood*** to which I have already referred. The relevant passages are as follows:

"2[12] It is correct that the court has power to make regulations regulating the relationship between the persons interested, and that is what I am doing at this hearing. That was also stated by Mr Justice Hildyard in ***Greenwood* v *Goodwin.***

[13 He also stated in the same decision that a balance should be struck between a cohesive presentation and the qualified right of the parties to assert representation and argument of their choice. In any group litigation, that is a balance that has to be struck, the balance between ensuring that all parties are properly and appropriately represented, and the efficient conduct and case management of the litigation, which includes ensuring the efficiency and proportionality of costs that are incurred."

(emphasis added)

38. From the provisions of CPR Part 19, PD19 and these authorities, I derive the following principles:
1. Parties to litigation are generally entitled to be represented by the solicitors of their choice, and to have their case argued by their own representatives. However, in group litigation, that entitlement is qualified. In order properly to achieve efficient conduct and case management of the group litigation, that basic right takes second place to the advancement of the rights of the cohort. This is achieved through the role of the lead solicitor, and the use of counsel chosen and instructed by the lead solicitor.
2. The relationship between the lead solicitor and other firms, whether on a steering committee or otherwise, must be carefully defined in writing. In the absence of agreement, or in the event of deficiency in that agreement, the court will become involved, but this will occur only rarely. It is a reserve power and therefore rarely will it be deployed.
3. In group litigation, all the claimants in that group litigation who will be represented by a lead solicitor (or, as in the British Steel Group Litigation, two firms jointly acting as lead solicitor) are only entitled to instruct one counsel team (although that may have, of course, multiple members). Different groups of claimants are not entitled to instruct different groups of counsel.

39. Some explanation can be provided to each of the above. So far as principle (1) is concerned, the lead solicitor is not being instructed by the court to act against its wishes for all the other claimants, including those for whom it does not wish to act, who are (or because they are) represented by another firm. The lead solicitor is acting as precisely that – the lead solicitor in group litigation. They will be the contact point for the court and for the other parties in terms of service and communication. They will instruct counsel. The degree of consultation and liaison with other firms also instructed will be a matter of agreement between all the firms. It is to be hoped that rarely would there be disagreements, but if there are, the court has the reserve power in principle (2).

40. Principle (2) is self-explanatory. There was no written agreement available at the hearing before me on 27 February 2020, although each of Leigh Day and Hausfeld argued there was. This "agreement" consisted of a paragraph in a draft order that effectively stated Leigh Day would act for the Leigh Day claimants, and Hausfeld would act for the Hausfeld claimants. That is not the type of agreement envisaged by PD19B 3.3 and it is not the type of agreement that would be acceptable. Since the detailed GLO issues were drafted by me and the outstanding controversies on the

wording of the GLO itself were resolved between the hearing on 27 February 2020 and the date of this judgment, a more detailed agreement was lodged. I will refrain from passing any comment upon it, positive or negative, as that is a matter for the Managing Judge once appointed.

41. Principle (3) is, in my judgment, so obvious that it does not appear to have been stated anywhere expressly before. However, it now seems necessary to do so, given some of the submissions made before me on 27 February 2020. Given group litigation involves resolving GLO issues, and given by definition GLO issues are all common or related issues of fact and/or law, there should never be any need for separate counsel representing separate groups of claimants. The claimants will have, broadly, co-existence of interest in the same issues. After the GLO Issues are all resolved, it will be a matter for the Managing Judge how (say) individual quantum claims are each to be litigated. Depending upon the subject matter of the group litigation, there will be different ways of achieving this. But certainly so far as resolving the GLO Issues themselves is concerned, no court should be faced with different counsel teams acting for the same cohort, save in the very rarest of circumstances which it is not possible fully to envisage. Certainly, no such rare circumstances exist in this litigation.

42. Finally, the court has broad case management powers under the CPR generally, and if anything a Managing Judge in group litigation has even wider powers under CPR Part 19. Group litigation presents particular challenges not only to the court, but also to the parties. Co-operation is an integral part of CPR Part 1.4(2)(a), and the parties have an express duty under CPR Part 1.3 to assist the court to further the over-riding objective. Co-operation in group litigation is of particular importance. The importance of this cannot be over-stated.

Delay

43. I deal with this subject only because it featured so centrally in some of the submissions. The parties, with the exception of Hausfeld, agreed a stay in 2019 in an effort to settle the proceedings. The Leigh Day claimants are aggrieved at the delay generally that has ensued in resolving these claims, but not all that delay can be laid at the door of the defendants. Some delay has been caused by the stay to which I have referred. A far greater part has been caused by the jurisdiction issues working their way up through the appellate system, all the way to the Supreme Court. Other disruption was caused by the behaviour of KCM and/or its provisional liquidator, not least in the way that Herbert Smith were left without instructions in the autumn of 2019, being forced to seek to come off the record, and the delay in KCM appointing replacement solicitors. That is particularly puzzling, given the close working relationship between the two closely aligned defendants who used the same legal advisers for so long. Some delay has also been caused by the matters which I have identified at [14] to [17] above. A party refusing to attend a CMC in litigation such as this is not entirely helpful; although on the other hand, there are mechanisms available to other parties who wish to make applications to ensure their opponents are before the court. Issuing an application is not a particularly difficult step.

44. Happily, more constructive behaviour appears, finally, to have broken out in early 2020. The Hausfeld proceedings, left on the shelf as though they were unwanted or being held back for a rainy day, have now been served on both defendants, service has been acknowledged, and KCM confirmed before me on 27 February 2020 that no

point would be taken on jurisdiction. There is therefore no good reason why constructive, positive and co-operative behaviour should not become the default behaviour in this litigation from here onwards. Eventually, parties and their advisers will come to realise that by doing so, everyone benefits, including the administration of justice itself.

45. Finally, nothing in this judgment is intended to, nor should it be taken as, in anyway seeking to interfere with the function of the Managing Judge once he or she is appointed by the President. This case will now continue in the Queen's Bench Division.

Appendix 1

GLO Issues appended to GLO Order at Schedule 1

1. What is the correct interpretation of the principles of the law of negligence, nuisance and trespass which are relied upon in the claims in the Group Litigation Claims as a matter of Zambian law?

2. Whether the First and/or the Second Defendant owed the Claimants a duty of care at common law in respect of the conduct of mining and mineral processing operations relied on in the claims.

3. In the event that the First and/or Second Defendant is found to owe a duty of care to the Claimants, what is the applicable standard of care in respect of the conduct of the aspects of the mining and mineral processing operations relied on in the claims.

4. What is the correct interpretation and application, as a matter of Zambian law, of the rule in *Rylands v Fletcher*?

5. What is the correct interpretation, as a matter of law, of the provisions of Zambian statute law common to the claims?

6. Whether the First and/or the Second Defendant owed the Claimants a statutory duty under the provisions of Zambian statute law common to the Lungowe and Kasonde Claims in respect of the conduct of the aspects of the mining and mineral processing operations relied on in the claims.

7. In respect of the discharges that are relied upon in the claims, were the alleged discharges, or any of them, permissible under Zambian law having regard to relevant mining licences and regulatory requirements?

8. In respect of allegations of discharges which are common to the claims, did the First Defendant and/or the Second Defendant act in breach of the common law or statutory duties which are common to the claims?

9. Whether, as a matter of generic causation, any breach established (and relied on by the claimants) is capable of causing the types of environmental pollution and/or damage to

property and/or the personal injuries alleged and/or any other damage or form of loss relied on by the claimants in their claims and provided for under Zambian statute.

10. What type of interest in property would a Claimant have to establish in order to be able to advance a claim in respect of property damage under Zambian law in respect of each cause of action relied on in the claims?

11. What heads of loss are recoverable under Zambian law in respect of any allegation of breach of common law or statutory rules or duties that may be established and which is common to the claims?

12. Are aggravated and/or exemplary and/or wayleave and/or negotiating damages recoverable in respect of any allegation of breach relied upon in the claims?

13. How is any recoverable head of loss to be quantified under Zambian law?

14. What are the relevant legal principles applicable to the Claimants' claim for injunctive relief against the First and/or Second Defendant and/or damages in lieu against either or both of the Defendants?

15. In respect of each allegation of pollution that is relied upon:

    a. Is the allegation made out?

    b. What was the nature, extent and cause of the pollution?

16. In of each allegation of loss and damage that is relied upon:

    a. Is the allegation made out?

    b. Is causation established?

17. The assessment of quantum in respect of each recoverable head of loss which is established.