

# The making of group litigation orders in the context of competing solicitors' firms (*Lungowe and others v Vedanta Resources plc*)

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**Dispute Resolution analysis:** This case deals with the various considerations when the court is being asked to make a group litigation order, particularly, where competing solicitors' firms are acting for a number of claimants. It was made plain that, submissions which are underpinned by a commercial advantage to the solicitors acting for claimants retaining their involvement independently from other claimant firms, will not find favour with the courts. Written by Georgia Whiting, barrister, 4 King's Bench Walk.

*Lungowe and others v Vedanta Resources plc and another company* [\[2020\] EWHC 749 \(TCC\)](#)

## What are the practical implications of this case?

This case provides a useful analysis of the guiding principles when considering an application to join various claims by way of a group litigation order (GLO). Courts will be critical of competing solicitors' firms seeking to gain commercial advantage by keeping all their own claimants entirely separate from another claimant firms, and advancing their claims in a way which would permit actions to be dealt with separately, where the cases are highly similar in terms of facts and causes of action. It was confirmed that such arguments do not amount to a good reason to refuse the making of a GLO and should not influence sensible case management; to allow this would be contrary to the ethos of group litigation.

Furthermore, where a GLO is made, the parties are expected to cooperate in the appointment of a lead solicitor, and it will be rare for the courts to intervene. It was also made clear that, whilst parties are generally entitled to be represented by the solicitors of their choice, this right is qualified in the context of group litigation.

Parties likely to be involved in group litigation ought to take note of this judgment, which was provided in writing following an application hearing in order to provide guidance such that these issues do not arise again.

## What was the background?

The underlying proceedings were against Vedanta Resources Plc (Vedanta) and Konkola Copper Mines Plc (KCM), KCM being the operator of the Nchanga Copper Mine in the Chingola region of Zambia. The Nchanga Copper Mine is the second largest open-cast copper mine in the world, the process involving the extraction of the relevant deposits directly from the surface and leading to topographical changes to the ground by increasing the depth.

The subject matter of the three different sets of proceedings concerned damage caused by pollution and other detrimental effects of the mines on various communities in Zambia. There were a large number of claimants, the majority of whom were subsistence farmers on very low incomes.

Proceedings were brought in England using Vedanta as an 'anchor defendant'. The defendants contested the jurisdiction of the English courts on a number of grounds, but the matter was resolved in the claimants' favour by Coulson J (as he then was), a decision which was subsequently upheld by both the Court of Appeal and the Supreme Court.

Both Leigh Day and Hausfeld each represented a number of the claimants, leading to the application made by Vedanta for the court to make a group litigation order. The Leigh Day claimants did not, in principle, oppose the making of a GLO. However, they did not wish to prejudice or delay the trial date, which had been listed for October 2021.

The Hausfeld claimants resisted, somewhat strenuously, being brought in, as they saw it, to the litigation between Leigh Day and the defendants. They essentially wished to await the outcome of the litigation brought by Leigh Day before the litigation issued by them was determined. While they had

made an application to stay the proceedings in which they were involved, this application had been withdrawn the day before the listed CMC and they instead sought an order which on its face appeared to be a GLO, but would effectively keep the issues regarding the Hausfeld claimants as separate.

### What did the court decide?

The judge held that there was no good reason why the two defendants in question, 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 seemed to be the antithesis of the overriding objective.

The solution suggested by Hausfeld also did not have much attraction to it. The defendants wanted, and in the judge's view, were entitled, to have the claims against them resolved. The system of justice ought not to be required to have the time of a judge to resolving all of the Leigh Day claims, and then repeating the same process. Further, there was no justifiable reason, given the similarity of the issues in the various claims, as to why the court should quietly shelve the very substantial Hausfeld claims, simply because the claimants in that action had chosen to instruct a different set of solicitors.

It was also submitted 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 well be a conflict of interest, and it was also submitted that, even if the judge 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. The judge outlined that underpinning the various submissions made by the claimants was the commercial advantage to each firm of solicitors keeping all the interests 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, to proceed separately from one another. The judge held that this was not a good reason and should not influence sensible case management. It was also contrary to the ethos of group litigation, which seemed to be ignored in the type of submission made.

There was nothing especially unusual or unique about the type of claims advanced, other than that they had been issued at different times and one of the sets of proceedings had been issued by separate solicitors. There were different communities involved, but the alleged pollution had all emanated from the same mine. The same type of damage was alleged in each action, and the periods of damage were broadly the same.

While there was limited authority on the type of points raised in the contested GLO application, the principles were fully explained in [CPR 19](#). It is appropriate to make a GLO where claims give rise to common or related issues of fact or law.

The real issue in this case was the relationship between the two competing solicitors' firms, and this was also presaged by both [CPR 19](#) and CPR PD 19, which outline provisions in respect of the role of 'lead solicitor'. From the provisions of the same and the relevant recent authorities, the Judge derived a number of principles. In summary, while parties to litigation are generally entitled to be represented by a solicitor of their choice, in group litigation, that entitlement is qualified. The relationship between the lead solicitor and other firms must also be carefully defined in writing; it is rare for the courts to intervene. It was also made clear that all the claimants in the group litigation will be represented by a lead solicitor and will only be entitled to instruct one counsel team, although that may be comprised of multiple members. The application for a GLO was granted, and the matters would be transferred for further case management in the Queen's Bench Division.

### Case details

- Court: Queen's Bench Division (Technology and Construction Court)
- Judge: Mr Justice Fraser
- Date of judgment: 27 March 2020

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