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By: James Hendry

The English and Wales Court of Appeal recently upheld the trial judge's ruling in *Kalma & Others v African Minerals Ltd & African Minerals (SL) Ltd & Tonkolili Iron Ore (SL) Ltd* (collectively AML) holding that a UK mining firm operating in Sierra Leone was not responsible in tort for relying on the

Sierra Leone Police (SLP) which had used excessive force in quelling two local disturbances that left one local killed and others injured. This article will look at the various theories of liability put forward by the claimants attempting to hold the AML liable in tort in the English courts and how all of them were defeated by the trial judge's findings that AML had done nothing of a causative nature to bring about the harm. This article will contrast a Canadian case, *Caal Caal v. Hudbay Minerals Inc.*, still in the pleading stage where the claimants' allegations of greater involvement in the violence committed by mine security, a hired security firm, the state police and military had to be taken as true, could lead to a different result if proved at trial.

'Calling the local police' to quell unrest led to violence

AML obtained the rights to build and operate the largest iron ore mine in the remote region of Tonkolili in Sierra Leone (the trial judge did not find it necessary to particularize the corporate mechanisms that resulted in the third defendant inheriting the rights of the first two defendants and the defence of the action (trial para. 7)). (There was no need to analyze the Vedanta issue of the degree of control of parent company over subsidiary set out at para. 49 of that case). The activities of AML's mining operation led to significant local unrest and two particularly serious clashes with the local population in 2010 and 2012. The mine employed Community Liaison Officers to act as go-betweens (para. 11). After the 2010 incident AML arranged for permanent police outpost near the mine and hired permanent police liaison officers (paras. 22, 28). The police attacks were a few kilometres from the mine (para. 9).

The defendants called in the SLP each time there was unrest. The result of the events was described by the trial judge as a violent chaos where the SLP killed one local and beat, shot, gassed, robbed, sexually assaulted and incarcerated others in squalid conditions.

In what became the linchpin of the Court of Appeal's decision, it noted that the trial judge found that AML's provision of financial support to the SLP, along with some vehicles and accommodation for police (and some detainees, para. 17), had no 'causative potency' in the violent chaos unleashed by the SLP on the locals. Rather, he found that without AML's support, things may have gone worse. He isolated the cause of the violent response of the SLP in their 'fear, ill-discipline, anger and testosterone' (paras. 166-8). The Court of Appeal explored the trial judge's findings on AML's relationship with the SLP in some detail: payments to a financially strapped police force were necessary to get quick and substantial aid, senior management was aware of 'at least some risk' that the SLP would use excessive force but the evidence did not show that AML could or did exercise an improper or decisive degree of control over the actions of the SLP to do what they did (paras. 41-43). The judge also found that AML employees neither committed unlawful acts themselves nor instigated, directed, counselled nor procured unlawful acts and that AML management did not intend any unlawful or excessive action by the SLP (paras. 71-3).

The Court of Appeal treated the trial judge's findings of fact as so solid that it criticized counsel for having often crossed the boundary in their challenges to them, noting that this case was 'emphatically'

one where the trial judge had so thoroughly canvassed the evidence that he had ‘brought the curtain down on the facts’ (paras. 48,50).

The Court of Appeal noted that the claimants focused at trial on AML’s vicarious liability for its employees’ direct tortious involvement in the violence and its liability for directing and encouraging the SLP to violence. But these were rejected on the facts found by the judge noted above along with other arguments on liability.

The Court of Appeal summarized the claimants’ issues: whether AML was jointly liable with the SLP to the claimants based on a common tortious design with the SLP to use excessive force; and, whether AML breached a direct duty to the claimants to take adequate steps to prevent the SLP from engaging in tortious conduct.

Was AML jointly liable with the SLP by acting to advance a common design to commit the torts?

The Court of Appeal rejected the claimants’ argument that AML instigated, directed, counselled or procured the use of excessive or unlawful force against them pursuant to a common design with the SLP to suppress the unrest. On the facts found by the trial judge, the claimants had failed to prove the two elements of joint liability: first, that AML had acted in any way to further the commission of torts by the SLP and second, that AML had done anything in pursuance of a common design or intention to do, or to secure the doing, of acts that constituted the torts against them (paras. 71-4). The Court relied heavily on *Sea Shepherd UK v Fish & Fish Ltd*.

The Court of Appeal then rejected a ‘new argument’ raised by claimants’ counsel based on inferred or conditional intent which counsel raised at the hearing but which had not argued before the trial judge nor formally pleaded on appeal. The argument was that even if AML had not instigated, directed, counselled or procured the torts committed by the SLP, a common design could still be proved based first, on the support provided by AML to the SLP with foresight that the SLP might use excessive force and second, the conditional intent to quell the protests, *if need be*, by the use of excessive force. The Court did not accept the argument, suspecting that counsel was asking it to infer intent because the trial judge had found there was no *actual* intent (para. 82). The Court of Appeal reasoned that the argument was unsustainable because it was based on the cumulative effect of AML’s providing material support to the SLP together with foreseeability that the SLP might over-react, therefore substituting conditional foreseeability for the necessary actual intent (para. 83). The Court of Appeal noted that foreseeability alone is never enough to create legal liability (para. 85). The trial judge’s finding that AML had no intent to contribute to the torts by the SLP was ‘insuperable’ (para. 91).

As a matter of principle, the Court of Appeal noted that inferred intent will suffice to establish a common design in some much clearer cases than this one and ones where the issue of intent had not been so clearly determined by the trial judge. It cited *Shah v Gale* where the defendant had pointed to the house of a man she wanted beaten up by her associates which turned out to be the wrong house

resulting in the death of the plaintiff's husband by common design. AML did not have such an unlawful purpose which it was pursuing 'on behalf of or in concert with' the SLP (para. 100).

In the Court of Appeal's view as a matter of common sense, ALM was entitled to call on the police to protect their employees and property, an act which could not lead to an inference that it intended that the police should act violently, if need be, even though it might have been foreseeable that they might use excessive force which would often be the case in the kind of violent situations where police are normally called (paras. 102-3). The claimants had to show more than the provision of material support to enable the SLP to restore order, which they could and should have done without unlawful force (paras. 105, citing Lord Neuberger in *Sea Shepherd UK v Fish & Fish Ltd*, para. 66).

Did AML owe the claimant's a direct duty of care?

The Court of Appeal also rejected the claimants' submission that AML owed and breached a direct duty of care owed to them. It pointed out that the case was not one that easily fit into the established authorities and so a duty of care would have to be constructed from first principles (para. 111). As already noted, the common law does not impose liability based on foreseeability alone or for omissions to protect (here, the claimants), the latter principle being subject to a few exceptions. The Court of Appeal agreed with the trial judge that this was a case where the underlying complaint was that AML had failed to protect the claimants from the harm caused by the SLP making it a case of omissions and so did not create a duty of care (paras. 122-3). Claimants' counsel then argued that the financial and other support provided the SLP were not omissions, but positive acts of assistance in the torts committed by the SLP. However, the Court of Appeal agreed with the trial judge that if AML owed no duty of care to the claimants, such a duty to protect them would not arise 'parasitically' from the support AML provided to the SPL (paras. 113, 121). Again, the claimants had not proved that these acts of assistance caused any damage (para. 124).

The Court of Appeal also rejected claimants' counsel's further alternative argument that, if this were a case of omission, then it fell within an exception to the general principle that omissions do not create a duty of care because AML had created the source of danger. It dismissed the argument that the provision of financial and other support created the danger because, again, it was contrary to the judge's findings of fact that the SLP had created the danger and that without the support things might have been worse: AML had simply 'called the cops' (paras. 130-4).

This disposed of the case in negligence.

In the alternative, was there a freestanding duty of care?

The Court of Appeal also rejected the argument that there was a freestanding duty of care owed the claimants by AML applying the three criteria for such a duty from *Caparo Industries Plc v Dickman*: foreseeability, proximity and whether the imposition of a duty was 'fair, just or reasonable'. Though there was foreseeability that the SLP might use excessive force, this did not, by itself, create a duty of care as we have seen. In this case, there were no unique factors creating proximity: the claimants had

no direct connection with AML, the claimants were not a clearly-identifiable group that would create a limiting factor on liability and the events took place largely in the absence of AML personnel. The Court of Appeal dismissed the argument that there was a relationship of proximity between AML and the SLP based on the finding that the SLP were operationally independent from AML (paras. 140-5). Finally, it would not be fair to impose a freestanding duty because the judge had found AML was not involved in the torts and it would not be fair to create a wide duty to protect the claimants from 'their own police' (para. 146-7). Further, if there was no liability for common design, then it would be unfair to impose direct liability (para. 148).

The Court further dismissed the claimants' submission that 'it would be consistent with' the Voluntary Principles on Security and Human Rights (VPSHR) to create this duty of care, quoting the section on 'Interactions Between Companies and Public Security' to the effect that while governments have primary responsibility to maintain law and order and human rights, companies have an interest that public security providers act consistently with individuals' human rights and may have to contribute to the costs of protecting them. The Court found these standards were general and primarily concerned with local liaison such as the programs run by AML. The Court held there was nothing in the VPSHRs that imposed liability on companies for unlawful actions of local security, which the VPSHRs said was primarily a responsibility of the state (paras. 149-51). The Court made some general observations about the direct duty of care. It noted that the VPSHRs were concerned with matters such as the need for risk assessment and liaison with the police (para. 149). The Court noted that the trial judge found four breaches of a direct duty to protect the claimants had there been one: failure to carry out a risk assessment, failure to have a crisis management plan, failure to do more to engage with the SLP and failure to sufficiently work with the SLP to try to reduce the risk of excessive force (para. 154). But the trial judge found that these breaches caused no harm, and for the Court of Appeal, that put an end to AML's liability for them (para. 156).

Discussion

The claimants' case clearly ran aground on the findings of fact made by the trial judge: AML had simply called the local police, provided them with the kind of support they needed in the circumstances and that nothing AML intended or did had a causal effect on the appalling damage done by the SLP.

In effect, the SLP were the *novus actus interveniens* that broke the chain of causation. Thus, the Court of Appeal noted that AML's primary defence was the general rule that there is no liability in negligence for a third party's criminal acts (para. 112).

As noted, the Court of Appeal rejected the argument that a duty of care should be imposed on AML because it failed to comply with the VPSHRs. This has generated some comment. One commentator decries the continued reluctance of the UK courts to apply international soft law standards concerning the use of local security forces to create a legal duty of care thereby creating uncertainty for businesses and rights holders. Another commentator finds the case assures businesses that rely on the VPSHRs that the principles do not create a standard of care and that businesses can rely on local

security forces at least in cases such as *Kalma* where the facts found at trial do not show the business was in control of those local forces or supported them in human rights abuses. However, he notes that the VPSHRs were a factor in finding proximity in negligence in the failed motion to strike application in *Choc v Hudbay Minerals Inc* (2013) in Ontario.

However, there has been a recent development in January 2020 in the Hudbay case making it more relevant to the issue in *Kalma*.

A Master of the Ontario Supreme Court allowed an amendment to the Statement of Claim in *Caal Caal v. Hudbay Minerals Inc.* related to the Choc case providing greater detail in the pleadings about allegations of torts committed by local police and military forces when called on to enforce evictions of locals. The Master noted that Hudbay is a Canadian mining company that acquired S Inc, also Canadian, whose Guatemalan subsidiary CGN owned and operated an open pit mine, which was later sold in an arrangement that left Hudbay defending the action (para. 4). The claimants are indigenous people claiming rights to their ancestral homeland who allege they were evicted with excessive violence and sexual assault by CGN mine security, its security contractors, as well as Guatemalan police and military in 2007 (para. 6). Hudbay alleges the evictions were legal and carried out by court order through the Public Prosecutor along with other general denials of the allegations (para. 7). Hudbay claimed the amendments added a new cause of action involving the police and military. The Master rejected this argument holding that the current pleadings allege S Inc attempted to influence government officials to involve the police and military in the forced evictions where the sexual assaults were carried out in a country rife with sexual violence as well as coordinating, supporting and participating in the violence with knowledge of prior violence without taking steps to prevent it (para. 37). He held that the amendments in issue would clarify the claimants' existing alleged claims of negligence against Hudbay related to the roles of the police and military, including S Inc's breach of its duty by requesting, influencing, controlling, planning, participating in and coordinating the evictions with the police and the military and providing them funding and support and by failing to take steps to prevent violence, particularly after the violence alleged in the first evictions (para. 40). Finally, the Master held that, taking the facts as proved for the purpose of this preliminary motion, he was not persuaded that the claimants could not establish their case in the circumstances (para.60). For this reason, it is difficult to compare the trial judge's actual findings in *Kalma* with the factual assumptions in this case.

The new allegations of fact in *Caal Caal*, which remain to be proven at trial, contrast with the lack of influence and control over state security forces, employee intent and participation in tortious conduct found as facts in *Kalma* that bear on the issue of liability. In *Kalma*, the judge found that while AML employed community and police liaison officers, it 'relied on the police to provide support not only at the mine but at key transport locations' (see para. 12 quoting the trial judge) that it did not exercise control over the police (para. 41(d)), that AML's employees did not instigate, counsel, direct or procure or intend the tortious conduct (para. 71-2) and that the cause of the tortious conduct was the 'fear, ill-discipline, anger and testosterone' of the police (para. 168).

Liability depends on the facts as they come out at trial…

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About the author

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