

Chandler v Cape: The new parent company 'duty of care' for health & safety injuries

The Court of Appeal decision in *Chandler v Cape*¹ has extended the situations in which a parent company can be held liable for group operations, by establishing a parent company duty of care to its subsidiary's employees. Whilst the case involved an asbestos exposure injury, it is likely to be of wider application in particular to industrial groups. Parents will want to assess their involvement in group operations and ensure that any intervention is suitable and effective to manage the liability risk. This briefing analyses the implications of this decision.

The Facts

Mr Chandler was employed for a short period from 1959 in a factory owned by Cape Building Products Limited ("Cape Products") which manufactured asbestos board products. During this time he was exposed to asbestos as a result of which he recently contracted asbestosis. Mr Chandler sought to claim against Cape Plc (Cape Products' parent company) because Cape Products had since been dissolved and its employer liability insurance policy contained an exclusion in respect of asbestosis claims. Mr Chandler claimed that Cape Plc was liable on the basis of a direct duty of care to the employees of its subsidiary.

The parent, Cape Plc, had itself been involved in asbestos manufacture for many years prior to these events. It acquired Cape Products (then called Uxbridge Flint Brick Company Ltd), became a tenant on Cape Products' empty factory site and installed the asbestos board business there. Subsequently Cape Plc sold the asbestos board business to Cape Products who then continued to operate it, including during the period of Mr Chandler's employment.

As is common for a group parent company, Cape Plc was involved in certain aspects of the strategic direction of Cape Products as well as health & safety matters and these were called upon in support of Mr Chandler's claim:

Key issues

- Parents owe a duty of care to subsidiaries where :
 - their business share common features;
 - parent has superior knowledge of health & safety;
 - parent knows / ought to know of unsafe practices;
 - it is foreseeable that subsidiary would rely on parent's superior knowledge.
- Parent duty of care could extend to other types of harm.
- Parents should consider their group structures / practices to understand and manage the potential for liability.

¹ *David Brian Chandler v Cape Plc* [2012] EWCA Civ 525

- Products were manufactured on the basis of Cape Plc's specifications with involvement from a group chemist.
- Cape Plc made technical knowhow available to Cape Products who adopted Cape Plc's working practices when they took over the business.
- A doctor engaged by Cape Plc was involved in assessing the links between asbestos exposure and asbestosis (probably as a group medical adviser, although this was disputed) and he carried out specific research in relation to employees at Cape Products. A scientist engaged by Cape Plc was involved in researching methods of dust suppression.
- Cape Plc dictated certain health & safety policies which applied to Cape Products, e.g. in relation to the provision of regular medical check-ups for employees working with asbestos.
- Cape Plc were aware that dust had been permitted to escape and they failed to advise on suitable precautionary measures.

Court of Appeal Decision

The Court of Appeal recognised that the simple fact of Cape Plc being Cape Products' parent did not mean that it was liable to Cape Products' employees. Also this was not a case where the "corporate veil" could be pierced (see box inset). However, the Court of Appeal (following the High Court) found that Cape Plc had assumed a duty of care to Cape Products' employees since: the damage was foreseeable, there was sufficient proximity of relationship between Cape Plc and Cape Products and it was otherwise fair, just and reasonable to impose the duty of care on Cape Plc².

Lady Justice Arden, who gave the only reasoned judgement in the Court of Appeal then proceeded to assist in setting out circumstances in which such a duty might be held to apply more generally:

1. *"the businesses of the parent and subsidiary are in a relevant respect the same.*
2. *the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry.*
3. *the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and*
4. *the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues."*

Arden LJ considered that the parent's liability would be limited to high level advice or strategy, rather than all aspects of the subsidiary's operation.

"Piercing the Corporate Veil"

The principle of separate legal personality which protects a parent / shareholder from becoming responsible for the liabilities of its subsidiary can only be removed (or "pierced") in limited situations including the following:

- Rare situations where Parent / subsidiary treated as a single economic unit
- Company created for fraudulent, illegal or improper purposes or as a mere facade to avoid legal obligations or practice some other deception
- Parent gives directions and the board of subsidiary is accustomed to act in accordance with directions of the parent (parent liable as a shadow director)
- A company acts as agent of another party (such as its members or Parent)

² This was the traditional three-part test set out in *Caparo Industries Plc v Dickman* [1992] 2 A.C. 605.

Comment

Parent liability for subsidiaries' operations is always a theoretical possibility through the broad concept of piercing the corporate veil, but such piercing rarely happens in practice. The decision of the Court of Appeal in *Chandler v Cape*, establishes a new and potentially easier route for employees of a subsidiary, and potentially also the subsidiary itself, to claim against the parent company for health & safety injuries.

Consequently, UK based parent companies will need to consider the implications for their group structure and whether they need to take action to change structures or practices.

Parent company involvement in Group company business

Parents will want to consider the extent to which they are involved in their subsidiaries' operations, e.g. by setting detailed group health & safety (and environmental) policies and risk assessments, providing group-wide technical support or monitoring illnesses but also more generally in relation to involvement in trading or funding.

They will need to consider whether that involvement is suitable and how it should be structured and managed across the group. Where parents do get involved, they will need to ensure that appropriate systems and lines of communication to monitor compliance are put in place.

Corporate structuring

Concerns over parent liability may also influence corporate structuring such as for complex entities like joint ventures: for example, shareholder agreements should set out clear rules for the involvement of shareholders to ensure that the potential for liability is understood and appropriately managed.

UK based parents will not only be concerned about liability for the operations of UK subsidiaries but also for those of overseas subsidiaries which may have very different standards and safeguards for health & safety protection. Commentators have noted that some multi-national companies may want to avoid incorporating in the UK for that reason.

Corporate disposals

Corporate sellers of group companies may find that they retain "duty of care" liabilities following the disposal transaction. This type of liability will need to be factored in to any allocation of responsibility under the transaction documents.

Potential for extension to other areas of law

Whilst this case involved asbestos exposure-related injury, there is the clear possibility to apply it to other cases of health & safety related injuries where parents have special knowledge of the industry and have taken an active participation in the subsidiary's operations.

It seems likely that the courts will want to limit the situations in which a parent's duty of care will be imposed to ensure that the separation of legal personality is maintained as a general principle. It is possible to imagine, however, that these principles could be used in appropriate cases to enforce liability against parents for other types of damage such as environmental pollution.

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