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Case Law Update: Chandler v Cape PLC

June 2012

Circumnavigating the corporate veil: parent company held liable for subsidiary's asbestos failings

In a landmark decision the Court of Appeal has upheld a High Court judgment which found Cape PLC directly responsible for the health & safety of an employee of its subsidiary, Cape Building Products Limited ("**CBPL**").

Parent held directly responsible for the health & safety of a subsidiary's employee

Although the Court explicitly rejected any suggestion that the decision impacts directly on the concept of piercing the corporate veil, this case will potentially have far-reaching implications for asbestos (as well as wider environmental and health & safety) related claims against group companies (including where the operations in question relate to overseas subsidiaries).

Background

The claimant, David Chandler, pursued Cape PLC after being diagnosed with asbestosis in 2007 as a result of a short period of employment with CBPL (now dissolved) over fifty years ago. During the course of his employment with CBPL, Mr Chandler was exposed to significant quantities of asbestos dust.

Mr Chandler did not seek to have the dissolution of CBPL set aside because CBPL's employer's liability insurance excluded claims of this type. Instead, a claim was brought in negligence against the parent company, Cape PLC.

Parent companies are advised to review their approach to the management of health & safety in their organisations

Decision

The Court found that Cape PLC's actions and knowledge at the time of Mr Chandler's exposure amounted to an assumption of responsibility to CBPL's employees, giving rise to a direct duty of care for their health & safety.

In particular, the Court noted that at the time of exposure, Cape PLC had superior **knowledge** of the health dangers of asbestos, would have known that CBPL was carrying out its business in a way which risked health & safety and would have or ought to have **foreseen** that CBPL and/or its employees would rely on its superior knowledge.

Additionally, the Court decided that Cape PLC had sufficient **control** over its subsidiary by virtue of its management of certain non health & safety aspects of CBPL's business (such as product mix and control of capital expenditure).

To discharge its duty of care to CBPL's employees, Cape PLC should either have (i) advised CBPL on what steps it had to take to provide employees with a safe system of work or (ii) ensured that those steps were taken. By failing to take action, it was held that Cape PLC had breached its duty, causing the injury to Mr Chandler.

In reaching its decision, the Court affirmed the principle that there is no imposition or assumption of a duty of care purely because of the parent and subsidiary relationship. However, the Court emphasised that such a relationship does not preclude the existence of a duty of care in circumstances where the actions and knowledge of the parent may be taken as an assumption of responsibility for the employees of the subsidiary.

Comment

What is striking about this judgment is the common place nature of the conduct which may give rise to this assumption or attachment of responsibility.

The Court stressed that the parent's conduct does not have to be out of the ordinary in a parent-subsidiary relationship or amount to absolute control. Provided the parent exercises some control over the subsidiary (which may only be of a high level advice/strategy nature and not necessarily concern health & safety issues) this will be sufficient.

Examples given by the Court of controls which may be sufficient include: instructions about products; prior authorisation of capital expenditure; a requirement to conduct operations 'in accordance with company policy' or aspects of health & safety policy, even if only at a strategic and high level – there being no need for the parent to have assumed any responsibility for, or to made a practice of intervening in, actual implementation of health & safety measures.

In summary, where a parent exerts some control along the lines discussed above and

- undertakes the same or similar business as its subsidiary;
- either had or ought to have had superior knowledge of relevant health & safety issues (e.g. the dangers of asbestos);
- was aware or ought to have known of the risk to employees; and
- knew or ought or have foreseen (and this may be inferred from the parent's conduct in relation to the kind of wider issues referred to above) that the subsidiary and/or employees would rely on its superior knowledge,

the parent could assume responsibility for the health & safety of its subsidiary's employees.

Implications

In conventional corporate group structures where, for example, there are (i) policies which apply on a group-wide basis, (ii) high level, strategic financial and/or product related control and direction exerted by a parent or (iii) Group level health & safety functions, there is now a real risk that a parent company, in certain circumstances, could be found to owe a duty of care to the employees of its subsidiary companies.

In light of this, parent companies are advised to review their approach to the management of health & safety in their organisations to take account of these risks, which may have both financial and reputational implications.

In our view it is clear from this case that no comfort can be derived from seeking to devolve all responsibility for health & safety to subsidiary companies. Such a response would, in any event, risk severe public opprobrium and run contrary to the trend in public policy which is toward greater, rather than less, group-wide accountability through, for example, reporting obligations.

The position where complex, multi-divisional corporate organisations or private equity structures are involved is more difficult to assess and is likely to depend on the exact circumstances. It is possible, for example, that a combination of lack of controls of the kind referred to in this case and failure to satisfy the knowledge tests, may be enough to protect the parent company from liability. However, this will require careful consideration and review in order to develop an appropriate strategy for the management of these risks.

If you would like to more about this case or would like further advice on the management of your environmental and health & safety risks, please contact Doug Bryden, Owen Lomas or your usual contact at the firm.

Key Environment & Safety Law Contacts

Doug Bryden

Head of Environment & Safety Law
doug.bryden@traverssmith.com
+44(0) 20 7295 3205

Owen Lomas

Consultant, Environment & Safety Law
owen.lomas@traverssmith.com
+44(0) 20 7295 3376

Doug Bryden is praised for being "bright and commercially aware [advising] on a broad range of environmental issues"

Chambers UK

Owen Lomas is a "first rate lawyer" who "cannot be matched", a "genuine star" with "consistent problem-solving ability", "the doyen of environmental law"

Legal 500 and Chambers UK

Travers Smith LLP
10 Snow Hill
London
EC1A 2AL
T: +44 (0)20 7295 3000
F: +44 (0)20 7295 3500

www.traverssmith.com