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Briefing note

August 2012

New Risks for Parent Companies in the Natural Resources Sector

In *Chandler v Cape Plc* the English Court of Appeal has held that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiaries' employees. In this briefing, we consider the broader implications of the judgment for companies operating in the natural resources sector.

It is common for large natural resources groups to centralise technical expertise and policies relating to matters such as health and safety, environmental practices and labour standards. Increasingly, multinational groups are also adopting policies on corporate social responsibility which are implemented in a top-down fashion. There are good reasons for maintaining consistent standards in groups operating in multiple jurisdictions where relevant domestic laws may vary considerably. It will often be cost-efficient for specialist technical expertise to be centralised within parent companies and made available to subsidiary enterprises as required.

The judgment in *Chandler v Cape* will cause natural resources groups headquartered in England to look carefully at their corporate governance arrangements and group policies in order to minimise the risk of litigation relating to the operations of subsidiaries.

The *Cape* decision

In *Chandler v Cape*, the claimant alleged that Cape Plc owed a duty of care to him as an employee of its subsidiary, Cape Building Products Ltd ("Cape Products"). The claimant had worked for Cape Products for a short period from 1959 in a factory which manufactured asbestos board. During this time the claimant was exposed to asbestos as a result of which he contracted asbestosis. The claimant brought a claim against Cape Plc because Cape Products had been dissolved and its employer liability insurance policy contained an exclusion for asbestosis. The claimant alleged that Cape Plc was liable on the basis of a direct duty of care to the employees of its subsidiary.

The Court of Appeal held that Cape Plc had assumed a duty of care to Cape Products' employees for health & safety matters in relation to risks from asbestos. Circumstances in which the law would impose responsibility on a parent company for the health and safety of persons employed by subsidiaries include:

1. where the business of the parent and subsidiary are 'in a relevant respect the same';
2. where the parent has or ought to have superior knowledge of relevant risks;
3. where the parent knows that its subsidiary's working practices are unsafe; and
4. where the parent knew or should have known that the subsidiary would rely on the parent to protect employees against risks of which the parent company had superior knowledge.

The judgment in *Chandler v Cape* does not create new law. It simply builds on the existing law of negligence. Although the issue had not previously been determined, previous cases had indicated support for the proposition that a parent company may owe a direct duty of care to employees of subsidiaries and the Court of Appeal agreed.

In finding that Cape Plc had assumed a duty of care in relation to the health and safety of persons employed by its subsidiaries, the Court of Appeal emphasised the following facts:

- Cape Plc had itself been involved in asbestos manufacture for many years and started the asbestos business at the factory before transferring the business to its subsidiary Cape Products;
- products manufactured by Cape Products were manufactured to Cape Plc's specifications with group chemist's involvement;
- Cape Plc were aware that dust had been permitted to escape from the asbestos board production facility and had failed to advise Cape Products on suitable precautionary measures to prevent harm to its employees;
- a doctor and scientist employed by Cape Plc were involved in assessing the links between asbestos exposure and asbestosis and researching methods of dust suppression (respectively);
- Cape Plc dictated certain health & safety policies which applied to Cape Products, for example, there was evidence that it was Cape Plc policy to require regular medical check-ups for employees working with asbestos.

In light of these facts, the Court of Appeal held that Cape Plc knew about the risks posed to employees of Cape Products and, further, that Cape Plc had *superior knowledge* of those risks and how they should be managed. In such circumstances, the Court of Appeal held that "*Cape assumed a duty of care either to advise Cape Products on what steps it had to take in the light of knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken*."

Cracks in the wall?

While it is unlikely that *Chandler v Cape* opens the floodgates for claims against UK-based parent companies relating to operations of subsidiaries, the judgment does demonstrate that the principle of separate legal personality is not an impermeable barrier.

Each case will depend on its specific facts, but it is possible that the courts will be asked to extend the reasoning in *Chandler v Cape* beyond the specific context of claims relating to the health and safety of subsidiary employees. In future cases, claimants may well seek to rely on parent companies' superior knowledge of certain risks in order to establish that the parent has assumed a direct duty of care to subsidiaries' employees or (with more difficulty) to other third parties. Claimants may also seek to extend the reasoning in *Chandler v Cape* to areas other than occupational health and safety where parent companies are involved in establishing and implementing group risk management policies.

Claims may, for example, be attempted in relation to environmental damage or human rights, involving allegations of damage to property, livelihood or personal injuries suffered in locations where group operations occur. The viability of any such claims will depend on many factors. In addition to showing that a duty of care exists, that it has been breached and that damage has been caused to the claimant, other relevant factors will include the country in which the subsidiary is located and the nature of the relationship between the parent company and subsidiary in question.

For example, claimants in cases where the relevant

The corporate veil and the mantle of responsibility

The Court of Appeal in *Chandler v Cape* emphasised that the case did not require the court to go behind the corporate veil; indeed it was common ground between the parties that there was nothing to justify piercing the corporate veil between Cape Plc and Cape Products. Veil-piercing may occur in cases where:

- the parent and subsidiary essentially operate as a single economic unit;
- the subsidiary has been established for fraudulent, illegal or improper purposes or as a mere facade to avoid legal obligations;
- the parent company gives directions and the board of the subsidiary is accustomed to act in accordance with directions of the parent (in such circumstances the parent company may be liable as a shadow director); or
- the subsidiary acts as the agent of the parent company.

Chandler v Cape shows that there are cases where the parent company may be directly liable in relation to the operations of subsidiaries notwithstanding the principle of separate legal personality. In this context, the Court of Appeal said it was not necessary that the parent should have absolute control over the relevant subsidiary.

subsidiary is incorporated in a foreign jurisdiction (in *Chandler v Cape* the subsidiary was an English company) may need to prove that the law of that jurisdiction would impose a duty of care on the parent company.

Prior to the introduction of the Brussels I Regulation, defendant companies were more readily able to argue that it would be more convenient for a case to be heard in the jurisdiction where the harm occurred. This argument is no longer open to companies incorporated in England because the Brussels I Regulation provides that the English courts must not decline to exercise jurisdiction over companies incorporated here. In some circumstances it may be open to claimants to sue foreign incorporated subsidiaries directly in the English courts on grounds that the subsidiary has its principal place of business or central administration in England, thus affording jurisdiction to the English courts under Article 60 of the Brussels I Regulation. In another recent judgment of the English High Court – *Flatela Vava and Others v Anglo American South Africa Limited* – an application for specific disclosure against a South African subsidiary of Anglo American plc was allowed to assist the claimants to investigate whether there was factual support for their allegation that Anglo American South Africa Limited had its central administration in England because the London headquarters of its parent, Anglo American plc, was the place where management decisions relating to its business activities were taken.

Claimants in future cases are most likely to pursue claims against parent companies when the subsidiary lacks sufficient assets to satisfy the claim in question. However, the deep pockets of the parent company are not the only relevant factor. Another important factor which may lead claimants to issue proceedings in the English courts is the possibility of obtaining conditional funding or pro-bono legal representation in this country, and which may not be available to them in other jurisdictions.

It goes without saying that test cases may mean costly and high profile litigation, even if liability is not ultimately established.

Assessing risks in light of *Chandler v Cape*

UK-based natural resources groups will need to consider the extent to which they are involved in their subsidiaries' operations and whether such involvement exposes them to the risk of claims in the English courts. For example, parent companies should consider their role in establishing group risk management policies, undertaking risk assessments, providing technical support to subsidiaries and monitoring compliance with group policies.

In large multinational groups, it is inevitable that parent companies will be involved in assessing and managing risks connected with operations of subsidiaries. In the natural resources sector in particular, investments are too important and the risks too overt for management to be entirely localised. Many companies now apply international standards throughout their operations for reasons of efficiency and also to meet expectations of external stakeholders. The efficiencies and advantages that such structures and policies bring need not be abandoned but the risks that may arise need to be recognised and managed.

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