PARENTAL LIABILITY FOR FOREIGN SUBSIDIARIES

It is a common (and unobjectionable) practice for multinational companies to operate via subsidiaries in Africa (and other developing parts of the world). Many of those subsidiaries carry out activities which are inherently risky both to human health and to the wider environment. Many are also obliged to do business in countries or regions that are unstable, sometimes violently so. Not only is the use of local subsidiaries perfectly permissible, in some jurisdictions it is required.

Against this background, in what circumstances might a UK parent company be liable in the civil courts for health and safety breaches or environmental damage caused by their African subsidiary or even for harm suffered by employees of that subsidiary resulting from local conditions? Under what circumstances might local legal teams seeking redress for serious (and potentially criminal) conduct in a local jurisdiction wish to examine the conduct of parent entities outside the jurisdiction.

Assuming liability can be established, where should any claim be heard? These questions are briefly answered below, together with some reflections on related policy and governance issues which UK based corporates with overseas subsidiaries may wish to consider.

The starting point is the landmark Court of Appeal case of *Chandler v Cape plc*[1], in which the court held that the parent company owed a duty of care to the claimant who had developed asbestosis resulting from a short period of employment over 50 years previously with the parent's subsidiary. The subsidiary was no longer in existence and its insurance policy excluded asbestosis claims. The court noted that this was one of the first cases in which an employee had established such liability at trial on the part of his employer's parent company.

Giving judgment in *Chandler*, Arden LJ emphasised that the court was not concerned with piercing the corporate veil. A parent and subsidiary are separate legal entities and there can be no imposition or assumption of liability by reason only that a company is the parent of another. The question was simply whether what the parent did amounted to taking on a direct duty to the subsidiary's employees, applying the ordinary and familiar principles of the law of negligence. Responsibility may be imposed on a parent where it is found to have been

[1] [2012] EWCA Civ 525.

"*attached*" (rather than "*assumed*", there being no requirement to find voluntariness) in appropriate circumstances.

In *Chandler*, those circumstances were said to include, (i) the parent and subsidiary had relatively similar businesses, (ii) the parent had (or ought to have had) superior knowledge on some relevant aspect of health and safety in the asbestos industry, (iii) the subsidiary's system of work was unsafe as the parent knew (or ought to have known) and (iv) the parent knew (or ought to have foreseen) that the subsidiary or its employees would rely on it using its superior knowledge for the employees' protection. Importantly, it was said to be not necessary to demonstrate that the parent was in the practice of intervening in the health and safety policies of its subsidiary. A court would look at the relationship between the companies more widely and may find (iv) established where there is evidence the parent involved itself in the trading operations of the subsidiary, for example around production and funding issues.

Some years after *Chandler*, the Court of Appeal had to determine jurisdiction in claims issued in England against UK parents for events occurring in Africa in *Okpabi v Royal Dutch Shell Plc*[2] and again in *AAA v Unilever Plc*[3]. In both instances, to establish jurisdiction, the claimants needed to demonstrate a properly arguable case that they were owed a duty of care by the parent.

In *Shell*, the claimants were Nigerian citizens inhabiting areas which had been contaminated by substantial discharges of crude oil from infrastructure operated by a joint venture agreement in which a Nigerian incorporated subsidiary of the UK parent company (Royal Dutch Shell) was a minority shareholder. The court held (by a majority) that the claimants could not demonstrate a properly arguable case that the parent owed them a duty of care on the basis either of an assumed responsibility for devising a material policy (the adequacy of which was the subject of the claim) or on the basis that it controlled or shared control of the operations which were the subject of the claim.

The mandatory and high-level policies issued by the parent were applicable across all of its subsidiaries, there was no evidence the parent took upon itself the enforcement of promulgated standards and the, "*exiguous evidence of centralised assistance to [the Nigerian*

[2] [2018] EWCA Civ 191.
[3] [2018] EWCA Civ 1532.

subsidiary] does not come close to supporting the sort of proximity on the basis of which the court might find a duty of care to exist." Sir Geoffrey Vos went so far as to make a general observation as to the unlikelihood, "*of an international parent…undertaking a duty of care to all those affected by the operations of all its subsidiaries*."

In *Unilever*, the claimants, former employees of a Kenyan subsidiary, alleged that the UK parent (Unilever Plc) owed a duty of care to protect them from serious tribal violence that had erupted on the subsidiary's tea plantations following a presidential election. The Court suggested two basic types of case where a duty might be imposed on a parent, (i) where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of (or jointly with) the subsidiary's own management, or (ii) where the parent has given relevant advice to the subsidiary about how it should manage a particular risk.

It was emphasised that ordinary, general principles of tort law should apply in such a scenario; *Chandler* had provided guidance but, "*did not lay down a separate test, distinct from legal principle, for the imposition of a duty of care in relation to a parent company*." In rejecting the claimants' appeal, the court concluded that Unilever did not provide relevant advice to its subsidiary, that, in fact, expertise in relation to the local political situation was to be found only within the subsidiary and that the latter understood that it alone was responsible for risk management and for handling the crisis following the election.

The Supreme Court considered these issues in *Lungowe v Vedanta Resources Plc*[4]. The claimants, a group of 1,826 Zambian citizens, alleged that the UK parent and its Zambian subsidiary were liable for damage to their health and farmland caused by toxic discharges from a very large copper mine operated by the subsidiary. Briggs LJ was, "*reluctant to seek to shoehorn all cases of the parent's liability into specific categories*" such as those described in *Unilever*, above. Crucially, each case must have regard to the particular way in which the business is structured, "*the parent may be no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries. At the other extreme, the parent may carry out a thoroughgoing vertical reorganisation of the group's businesses so that they are, in management terms, carried on as if they were a single commercial undertaking…"*.

[4] [2019] UKSC 20.

Briggs LJ rejected defence submissions (based on *Shell* and *Unilever*) that a parent could never incur a duty of care in respect of a subsidiary's activities merely by laying down group-wide policies. Such material might, after all, contain systemic errors which cause harm when implemented. Further, a parent may take active steps (training, supervision and enforcement) to see that policies are implemented. Lastly, and perhaps somewhat controversially, "*even if it does not in fact do so*" a parent may incur liability if it holds itself out as exercising that degree of supervision and control. "*In such circumstances its very omission may constitute the abdication of a responsibility which it has publically undertaken*." The court found that the claimants had a good arguable case on the facts (although whether a duty can be established is, of course, a matter for the trial).

Thus *Vedanta* undoubtedly widens the circumstances in which a UK parent might be liable for the acts of its foreign subsidiaries. But the judgment is also significant because the court found that, although Zambia would ordinarily be considered the proper place for the proceedings (location of the claimants and the alleged damage, application of Zambian law, etc.) there was a real risk that the claimants would not obtain substantial justice in that jurisdiction. Two factors were determinative. First, the claimants were impecunious and, without legal aid or conditional fees, would be unable to fund their claim. Second, Zambia lacked sufficient suitably experienced lawyers familiar with managing and conducting complex group litigation. As a result, the court decided that the claim should be heard against both parent and subsidiary in the UK.

Whilst there are clear moral and ethical reasons why a parent company should ensure that its subsidiaries or group companies comply with international standards with respect to health and safety and the environment wherever they are based, the question is how that moral obligation can be prevented from becoming a legal one sounding in damages. In light of *Verdana* and the former authorities, parent companies might lean towards one of two broad approaches.

They could opt to ensure that the operations of a subsidiary are kept truly separate, that no steps towards implementation of group-wide policies are taken by the parent, that care is exercised over what is asserted by the parent in relation to its group policies and that the subsidiary's activities are regulated by decisions made by its own directors. This would include not providing relevant health and safety documentation to subsidiaries, but

permitting them to develop and implement their own policies. Care should be taken that subsidiary companies do not simply adopt, company logo and all, the policies of its parent or reference or defer to group protocols. In any event, there may be no need for subsidiaries operating in other jurisdictions to rely on group policies as good practice suggests that they should develop their own policies taking into account the regulatory regime in which they operate and the particular risks posed by their own operations. Of course, non-legal risks might also arise which have negative implications for the group irrespective of the effective minimisation of risk. For example, potential commercial or reputational impacts to the group if a subsidiary's policies are found to be sub-standard.

Alternatively, a parent could choose to examine their group-wide policies to eliminate any systemic errors and then ensure that the subsidiary receives appropriate oversight and supervision of their activities, particularly if their business is potentially dangerous and carried on in fragile environmental conditions. If this latter option is followed, it must be recognised that it risks the parent becoming liable for any alleged failures of the systems adopted by its subsidiaries and appropriate insurance should be put in place.

Which approach is favoured may say a great deal about the wider business culture of the parent itself.

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