English Court of Appeal clarifies when a parent company will be liable for the actions of its subsidiary

The Court of Appeal has handed down judgment in the case of *Okpabi and others v Royal Dutch Shell Plc and another.*[1]

The case raised important issues with regard to the circumstances in which a parent company will be held liable for the actions of its subsidiary. In particular, the judgment considered the effect of the implementation of the parent company's group policies by the subsidiary and whether or not that made it more likely that a parent would be held liable for the actions of its subsidiary.

Background to the appeal

At first instance the claimants had sought damages as a result of serious, and ongoing, pollution and environmental damage caused by leaks of oil from pipelines and associated infrastructure in and around the Niger Delta, for which they contended the first defendant (**"Shell"**) and the second defendant (**"SPDC"**) (Shell's Nigerian subsidiary) were responsible.

Shell and SPDC argued that the English courts did not have jurisdiction to hear the case and that the claim had only been brought against Shell to create a connection to the English courts, in circumstances where no other connection existed.

At first instance, the High Court found in favour of the defendants on the basis that the claimants had failed to present a properly arguable case that Shell directly owed them a duty of care. The claimants appealed to the Court of Appeal in an attempt to overturn that finding.

Court of Appeal's decision

By 2:1, the Court of Appeal has upheld the first instance decision and dismissed the appeal (with Lord Justice Sales dissenting), finding that no duty of care was owed by Shell to the claimants.

Formulation of principles for establishing parent company liability

In reaching that decision, the Court of Appeal followed its previous decision in *Lungowe and others v Vedanta and KCM*[2]. In that case several key principles were established in respect of the circumstances in which a parent company may be liable for the actions of its subsidiary. In *Vedanta* it was held (at paragraph 83) that:

(1) The starting point is the three-part test of foreseeability, proximity and reasonableness.

(2) A duty may be owed by a parent company to the employee of a subsidiary, or a party directly affected by the operations of that subsidiary, in certain circumstances.

(3) Those circumstances may arise where the parent company:

(a) has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim, or

(b) controls the operations which give rise to the claim.

(4) Chandler v. Cape Plc and Thompson v. The Renwick Group Plc describe some of the circumstances in which the three-part test may, or may not, be satisfied so as to impose on a parent company responsibility for the health and safety of a subsidiary's employee.

1 [2018] EWCA Civ 191

2 [2017] EWCA (Civ) 1528

(5) *The first of the four indicia in Chandler v. Cape Plc [80], requires not simply that the businesses of the parent and the subsidiary are in the relevant respect the same, but that the parent is well placed, because of its knowledge and expertise to protect the employees of the subsidiary. If both parent and subsidiary have similar knowledge and expertise and they jointly take decisions about mine safety, which the subsidiary implements, both companies may (depending on the circumstances) owe a duty of care to those affected by those decisions.*

(6) *Such a duty may be owed in analogous situations, not only to employees of the subsidiary but to those affected by the operations of the subsidiary.*

(7) *The evidence sufficient to establish the duty may not be available at the early stages of the case. Much will depend on whether, in the words of Wright J (in Connelly v. RTZ Corporation Plc [1999] C.C.C 533), the pleading represents the actuality.*

In the present case, these principles were accepted by both sides and, in future cases they will, no doubt, serve as a useful guide for litigants involved in similar disputes concerning the potential liability of parent companies for the actions of their subsidiaries. This does not, however, preclude the prospect of there being significant legal argument in future in respect of the meaning and relevance of each of these principles.

Could the adoption of parent company policies by subsidiaries increase the risk of a duty of care arising?

In respect of the principles set out in *Vedanta*, there was some concern that the third principle may significantly increase the risk of English multinational organisations being held liable for the actions of subsidiaries.

In particular, construed more widely, "policies" could extend to all policies required by the parent company, including those concerning the prevention of human rights violations which could, in turn, result in English multinational companies limiting or scrapping such policies for their subsidiaries.

However, the Court of Appeal has now clarified the position and has held that the mere existence of parent company policies is not, in itself, sufficient to give rise to a duty of care. In particular Lord Justice Simon noted that:

> *"the issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of a subsidiary…such as to give rise to a duty of care in favour of any person or class of persons affected by the policies".*

Sir Geoffrey Vos, Chancellor of the High Court also noted (in agreement with Simon LJ) that in this specific context, the "*detailed policies and practices*" had not been devised specifically for SPDC but had been applied across many of Shell's subsidiaries and joint-ventures.

It therefore seems from the judgment that: (i) it is unlikely that any group-wide policies will in isolation create sufficient proximity to give rise to a duty of care which puts the parent at risk for being liable for its subsidiaries' actions; and (ii) where a bespoke policy is created by the parent company for implementation by a specific subsidiary, there is a greater risk that the parent company will be said to have assumed a duty of care.

Comment

This judgment should provide some comfort in respect of parent company liability and provide helpful clarification in respect of when a parent company will (and will not) be liable for the actions of its subsidiaries.

In particular, it is clear from the judgment that where a parent company requires its group companies to implement certain policies, this will not in itself create sufficient proximity for the purpose of giving rise to a duty of care.

Any risks can be further mitigated by the parent company requiring each subsidiary entity to be primarily responsible for the implementation of the policy. From a practical standpoint, it is likely to be preferable to have such policies implemented by the subsidiaries in any event given their knowledge and understanding of the relevant local regulatory requirements.

If you have any questions or comments in relation to the above, please contact the authors or your usual Mayer Brown contact.

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