Chandler v Cape: Piercing the Corporate Veil: Lessons in Corporate Governance

Introduction

On 25 April, the Court of Appeal handed down an historic ruling concerning the liability of parent companies to an employee of one of its subsidiaries.

The case concerned health and safety matters, but the decision has much wider implications for parent company liability across a broad range of issues.

One area of particular concern will be multi-national companies headquartered in the UK operating through subsidiaries in less developed countries. The case potentially opens up avenues of recourse that, up to this decision, would not have been available.

Mayer Brown’s Corporate and Environment and Safety Groups have teamed up to offer a one-stop service to guide clients on the ramifications of the decision and on the practical steps they can take to mitigate the risk of liability.

The Facts

The claimant, Mr Chandler, was employed for a short time by Cape Building Products Limited (“Cape Products”) in the late 1950s and early 1960s. During the course of his employment he was exposed to asbestos fibres.

Mr Chandler was diagnosed with asbestosis in 2007. Cape Products was dissolved some time ago and, in any event, its insurance policy contained a very broad exclusion that would have prevented recovery for this illness against its insurer.

In view of this, Mr Chandler began proceedings against Cape Products’ parent company, Cape PLC.

As a general proposition, parent companies are not liable for the negligence of their subsidiaries on the basis that each has a distinct legal personality and it should, as a rule, not be possible to “pierce the corporate veil”.

In this case, however, the Court of Appeal held that the parent company, Cape PLC, was liable (although, technically, the corporate veil was not pierced).

Basis of Court of Appeal’s decision

The Court of Appeal was keen to stress that Cape PLC was liable not because it in some way assumed the liability of its subsidiary, but because it owed a direct duty of care to Mr Chandler which it breached.

Key then, to the decision – and to addressing the more general governance issues arising from it – are the factors identified by the Court as being relevant to establishing whether such a duty of care exists.

Arden LJ identified four relevant factors as follows:

• are the businesses of the parent and subsidiary in a relevant respect the same?
• does the parent have, or ought it to have, superior knowledge on some relevant aspect of health and safety in the particular industry?
• does the parent know (or ought it to know) that the subsidiary’s system of work is unsafe in some way?
• does the parent know (or ought it 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 the last point, the court noted that 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 this last point 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.
In the case of Cape PLC and its subsidiaries, the court found that there was a group policy in relation to health and safety.

While Cape PLC did not control all of the activities of Cape Products, the court ruled that it is enough if it can establish that the defendant controlled or took overall responsibility for the measures adopted by Cape Products to protect employees against harm from asbestos exposure.

In this case, Cape also had a Group Medical Adviser who was responsible for health and welfare of all employees within the group. Indeed, the Group Medical Adviser was directly involved in an investigation of a case of a person who had contracted an asbestos related disease at a factory in Uxbridge. In addition, Cape employed a Group Chief Scientist or Chemist who was involved in seeking out ways of suppressing dust from the group's factories, not just those operated by Cape itself.

**Practical Points**

Group companies will need to examine the decision carefully to determine whether their codes of governance procedures (including health and safety, employment and environment policies and practices) create a risk of parent liability. In particular, businesses need to look at:

- the roles and responsibilities of directors and managers;
- the composition of parent and subsidiary boards;
- line management and reporting lines;
- director and local management training;
- the scope of environmental, health and safety and employment communications from subsidiary to parent and the role of legal privilege; and
- the content of external communications by parent companies on environmental, health and safety and employment matters and membership of lobby or trade groups.

If you would like any further information on Chandler v Cape PLC or any related issue, please contact:

**Michael Hutchinson**
Partner, London
E: mhutchinson@mayerbrown.com
T: +44 20 3130 3164

**Martin Mankabady**
Partner, London
E: mmankabady@mayerbrown.com
T: +44 20 3130 3830