

PEOPIL OCCUPATIONAL HEALTH EEG
THESSALONIKI 15 JUNE 2023


TRANSNATIONAL CORPORATE LIABILITY

PHILIP MEAD

mead@I2kbw.co.uk



www.I2kbw.co.uk

 @I2KBW

Introduction

Give an overview of case law developments in England and Wales on the liability of parent companies, in particular by reference to the following cases:

- (1) *Chandler v Cape* [2012] (Court of Appeal)
- (2) *Lungowe v Vedanta* [2019] (Supreme Court)
- (3) *Okpabi v Royal Dutch Shell* [2021] (Supreme Court)

Questions to consider:

- ▶ How to establish a direct duty owed by a Parent Co to the victim?
- ▶ Is it necessary to establish direct control by the Parent?
- ▶ How are omissions to act treated?
- ▶ Are the activities of the Subsidiary inherently dangerous?
- ▶ Is there evidence of systemic failure?
- ▶ Can the Parent assume responsibility for the Subsidiary merely by adopting policies or making public statements of responsibility?

Facts in Chandler (I)

- ▶ The Claimant was employed as a brick loader in 1959 and 1961–1962 by a subsidiary of the defendant company.
- ▶ Asbestos was also produced on the site where he was employed, in a factory with open sides, and dust from the factory migrated into the area where the claimant worked.
- ▶ Fifty years later the claimant contracted asbestosis and brought a claim against the defendant, alleging that it owed a direct duty of care to the employees of its subsidiary company to advise on, or to ensure, a safe system of work for them.

Facts in Vedanta (2)

- ▶ The Claimants, Zambian citizens who lived in Zambia, brought claims in negligence against the Defendants, a United Kingdom company and its Zambian subsidiary, alleging personal injury, damage to property and loss of income, amenity and enjoyment of land due to pollution and environmental damage caused by discharges from a Zambian copper mine which was owned and operated by the Second Defendant subsidiary.

Facts in Okpabi (3)

- ▶ The two sets of Claimants, representing themselves and others who lived in the Niger Delta region of Nigeria, where the Second Defendant Nigerian company (“the subsidiary”) operated oil pipelines and ancillary infrastructure, claimed that persistent oil leaks from the pipelines caused serious water and ground contamination.
- ▶ They commenced proceedings in England for damages in negligence against the subsidiary company and its UK-domiciled parent company, claiming that the subsidiary's efforts to prevent oil leaks or to remediate their impact were inadequate and in breach of a duty of care owed to them not only by the subsidiary but also by the parent company, on the basis that it exercised a high degree of control, direction and oversight in respect of the subsidiary's pollution and environmental compliance and the operation of its oil infrastructure.

Chandler Judgment

- ▶ *Held*: that a duty to intervene to prevent damage to another would arise where there was a relationship between the parties which gave rise to an imposition or assumption of responsibility on the part of the defendant;
- ▶ that, while a subsidiary and its parent company were two separate entities and there was no imposition of responsibility by reason only that a company was the parent of another company, it was not necessary for the parent company to have absolute control of its subsidiary before a duty of care could exist;

Chandler continued

- ▶ that the law might impose on a parent company responsibility for the health and safety of the employees of a subsidiary, where, as in the present case, the businesses of the two companies
- ▶ were in a relevant respect the same and
- ▶ the parent (i) had, or ought to have had, superior knowledge on some relevant aspect of health and safety in the particular industry, (ii) knew, or ought to have known, that the subsidiary's system of work was unsafe, and (iii) knew, or ought to have foreseen, that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection;

Vedanta: Defendant's argument

- ▶ [The Defendant contended for] a general principle that a parent could never incur a duty of care in respect of the activities of a particular subsidiary merely by laying down group-wide policies and guidelines, and expecting the management of each subsidiary to comply with them. This is, [it was] submitted, all that the evidence thus far deployed in the present case demonstrated about the Vedanta Group.

Vedanta Judgment

- ▶ “... I am not persuaded that there is any such reliable limiting principle. Group guidelines about minimising the environmental impact of inherently dangerous activities, such as mining, may be shown to contain systemic errors which, when implemented as of course by a particular subsidiary, then cause harm to third parties. In the Chandler case [2012] 1 WLR 3111 , the subsidiary inherited (by taking over a business formerly carried on by the parent) a system for the manufacture of asbestos which created an inherently unsafe system of work for its employees, because it was carried on in factory buildings with open sides, from which harmful asbestos dust could, and did, escape.”

Vedanta Judgment (2)

- ▶ “53. Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries.
- ▶ Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.”

Vedanta Judgment (3)

- ▶ Direct or indirect ownership by one company of all or a majority of the shares of another company (which is the irreducible essence of a parent/subsidiary relationship) may enable the parent to take control of the management of the operations of the business or of land owned by the subsidiary, but it does not impose any duty upon the parent to do so, whether owed to the subsidiary or, a fortiori, to anyone else. Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary. All that the existence of a parent subsidiary relationship demonstrates is that the parent had such an opportunity.

Vedanta Judgment (4)

- ▶ “There is no limit to the models of management and control which may be put in place within a multinational group of companies. At one end, 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, with boundaries of legal personality and ownership within the group becoming irrelevant, until the onset of insolvency, as happened within the Lehman Brothers group.”

Okpabi Judgment

- ▶ In considering any question of a parent company's liability in relation to the activities of its subsidiaries the court is to be mindful that: (1) there is no general principle that the promulgation by a parent company of group wide policies or standards can never in itself give rise to a duty of care; (2) the issue is not one of control but the extent to which the parent did take over or share with the subsidiary the management of the relevant activity, which may or may not be demonstrated by the parent controlling the subsidiary; (3) there is no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-à-vis persons affected by those activities; and (4) nor does such a case amount to a novel and controversial new category of case for the recognition of a common law duty of care

Concluding thoughts:

Analyse:

- ▶ the extent to which the Parent acted
- ▶ the assumption of responsibility
- ▶ the application of global standards
- ▶ whether systemic risk or error

Thank you.

Enjoy your time in Thessaloniki!!!

12

King's Bench Walk