ASBESTOS CORPORATE LIABILITIES: CHANDLER AND BEYOND

By

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CASES BEFORE CHANDLER

***Ngcobo v Thor Chemicals Holdings Ltd* The Times, 10 November 1995**

A claim was brought in the English courts against Thor Chemical Holdings Ltd, the parent company in relation to the alleged negligent design and transfer of hazardous chemical technology to South Africa and negligent monitoring of the health of South African workers by the parent company, said to have resulted in mercury poisoning of South African workers.

The court considered it was arguable that a parent company may owe a duty of care to employees of its subsidiaries (in the context of TCH's unsuccessful jurisdiction/*forum non conveniens* application).

Eventually the litigation settled.

***Connelly v RTZ Corporation plc (No 3)* [1999] CLC 533**

A claim was brought in the English Courts by Mr Edward Connelly, an employee at a uranium mine in Namibia, for negligence, which was said to have caused Mr Connelly to develop cancer.

The claim was against the Rio Tinto parent company ("RTZ) on the alleged basis, *inter alia*, that RTZ had devised or advised in relation to RUL's (the Namibian subsidiary) policy on health, safety and the environment.

In the context of a strike out application the Court considered it was arguable that a parent company may owe a duty of care to employees of its subsidiary. However, the claim was then struck out on limitation grounds.

***Lubbe & Others v Cape Plc* 2000 1 WLR 1545 (HL).**

Claims were brought by South African claimants who had suffered exposure to asbestos in mines and mills owned and/or operated by South African subsidiaries of Cape Plc (an English registered company).

The claims were brought against the parent company for negligent exercise of its "effective control" of health and safety at its South African subsidiaries' asbestos mining operations.

Cape Plc made a *forum non conveniens* application which was eventually dismissed by the House of Lords.

Eventually (though not without various difficulties) the case settled.

CHANDLER V CAPE PLC [2012] 1WLR 3111

The first reported case in which liability of the parent company to an employee of the subsidiary was established. Cape plc was ordered to pay £120,000 in damages.

In 1959 and again in 1961-1962 Mr Chandler had stacked and loaded bricks for Cape Building Products Ltd, a wholly owned subsidiary of Cape plc. During that period he was exposed to asbestos dust. In 2007 was diagnosed with asbestosis.

It was not possible to sue Cape Products because: (1) by 2007 it had ceased to exist; and in any event (2) its liability insurance excluded asbestosis.

Instead Mr Chandler sued Cape plc. He argued that Cape plc owed a duty of care directly to him.

On the facts it was admitted that Cape plc had been negligent in its management of the site.

"In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its employees. Those circumstances include a situation where, as in the present case:

(1) the businesses of the parent and subsidiary are in a relevant respect the same;

(2) the parent has or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;

(3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and

(4) the parent knew or ought 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 (4) 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 element (4) 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." (para 80, per Lady Justice Arden).

(1) WHAT WAS THE CONCEPTUAL BASIS FOR THE DUTY OF CARE?

-There is in general no duty to prevent third parties causing damage to another: *Smith v Littlewoods Organisations Ltd* [1987] AC 241, 270.

-However "there are exceptions to this principle", for example where there is "a relationship between the parties which gives rise to an imposition or assumption of responsibility on the part of the defendant."

-The word "assumption" is something of a misnomer. The phrase "attachment" of responsibility might be more accurate.

-Cited *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 in which the Home Office was held liable for damage done by escaping Borstal boys over whom the Home Office had control.

(paras 63 to 65)

(2) DID THE CASE INFRINGE THE CONCEPT OF SEPARATE LEGAL PERSONALITY?

"I would emphatically reject any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company. The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees." (para 69)

(3) WHAT FACTS ARE NECESSARY TO ESTABLISH A DUTY OF CARE OWED BY THE PARENT COMPANY TO AN EMPLOYEE OF ITS SUBSIDIARY?

No need to show the parent company has absolute control of the subsidiary (Paragraph 66).

No need to show that the relationship between parent and subsidiary was beyond what is "normal" (Para 67).

(4) WHAT PRECISELY IS THE SCOPE OF THE DUTY OF CARE?

The duty of care owed by the parent to the employee is not identical in its scope to the duty of care owed by the subsidiary.

"The parent company is not likely to accept responsibility towards its subsidiary's employees in all respects but only for example in relation to what might be called high level advice or strategy" (para 66)

"I have no doubt that in this case it is appropriate to find 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" (para 78)

On the facts of Chandler there was:

"an omission to advise on precautionary measures even though it was doing research and that research had not established (nor could it establish) that the asbestosis and related diseases were not caused by asbestos dust." (para 79)

(5) IN WHAT OTHER SITUATIONS MIGHT THE CHANDLER REASONING BE APPLIED?

A duty care owed by a parent company to third parties other than employees of its subsidiary ?

A duty of care owed by a company to employees of its supplier under a long term supply contract?

(6) INTERNATIONAL SITUATIONS

Jurisdiction

Basic rule is that a company which has its "domicile" in England can be sued in the English courts (regardless of where the acts and damage giving rise to the claim occurred): EC Regulation (EC) 44/2001 ("the Brussels Regulation")/Article 2. A company has its "domicile" in England[1] for these purposes if any of the following conditions is fulfilled (see generally the Regulation/Article 60):

(1) It has its registered office in England; or

(2) If it has no registered office, it was incorporated in England; or

(3) It has its "central administration" in England; or

(4) It has its "principal place of business" in England.

In 2005 the European Court of Justice held that, where the English Courts (or indeed any other domestic courts in the EU) have jurisdiction by reason of Article 2 of the Regulation, they do not have any power to stay the proceedings on the grounds that some other forum is more appropriate: Judgment of the European Court of Justice in *Owusu v Jackson* [2005] 2 WLR 942 (cf *Connelly v RTZ Corporation Plc & Another* [1998] AC 354 (HL); and *Lubbe & Ors v Cape Plc* [2000] 1 WLR 1545 (HL).

Applicable Law

If the English court has jurisdiction over a claim, it will have to decide what substantive law applies to the claim.

In English courts, the question of applicable law was until recently governed by the Private International law (Miscellaneous Provisions) Act 1995 ("PIL") which came into force on 1 May 1996. In outline the rules are as follows:

(1) The general rule is that the law applicable to issues in tort is the law of the country where the event constituting the tort occurs: PIL/s11(1).

(2) Where the elements of the events occur in different countries, the general rules are that the applicable law will be: (a) for causes of action relating to

[1] Under the Regulation England and Wales are treated as separate jurisdictions.

damage to personal injury, the law of the country where the individual was when he sustained the injury; (b) for cause of action relating to damage to property, the law of the country where the property was when it was damaged; (c) for any other cause of action the law of the country in which the most significant element(s) of the relevant events occurred: ss11(2) and (3);

(3) The general rules set out above may be displaced if (broadly speaking), from a consideration of all factors, it is substantially more appropriate for some other law to apply: s12.

However Regulation (EC) 864/2007 of 11 July 2007 on "the Law Applicable to Non-Contractual Obligations" ("the Rome II Regulation": "RIIR") has now come into force. Events giving rise to damage after August 20 2007 are subject to the Regulation.

(1) The general rule is that the law applicable to non-contractual obligations will be the law of the country where the damage occurred, irrespective of where the event giving rise to the damage occurred: RIIR/Article 4(1).

(2) However where the defendant and claimant have their habitual residence in some other country at the time of damage then the law of that other country will apply: RIIR/Article 4(2).

(3) Where, in all the circumstances the tort is "manifestly more closely connected" with a country other than that indicated in Articles 4(1) or (2), then the law of that other country will apply: RIIR/Article 4(3).

(4) In relation to "environmental damage", the law will be that of the country where the damage occurred, unless the claimant chooses the law of the country in which the event giving rise to the damage occurred: RIIR/Article 7.

Examples

-Claim in English Courts against English Parent which is alleged to owe duty of care to employees of foreign subsidiary.

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