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## “I blame the parents”: Parent companies (in the UK) may owe a duty of care to their subsidiaries’ employees

*By Jane Harte-Lovelace and Terry Eleftheriou*

The English Court of Appeal recently delivered a judgment in *Chandler v Cape Plc* [2012] EWCA Civ 525 which has potentially significant implications for groups of companies. It is also a warning of contingent liabilities which might arise where a group company may have exposed employees to asbestos or other toxic substances. These liabilities may emerge many years after the alleged exposure to the toxic substance. Mesothelioma and other illnesses caused by exposure to asbestos can take decades to develop. For the unwary, the liability for damages to employees of subsidiary companies may be unexpected and potentially significant.

A recognition of the potential risks for parent companies arising from this case is of importance in the M&A context, where alleged exposure to asbestos may have been by companies which are now dormant, insolvent, or no longer in the group and where records may no longer be available. The case emphasises the need for due diligence and the importance of indemnities and insurance arrangements when undertaking corporate group acquisitions.

In the *Cape* case, Mr Chandler had contracted asbestosis as a result of a short period of employment over fifty years earlier with Cape Building Products Ltd, a company which is no longer in existence. Its parent company, Cape plc, is still in existence and Mr Chandler had obtained a judgment under which Cape plc was held to be liable to him. The decision was in an appeal by Cape plc against that earlier decision. The case is significant because it is one of the first in which an employee established that his employer's parent company (not just the employer) owed him a duty of care.

Mr Chandler had worked out of doors loading bricks near a factory with open sides in which asbestos was processed. Dust from that factory migrated into the area where Mr Chandler worked. On these facts it was not disputed that the relevant system of work was unsafe. The question was who owed a duty of care to Mr Chandler. The Court of Appeal decided that, on the facts, there was a direct duty of care owed by Cape plc to the employees of its subsidiary company, including Mr Chandler. This duty of care was not a necessary result of the general parent-subsidary relationship, but was rather one example of appropriate circumstances where the law could impose responsibility on a parent company for the health and safety of its subsidiary's employees. Those circumstances include a situation where:

- (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

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(4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge of the employees’ protection.

Accordingly, the parent of a subsidiary company whose employees may have been exposed to asbestos or toxic material in the workplace may itself be subject to claims brought by employees of the subsidiary diagnosed with industrial illnesses.

In order to be prepared to deal with claims of this sort, it is important to review not only the insurance records of the subsidiaries which may have exposed employees to asbestos or other toxic materials, but the parent company’s employers’ liability and public liability insurance policies. The policies which are most likely to respond are those in place at the time of the exposure to the asbestos, not the current policies, although individual wordings need to be checked carefully. There is a danger that such claims may be uninsured because no such policies were purchased at the time the exposure occurred, or records of the insurance may not be located, or limits may be inadequate.

In the light of the Cape decision it is even more important that complete historical records are maintained relating to employees, premises, systems and insurance policies of all companies now or formerly within a group, and of the extent to which the parent has had a practice of intervening in the trading operations at the subsidiary, for example in production and funding issues, not just in health and safety policies.

A group which, in the past, had asbestos in premises it owned or occupied, or exposed employees to asbestos in a manufacturing or industrial process, can have a potentially large contingent liability affecting both subsidiary and parent. This should be considered carefully and might be factored into due diligence and may affect indemnities and price when companies are acquired.

The fact that a group does not currently operate any premises where asbestos is present is no guarantee that this has never been the case, perhaps when health and safety requirements were less stringent. Appropriate warranties and indemnities might be sought from a seller to cover the risks of unidentified asbestos-related liabilities. Consideration may be given to obtaining warranty and indemnity insurance, which can be purchased on either the buyer’s or the seller’s side.

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