Briefing

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Health and Safety

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Parent Company Liability

A parent company can in certain circumstances be held liable for the health and safety breaches of its subsidiary. This article looks at when this duty can arise and what factors you should be considering in order to manage the risk.

Health and Safety laws impose duties and liabilities on all employers. Commonly, businesses will be delivered through a group structure. One basic purpose of a group structure is to separate legal liability between the parent and any subsidiary companies i.e. to restrict losses incurred by a subsidiary from being paid by other parts of the business. While this commonly works for claims for compensation, the extent to which other group companies are liable for breaches of Health and Safety law (which are regulatory/criminal in nature) has been less certain.

In 2012, in the case of *Cape*[1] (which we wrote about in our May 2012 **"Parent Liability, Employer Liability and more"** briefing), the Court of Appeal held, for the first time in a civil claim, a parent company directly responsible for the health and safety of its subsidiary. In that case the decision was based around the degree of control exercised by the parent over the subsidiary.

Following this decision, parent companies have increasingly had to balance the business requirement to maintain control of the group with the risk that they may inadvertently assume sufficient control to be held responsible for the health and safety of their subsidiary. Recently *David Thompson v The Renwick Group*[2] has looked further at the boundaries between group companies and the control that a parent company actually exerts. This is discussed below in more detail.

The Cape and Thompson cases relate to historic exposure to asbestos and therefore the Health and Safety Executive ("HSE") will probably not take action against the parent company for the breach in these cases. However, the importance of these cases is that they depend upon a principle that a parent company could be found liable for any breaches of health and safety made by its subsidiary.

If the breach committed by the subsidiary company was more recent, then the HSE would investigate and potentially take action against the parent company. In addition, a finding that a parent company has assumed direct responsibility for the health and safety breaches of its subsidiary could expose the parent company to an additional liability under the Corporate Manslaughter & Corporate Homicide Act 2007. An organisation can be found guilty of that offence if the way in which any of its activities is managed or organised by its senior managers causes death due to a gross breach of a relevant duty of care. Key issues revolve around the identification of senior managers, consideration of whether breaches are 'gross' and whether relevant duties of care exist.

Health and safety case decisions are always fact specific. However, we are beginning to get further commentary from the court in relation to what factors will be considered when the court assesses the question of assumed liability.

The Thompson Case

The Court of Appeal set out explicitly in *Cape* that "absolute control" of the subsidiary was not necessary for the parent to assume a responsibility to employees of the subsidiary. In Thompson, the Court of Appeal has revisited the factors set out in *Cape* and upheld an appeal by a parent company that had been found initially to owe a duty of care to an employee of its subsidiary who had been exposed to asbestos.

The Court of Appeal held that a director of a company nominated by a shareholder does not, of itself, impose a duty on that director to the company nominating him. Therefore, a parent company will not assume a duty of care solely by virtue of appointing an individual as director of its subsidiary company even if they have specific responsibility for health and safety matters.

The Court also considered the issue of corporate branding. The employee asserted that following the acquisition of the subsidiary, the paperwork and branding colour of the vehicles had been made consistent across the group which indicated the ultimate control of the parent company. However, the Court held that the corporate branding did not identify the group holding company and was likely to reflect the subsidiary. It was also relevant that there was no evidence that the parent company had carried out any business other than holding shares during the relevant period.

Finally, the court considered the co-ordination of operations between subsidiaries. On the facts the subsidiaries shared drivers, depots and co-ordinated deliveries and pickups. However, although persuasive it did not, in this case, demonstrate that the group parent had assumed control in such a manner to demonstrate an assumption of a duty to the employees of the subsidiaries. The subsequent consolidation of operating sites came too late to assist as Mr Thompson who had already terminated his employment.

[1] *David Brian Chandler v Cape Plc* [2012] EWCA Civ 525

[2] *David Thompson v The Renwick Group Plc* [2014] EWCA Civ 635

Overall the Court determined that the parent was not exercising sufficient control to have assumed a direct liability for the subsidiary.

What should group companies be considering?

A court will consider what the parent company has done and whether this amounted to taking on a direct duty to the subsidiary employees. Group companies should consider their current commercial set up in light of the following factors that may influence a Court in finding that a parent may have sufficient control to assume direct responsibility for a subsidiary:

- does the parent company oversee any health and safety functions especially where these affect the subsidiary? For instance in *Cape*, a group medical adviser was in place; group medical surveillance was carried out; and a group manual provided for regular medical check-ups for all employees having regular exposure to asbestos;
- does the parent company work in the same industry as the subsidiary?
- does the parent company have (or ought to have) superior knowledge on a relevant aspect of health and safety in the particular industry?
- is there is an overlap between the directors of the board at parent and subsidiary level?
- are there procedures set by the parent which apply on a group basis? For example, a parent company may set a group procedure on product testing or fatigue management;
- does the parent exercise some control over the activities of the subsidiary including some financial control? and
- does the parent have (or ought to have) visibility of working conditions at subsidiary level and/or is aware of any failures in respect of control measures?

Where a parent company answers yes to any of the questions above, it is sensible for them to consider the current group structure and what, if any, additional risk it may be exposing itself to.

Parent companies can take action to reduce the risk of pure legal liability by not taking control. However, ultimately the parent company must balance the wider risks of a failure to give direction and scrutiny to its subsidiary with a decision to keep the subsidiary at arm's length for legal reasons where the failure of the subsidiary to perform will in any event taint the parent company. This may mean the parent company takes a commercial decision to take control of certain procedures at a group level because the commercial reality for the group should the subsidiary fail to perform outweighs the pure legal risk created by taking control.

Conclusion

The *Thompson* case is helpful as it demonstrates the courts are taking a cautious but methodical approach in light of the *Cape* decision. The courts are looking at the relationship between the parent and subsidiary very closely in order to assess whether the parent has acted in such a way as to have assumed a direct responsibility. The evidence will be considered on a cumulative basis in order to assess whether there is sufficient proximity between the parent company and the employees of the subsidiary.

The Court of Appeal judgment in *Thompson* acknowledged that group companies often co-ordinate their organisation which may lead to intermingling of the businesses and the interchangeable use of resources such as depots. However, the Court also made clear that this does not always mean that the legal personalities of the companies are lost and that the ultimate parent takes on a duty of care to all subsidiary employees. The extent of control and interference by a parent company should be carefully considered. Although in many instances a parent company will want to ensure consistency across the group this must to be balanced with the potential extension of liability.

These cases remain fact specific. It is unlikely that the *Thompson* decision will deter claimant solicitors from naming relevant parent companies as joint defendants so that the working relationship between the parent company and any subsidiary can be considered by the court.

Contacts

For further information, please contact:

Ann Metherall
Partner

+44 (0)117 902 6629
ann.metherall@burges-salmon.com

Nicola Campbell
Trainee Solicitor

+44 (0)117 307 6888
nicola.campbell@burges-salmon.com

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