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MANAGING HEALTH AND SAFETY WITHIN CORPORATE STRUCTURES



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Despite being a relatively 'new' industry, the wind and marine renewables sectors are at the forefront of championing health and safety. Last month, RenewableUK published its Offshore Wind and Marine Energy Health and Safety Guidelines. This is a lengthy and detailed document – it runs to more than 250 pages and covers the whole offshore lifecycle.

construction plans. Corporate structures need to be carefully thought through by developers, not only financially and commercially, but also from a health and safety perspective.

Wind and marine energy projects will often be undertaken and developed by subsidiary companies or in joint ventures (JVs) and the legal structure applied will vary from project to project. Structuring project companies

Businesses, however, should beware of any assumption that from a health and safety perspective responsibility for the health and safety of a subsidiary's (or JV's) employees automatically rests solely with that subsidiary or JV company.

Such an initiative is to be applauded and Burges Salmon is involved in drafting similar guidelines for RenewableUK in respect of small wind. However, they also come with a 'health warning'. Guidelines such as these can never be a definitive statement of appropriate behaviours, or steps to take, when faced with a specific hazard.

Good 'health and safety' involves more than risk statements and

appropriately can offer significant commercial, practical and financial benefits and limit liability. Businesses, however, should beware of any assumption that from a health and safety perspective responsibility for the health and safety of a subsidiary's (or JV's) employees automatically rests solely with that subsidiary or JV company. A Court of Appeal health and safety case last year highlighted this.

The case

The claimant, Mr Chandler, had been exposed to asbestos fibres while working many years earlier for Cape Building Products Limited, a subsidiary of Cape Plc, and he subsequently developed asbestosis.

Despite obtaining judgment against the subsidiary, Mr Chandler was unable to enforce the judgment as that company had long been dissolved and its insurance policy excluded asbestos claims. So Mr Chandler commenced proceedings against Cape Plc.

Although the parent and subsidiary were clearly separate legal entities, the Court looked at whether the parent had, through its actions, taken on a direct 'duty of care' for the subsidiary's employees. In this case:

- Cape Plc had known that the release of asbestos fibres had not been adequately controlled.
- There had been a group-wide medical officer responsible for all group employees.
- Cape Plc had been directly involved in some elements of the subsidiary's operation and financial decisions.
- The parent and subsidiary companies shared some directors.

No automatic parent liability

Chandler v Cape does not go so far as to make parent companies automatically liable for the failings of a subsidiary. What it does say is that a parent company is likely to have some responsibility for the health and safety of a subsidiary's employees where:

- the business of the parent and subsidiary are in a relevant respect the same;
- the parent knew or ought to have known that the subsidiary's working systems were unsafe;
- the parent has or ought to have superior health and safety knowledge in the particular industry and the subsidiary was likely to rely on that superior knowledge to protect its employees.

Implications for corporate manslaughter?

Chandler v Cape may also have implications in more serious cases, where companies are prosecuted for corporate manslaughter. If the relevant duty of care is established in relation to a parent company, then the fine levied will be based on the parent's turnover and profit. This will, in all likelihood, be significantly more than the equivalent figures for a subsidiary or JV company.

Practical steps

It is crucial in the wind and marine energy industry that knowledge and experience are shared so as to establish safe and efficient ways of working and Chandler v Cape should not be interpreted so as to promote limited group involvement. It does however emphasise the importance of providing a combined approach to risk management.

Sensible steps that can be taken to minimise the unintended risks of parents assuming the responsibilities of subsidiaries might be:

- ensuring clear lines of communication and responsibility, with group policies clearly distinguished from subsidiaries' own operational decisions;
- giving each subsidiary as much knowledge and expertise as is available at parent company level, and the subsidiaries then given responsibility for the management and implementation of their own health and safety policies;
- if safety audits are undertaken, the parent company should ensure that any actions are followed through.

The important point is not the mere fact of ownership that could make a parent liable for a subsidiary: it is fixed by its actions. RenewableUK has published an ambitious and comprehensive set of health and safety guidelines, but interpretation and implementation of the practical steps to ensure health and safety risks are kept as 'low as reasonably practicable' rests with all of those actually involved throughout the lifecycle of a wind or marine energy project, and the corporate structure used on a project should not alter this.

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For further details on health and safety in the wind and marine energy sector, please feel free to contact Ross Fairley on 0117 902 6351 or email ross.fairley@burges-salmon.com, or contact his colleague Ann Metherall, Head of Burges Salmon's Health and Safety Team, on 0117 902 6629 or email ann.metherall@burges-salmon.com.

■ ■ Biography

Ross Fairley is a partner and Head of Renewable Energy at Burges Salmon solicitors.

The team advises on all types of renewable energy project including wind (onshore and offshore), wave and tidal, hydro, solar, biomass, geothermal and innovative waste to energy technologies.

Ross advises clients on legal/regulatory aspects of the energy sector including incentives, grid, fuel procurement and power sales. He has substantial experience in marine renewables and offshore wind, covering projects in all Crown Estate rounds.

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References

1. Chandler v Cape Plc [2012] EWCA Civ 525