

# International Company and Commercial Law Review

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## Case Comment

### United Kingdom: company law - corporate groups

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**Subject:** Company law . **Other related subjects:** Health and safety at work. Negligence.

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#### Case:

[Chandler v Cape Plc \[2012\] EWCA Civ 525; \[2012\] 1 W.L.R. 3111 \(CA \(Civ Div\)\)](#)

**\*I.C.C.L.R. N-8** This comment seeks to acknowledge the reasoning behind the recent Court of Appeal decision in [Chandler v Cape Plc](#). The purpose is to establish why this was not considered a situation where the "corporate veil" was pierced where the court found a duty of care was owed by a parent company to its subsidiary's employees.

#### Facts

The facts concerned an employee of Cape Buildings Products Ltd, which is no longer in existence. The employee had contracted asbestosis from their employment. In the court of first instance the trial judge upheld the employee's claim that the parent company, Cape Asbestos Plc, was liable on the basis of an assumption of responsibility. The parent company appealed against this decision.

The relationship between the parent and subsidiary originally began with the parent as a tenant at the subsidiary's site. The subsidiary modified a factory for the parent to use in the production of Asbestolux. Eventually, the subsidiary became part of the group headed by the parent company. This was evidenced by the facts including, inter alia, that the subsidiary's board at all material times contained one or more directors of the parent's board; the sale of the parent's asbestos production to the subsidiary; and the parent's board minutes confirmed that the subsidiary had become part of the group.

While the company became integrated, it retained its separate legal identity and was not considered a branch of the parent. The parent, however, continued to provide technical assistance on matters such as know-how, product development and health and safety of group employees in the asbestos industry. Therefore the submission was that the parent company had assumed responsibility for the subsidiary's employees.

#### Held

The Court of Appeal in Arden's L.J. judgment upheld this claim and dismissed the appeal of the parent company. They acknowledged that a parent company is capable of owing a direct duty of care to its subsidiary's employees on a matter of health and safety. The circumstances where such a duty may be owed, according to the judgment, included those that were present in the 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. **\*I.C.C.L.R. N-9**" <sup>1</sup>

Arden L.J. rejected the notion, however, that this constituted a piercing of the corporate veil since companies in a group are generally regarded as separate legal entities that are individually responsible for their rights and liabilities.

## Comment

Companies have been recognised as separate legal entities ever since the [Joint Stock Companies Act 1844](#) that allowed companies to be incorporated by registration. The decision in [Adams v Cape](#)<sup>2</sup> recognised that in a group of companies each individual company is a separate legal entity. Therefore at first glance each company is responsible for its own employees. Prima facie the parent company in a group is not responsible for the subsidiary's obligations to its employees and the parent is effectively a stranger to that relationship. In the case of [Bath v Standard Land Co Ltd](#)<sup>3</sup> this distinction was emphasised to demonstrate the principle that directors owe duties to the company but not to those with whom the company is dealing.

However, liability for a duty of care arises not out of status but out of assumption of responsibility. Therefore it is possible for employees to establish that anyone can owe them a duty of care, including a parent company, if they have assumed responsibility to do so. The test for determining duty of care was established in [Caparo Industries v Dickman](#),<sup>4</sup> which states that the duty is owed if: (1) the harm is reasonably foreseeable; (2) there is sufficient proximity between the parties; and (3) whether it is fair, just and reasonable for a duty of care to be owed.

Arden L.J. on this test found that a direct duty of care was owed by the parent to the subsidiary's employees based on the reasons highlighted above. In doing so she emphatically rejected the notion that this decision in any way pierces the corporate veil. She demonstrated "there is no imposition or assumption of responsibility by reason only that a company is a parent company of another company".<sup>5</sup> Despite this clear statement, Eccles sought to contend that this decision does pierce the corporate veil "but only on the basis of an existing concept of assumption of responsibility — [Caparo Industries v Dickman](#)".<sup>6</sup> However, this is not an argument that the veil has been pierced. It merely restates the judgment that a direct duty of care was owed by the parent company because they satisfied the test from [Caparo](#). Piercing the corporate veil results in the assets of the two companies being treated as indistinguishable<sup>7</sup> in order to hold the parent company responsible for the obligations of the subsidiary; or unravels sham transactions to identify the company who has control over the property transferred out of the claimant's reach.<sup>8</sup> Neither of these are the cases here. The judgment illuminates the separate legal personality of the parent company by acknowledging its own obligation to owe a duty of care to the employees. It was not imposing liability on the parent for the subsidiary's obligations.

Therefore, generally, companies in a group will not be considered to owe a duty of care to any of the other companies in the group unless the circumstances demonstrate that there is an assumption of responsibility by that company. That assumption, however, does not pierce the corporate veil as this judgment illuminates the separate legal entity principle, and does not obscure it. One must conclude that while this case is significant in the sense that it is one of the first cases where an employee has successfully *\*I.C.C.L.R. N-10* demonstrated liability to him by his employer's parent company, it is not significant because it was established on an existing principle. It did not alter the landscape of parent/subsidiary liability since the decision confirmed that companies are responsible for their own obligations. That is something that has been the consensus for over a century, as demonstrated in the courts from cases such as [Salomon v Salomon & Co Ltd](#)<sup>9</sup> and [Foss v Harbottle](#).<sup>10</sup>

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1. [Chandler v Cape \[2012\] EWCA Civ 525; \[2012\] 3 All E.R. 640](#) at [80].

2. [Adams v Cape \[1990\] Ch. 433 CA \(Civ Div\)](#).

3. [Bath v Standard Land Co Ltd \[1911\] 1 Ch. 618 CA](#) at 627.

4. [Caparo Industries v Dickman \[1990\] 2 A.C. 605 HL.](#)
5. [Chandler v Cape \[2012\] EWCA Civ 525; \[2012\] 3 All E.R. 640](#) at [69].
6. See P. Eccles, "Liability of parent companies and the actions of their subsidiaries" (May 4, 2012), <http://www.shoosmiths.co.uk/news/4157.asp> [Accessed October 31, 2012].
7. See P. Davies, *Gower and Davies Principles of Modern Company Law*, 8th edn (London: Sweet & Maxwell, 2008), p.199.
8. [VTB Capital Plc v Nutritek International Corp \[2012\] EWCA Civ 808; \[2012\] 2 Lloyd's Rep. 313; Linsen International Ltd v Humpuss Sea Transport Ltd \[2011\] EWHC 2339 \(Comm\); \[2012\] Bus. L.R. 1649.](#)
9. [Salomon v Salomon & Co Ltd \[1897\] A.C. 22 HL.](#)
10. [Foss v Harbottle \(1843\) 2 Hare 461.](#)

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