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Looking beyond the corporate veil: parent company exposure to human rights litigation risk

There is a steady trend for plaintiff lawyers to argue that corporate groups should be seen as more unified organisms. Particularly where adverse human rights impacts are concerned, parent companies are increasingly finding themselves exposed to the risk of litigation for the activities of their subsidiaries. Where they actively involve themselves in subsidiary operations, parent companies should not assume that the separation of legal personality will isolate them from liability.

Limited liability companies are founded on the principle that they are legal entities distinct from their members – a characteristic that has traditionally been used to isolate liability within corporate groups.

In most jurisdictions, parent companies are unlikely to bear liability for the acts of their subsidiaries except in very limited circumstances. For example, if there is evidence of clear wrongdoing by the controlling members of the company and the corporate structure is a facade, or where a subsidiary acts as the parent's agent and is subject to a very high degree of control, or where sufficient proximity exists for tortious liability and where clearly provided for by statute.

In some regulatory areas, corporate groups have been treated for some time as more unified organisms, rather than a collection of separate legal persons.

Taking these different instances together, it should not necessarily be assumed that a parent company will be immune from risks associated with operations in respect of which it has incorporated a subsidiary.

Looking beyond the corporate veil

Recent developments in case law in a number of jurisdictions suggest that parent companies exercising active influence over or control of a subsidiary's affairs can risk assuming a duty of care towards those affected by the subsidiary's operations.

> The risk of parent companies facing liability for the activities of their subsidiaries could increase, particularly where the group relies upon the expertise of central functions.

> This trend may be particularly relevant to corporates acquiring subsidiaries with historic problems, in respect of which they deploy centralised resource to improve integration within their group.

> Claimants are becoming more sophisticated in this area, and increasing numbers of claims against parent companies are being reported.

> This is particularly the case in the extractives sector, where operations are often conducted in challenging circumstances.

These developments have had the effect of opening a potential route for plaintiffs to seek remedies against parent companies who, while operating on a group basis, have failed to demonstrate that they have protected stakeholder groups from adverse human rights impacts.

Recognising the growing risk of litigation

In several instances, communities in emerging markets have brought claims for damages against parent companies domiciled elsewhere in relation to incidents involving subsidiaries, contractors or local security forces.

Few of these cases result in case law determinative of whether such liability could arise: it is often in the interests of both parties to settle. As the law currently stands, it is difficult to see how liability could sit with a company unless, through its actions, it had caused a duty of care to the victims, and causation is also typically very difficult to establish.

Notwithstanding this, multinationals do face a litigation risk associated with claims of this nature and the volume of such claims appears to be slowly increasing (see box overleaf).

Setting the standard

In recent years, the UK courts have set down important principles in this area.

Chandler v Cape concerned a claim against a parent company in respect of asbestosis resulting from actions carried out in the course of employment by a subsidiary. The Court of Appeal held that a parent company may owe a duty of care directly to the employees of a subsidiary as regards their health and safety where: (i) the businesses are in all relevant respects the same; (ii) the parent has or ought to have superior knowledge of some relevant aspect of health and safety in that industry; (iii) the subsidiary's system of work is unsafe; and (iv) the parent knew or ought to have known this, and the parent knew or ought to have known that the subsidiary or its employees would rely on the parent to use its superior knowledge to protect those employees.

It is not necessary to show that the parent was in the practice of intervening in the subsidiary's health and safety policies, but the court will generally look at the relationship, including the parent's intervention in the trading operations of the subsidiary, such as decisions relating to production and funding.

Thompson v The Renwick Group plc concerned a parent company that appointed a director to a subsidiary's board to take over health and safety management of a depot where the claimant handled asbestos and subsequently became ill. The Court of Appeal affirmed the decision in *Chandler v Cape* but held that, because the director had not been acting on behalf of the parent company in running the day-to-day operations of the subsidiary, but was instead acting pursuant to his fiduciary duty to the subsidiary, his appointment did not give rise to a duty of care to the subsidiary's employees.

Optimising the balance

Many multinationals will have implemented governance and compliance systems designed to exercise oversight over subsidiary operations globally. Certain functions within the business may be centralised, to ensure effective risk management through clear reporting lines and data aggregation, and to take advantage of economies of scale in the provision of group services.

This can form a crucial part of a good governance system, and may reduce risks to the business as a whole. However, parent companies will wish to ensure that they strike an appropriate balance between active oversight and involvement in subsidiary affairs, and managing their own exposure to litigation and liability risk. Where major situations arise, this may need to be assessed on a case-by-case basis, to ensure optimum risk management within the group.

Most importantly, parent companies should be aware that the mere incorporation of a subsidiary will not shield them from liability where they actively involve themselves in its operations.

Alleged human rights abuses in the extractives industries: recent litigation in the UK and Canada

> In March 2013, negligence claims were brought in the English courts against UK-incorporated mining company Africa Barrick Gold (now Acacia Mining). These concerned allegations of human rights abuses occurring in an unsafe working environment, including in respect of the handling of security incidents at a mine operated by a subsidiary company in Tanzania. The claimants argued that the parent company owed them a direct duty of care, highlighting the level of awareness and involvement the parent company had in the operations of its subsidiary. The claims were settled before being heard by the court.

> In July 2013, negligence claims were brought in the Ontario courts against Toronto-based Hudbay Minerals, in respect of human rights abuses allegedly committed by security personnel in connection with a subsidiary company's Guatemalan operations. The claimants argue that they were owned a duty of care by the parent company given the level of control it exercised over local security personnel, the deployment of its employees to manage the project and its acknowledgement of responsibility for security practices. Amnesty International made submissions to the court, arguing that international human rights standards publicly recognised by Hudbay supported the view that a duty existed. Hudbay applied to strike out the claim on the basis that it disclosed no reasonable cause of action, but the court rejected the application and the matter is progressing.

> Most recently, British Colombia-incorporated mining company Tahoe is reportedly being sued by residents of Guatemala in connection with an alleged shooting by security personal at a mine owned by a local subsidiary. The claimants are said to be alleging that Tahoe owed a duty of care to them given the extensive control that it exercised over mine security.

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