Parent Company Liability for Environmental Disaster Caused by Subsidiary Company

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Abstract: Multinational companies operate in various jurisdictions via subsidiary companies incorporated in local jurisdictions. Generally, the subsidiary company is responsible for its own acts and/or omissions since the law is pellucid that only in exceptional cases will a parent company be held liable for the acts and/or omissions of its subsidiary company. Under these exceptional cases the parent company may be made liable for the acts and/or omissions of its subsidiary company through lifting of the corporate veil (derivative liability) or the imposition of direct liability for corporate negligence. This article examined the issue of the liability of a parent company for an environmental disaster caused by its subsidiary company by exploring derivative and direct parent liability.

1. INTRODUCTION

A company is birthed upon the registration of documents with the relevant public body in the jurisdiction in which the company is to be located. The company becomes a legal person upon registration and its most imperative legal characteristic is that it possesses its own legal/corporate personality as exemplified in the leading cases of Salomon v. A Salomon and Co. Ltd [1897] AC 22, Macaura v. Northern Assurance Co. Ltd [1925] AC 619 and Lee v. Lee’s Air Farming Ltd [1961] AC 12. A duly registered subsidiary company also possesses its own corporate personality separate from its parent company and it is immaterial whether the subsidiary company is wholly owned by the parent company as explicated in Adams v. Cape Industries Plc [1990] Ch 433.

Notwithstanding, as early as the Salomon’s case it was acknowledged that the concept of separate legal personality is of general application and that there are circumstances where it is permissible for the courts to lift the corporate veil, for instance, where there is fraud, an agency relationship and the company is a sham/façade. Therefore, where the subsidiary company is the agent of the parent company or where the companies are operating as a single economic unit, the corporate veil may be lifted to impose liability on the parent company as explicated by Sheller JA in James Hardie & Co Pty Ltd v. Hall (1998) 43 NSWLR 554 and exemplified by the Amoco Cadiz case 954 F. 2d 1279 (7th Cir. 1992). However, there are no unified legal principles governing the area of lifting the corporate veil because the courts have lifted the corporate veil with arbitrariness. Consequently, the postulation that each case will turn on its own facts emanated, as conceded by Herron CJ in Commissioner of Land Tax v. Theosophical Foundation Pty Ltd (1966) 67 SR, Rogers AJA in Briggs v. James Hardie and Co. Pty Ltd (1989) 16 NSWLR 549 and more recently by Lord Sumption in Prest v. Petrodel Resources Ltd and Others [2013] UKSC 34.

According to Sheller JA in James Hardie & Co Pty Ltd v. Hall direct liability may be imposed on the parent company due to its failure to prudently govern its subsidiary company. The foundation of such liability is control; thus, the control exerted by the parent company on the subsidiary company results in the parent company incurring a legal obligation to prevent harm if it could (Nygh, 2002) [1] as exemplified in the Bhopal case (Union of India v. Union Carbide Corporation, Bhopal Gas Claim Case No.113 of 1986) and more propitiously in the Lubbe Litigation (Lubbe v. Cape Plc. [2002] 1WLR 1545) but unfortunately not in the Omai case (Recherches Internationales Quebec v. Cambior Inc. 1998 QJ 2554 Canada). Further, and more recently the common law concept of assumption of responsibility has been used to impose direct liability on a parent company for acts and/or omissions of subsidiary companies as elucidated in Chandler v. Cape Plc. [2012] EWCA Civ.

2. DERIVATIVE AND DIRECT PARENT LIABILITY

The ways in which a parent company may incur liability for the acts of a subsidiary were explicated by Sheller JA in James Hardie & Co Pty Ltd v. Hall. According to Sheller JA, derivative liability may be imposed on the parent company via lifting of the corporate veil for the acts and/or omissions of the subsidiary company that is under its control. Alternatively, the parent company may incur direct and separate liability on the basis of negligent
corporate governance. Negligent corporate governance is essentially the failure to exercise proper control over the subsidiary company (Nygh, 2002) [1]. Sheller JA posited at pp 579-80: "The characterisation of a group of companies, linked by shareholding, as a single enterprise where one is an actor, whose acts or omissions should be attributed to another or others in the group, involves either 'lifting the corporate veil', treating the actor as an agent or imposing upon another or others within the group a duty by reason of the degree or manner of control or influence over the actor. The distinction between these ideas is easily blurred.”

The latter part of the contention by Sheller JA that the distinction between derivative and direct parent liability is easily obscured appeared to be veracious when the cases where analysed and for that reason the two concepts were analysed together in light of the cases.

The Amoco Cadiz case exemplified the corporate veil being lifted to impose liability on the parent company for an environmental disaster caused by a subsidiary company. Notwithstanding, overtones of direct parent liability were evident in the case. On March 16, 1978, the largest oil spill in history to that date had occurred in the seas off Brittany when the Amoco Cadiz, a supertanker, broke apart releasing 220,000 tonnes of crude oil. The approximately 180 miles of coastline in France which was damaged was situated in a tourist and fishing hub. Amoco Cadiz was owned by Amoco Transport Co, a company registered in Liberia and its stocks were indirectly owned by Standard Oil (a United States company located in Illinois) via various subsidiaries. The matter was adjudicated in the United States (US) where the corporate veil was lifted to impose liability on the parent company Standard Oil for corporate negligence which resulted in the failure of the steering system of the supertanker that made it unseaworthy and caused its grounding.

Conversely, in the Bhopal case which is reputed as being the world’s worst industrial disaster, while the parent company incurred liability for the environmental disaster caused by its subsidiary company, the corporate veil was not expressly lifted as in Amoco Cadiz to impose liability on the parent company. That was due to the fact that Deo J was adjudicating on the issue at an interim level. In addition, the facts of the case blatantly evidenced corporate negligence.

Between December 2 and 3, 1984 while residents were asleep lethal gases escaped from the Union Carbide’s pesticide subsidiary company in Bhopal, leaving over half a million persons surrounded by clouds of deadly poisons. The catastrophe resulted in the immediate death of 8000 persons (Morehouse and Subramaniam, 1985) [2] and the death toll continued to rise with the death of over 30 survivors per a month (Madhya Pradesh Government, 2001) [3]. There was substantial evidence that Union Carbide exerted complete control over the pesticide plant in Bhopal and acted negligently as regards the location, design, operation and maintenance of the plant (Sarangi, 2002) [4]. In a confidential business memo two years prior to the catastrophe, Union Carbide’s safety experts had cautioned about the potential for toxic materials to be released and this caution was ignored by the company’s chairman and senior executives (Sarangi, 2002) [4]. Further, less than three months predating the disaster, there was an internal memo within Union Carbide that cautioned against a runway reaction which could result in the storage tanks housing the poisonous methyl isocyanate gas failing at Union Carbide’s West Virginia plant; information which was never shared with the Bhopal plant (Sarangi, 2002) [4].

As regards plant design, the most flagrant blunder was the decision of Union Carbide’s US management executives to have the methyl isocyanate gas stored in 15,000 gallons tanks at Bhopal’s plant instead of smaller tanks, notwithstanding the objections made by the subsidiary’s managers (Dembo, Morehouse and Wykle, 1990) [5]. That decision was made purely for the economic reason of manufacturing commercial quantities of methyl isocyanate gas for not only the plant’s use but for sale to other industrial customers.

Other blunders included the cost cutting initiative by corporate headquarters in Connecticut to reduce the maintenance crews at the methyl isocyanate unit at Bhopal’s plant and the shutting off of the refrigeration unit used to keep the gas at safe storage temperatures (Dembo, Morehouse and Wykle, 1990) [5]. Further, notwithstanding that the safety systems at Bhopal’s plant might have been inadequate to deal with the runway reaction, they were not functional; for instance, the scrubber
which was used for the neutralizing of escaping gases with caustic soda was empty; the flare tower which was responsible for the burning of gases from the scrubber was under repair; and the alarm system was turned off because it was going off at the several leaks that predated the disaster (Dembo, Morehouse and Wykle, 1990) [5].

In March 1985, the Bhopal Act was passed to protect the victims from unscrupulous lawyers. The Act provided that the government of India would seek justice for and assist the victims since the government was better disposed to obtain adequate legal representation against the powerful multinational corporation. In 1985, the Indian government brought a case against the parent company Union Carbide in a New York District Court since its subsidiary Union Carbide India Ltd had far less assets and would be incapable of paying substantial compensation and also it believed that the US courts were better equipped to deal with the case given their advanced development. Union Carbide unsuccessfully tried to blame the entire incident on its subsidiary. The judge found that Union Carbide was implicated but declined to adjudicate the case in the US on the ground of forum non conveniens.

The case Union of India v. Union Carbide Corporation was then heard before the Madhya Pradesh District Court in Bhopal where Deo J made an unprecedented use of the court’s inherent discretionary powers to dispense justice by granting the victims an interlocutory relief of US $270 million (Abraham and Abraham, 1991) [6]. According to Deo J at p 15:

“The inherent powers have not been conferred upon the courts. It is a power inherent in the court by virtue of its duty to do justice between the parties before it...inherent powers are born with the creation of the court, like the pulsating life coming with a child, born into the world. Without inherent powers, the court will be like a stillborn child. The powers invested in the court after its creation is like many other acquisitions of faculties which the child acquires after birth during its life. Thus inherent powers are of primordial nature. They are almost plenary except for the restriction that they shall not be exercised in conflict with any express provision to the contrary.”

The submission by the legal representative of the victims that the fact that Union Carbide owned 50.9% of Union Carbide India Ltd was sufficient to show that it was within the power and capacity of the parent company to control the workings of the subsidiary found favour with Deo J. Union Carbide then appealed against Deo J’s ruling in the Madhya Pradesh High Court for a revision of the order which was partially done and the amount payable by Union Carbide was the reduced sum of US $195 million as interlocutory compensation. Dissatisfied that they were still affixed with liability Union Carbide appealed to the Supreme Court of India where a settlement was reached between the Union of India and Union Carbide for US $470 million for full compensation.

Notwithstanding that the legal principle of lifting the corporate veil was not deliberated by Deo J since he was only dealing with the issue at an interim level, in his judgment he did refer to the cases of DHN Food Distributors Ltd v. Tower Hamlets London Borough Council [1976] 1 WLR 852 and Escorts AIR 1986, SC 1370. DHN Food Distributors Ltd v. Tower Hamlets London Borough Council is one of the leading cases on lifting of the corporate veil due to a single economic unit/group enterprise while Escorts is an Indian case which involved lifting of the corporate veil where O. Chinnappa Reddy J emphasized that the veil of incorporation should be lifted where the companies in a corporate group are so inextricably connected that in reality they are part of one concern.

However, whether companies in a group may be treated as one is a controversial issue giving the contrasting approaches utilized by the court in The Albazero [1977] AC 774 where the veil was not pierced and DHN Food Distributors Ltd v. Tower Hamlets London Borough Council where the veil was pierced. The judgement of the Court of Appeal in The Albazero enshrined the formalistic approach to the issue which states that each company in a group has its own separate corporate personality (Mayson, French and Ryan, 2009) [7].
In The Albazerò, Concord Petroleum Corporation (consigning company) which was a wholly owned subsidiary of Occidental Petroleum Corporation made a consignment on a ship for the shipment of crude oil from Venezuela to Europe. Ownership of the cargo prior to its loss was transferred by Concord to another wholly owned subsidiary of Occidental during the course of the voyage. Concord sued the ship owner for the loss of the cargo claiming that it should be treated as one with the other subsidiary company since they were both wholly owned by the same parent company. That argument was rejected, Roskill LJ contended that it was a long established and unchallengeable principle that each company in a group of companies is a separate legal entity. Notwithstanding, Concord succeeded in the House of Lords by invoking maritime law which allows a consignor of cargo to sue for loss cargo irrespective the cargo’s ownership.

In DHN Food Distributors Ltd v. Tower Hamlets, DHN Food Distributors carried on a grocery and provision merchant business on premises that was owned by Bronze Investments Ltd, its wholly owned subsidiary; and it used vehicles from its other wholly owned subsidiary DHN Food Transport Ltd. The Tower Hamlets London Borough Council compulsorily acquired the premises on which DHN Food Distributors were occupying causing the group of companies to go into voluntarily liquidation because no appropriate alternative premises were available. Bronze Investments Ltd received compensation for the value of the premises from Tower Hamlets who claimed that since Bronze Investments Ltd did not carry on any business on the premises it was not entitled for compensation for disturbance. The Court of Appeal disagreed and held that the court was entitled to consider the realities of the situation and pierce the veil and treat the three companies as one and award compensation accordingly for disturbance. According to Lord Denning MR at p 860:

“…this is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil. I wish to safeguard myself by saying that so far as this ground is concerned, I am relying on the facts of the particular case. I would not at this juncture accept that in every case where one has a group enterprise one is entitled to pierce the veil, but in this case the two subsidiaries were both wholly owned; further, they had no separate business operations whatsoever.”

In Woolfson v. Strathclyde Regional Council, Lord Keith while acknowledging the distinguishing facts of that case from DHN, questioned the accuracy of permitting the piercing of the corporate veil in DHN’s case on the ground of single economic unit since there was no sham/façade involved. He conceded:

“The grounds for the decision were (I) that since D.H.N. was in a position to control its subsidiaries in every respect, it was proper to pierce the corporate veil and treat the group as a single economic entity for the purpose of awarding compensation for disturbance…It is the first of those grounds which alone is relevant for present purposes. I have some doubts whether in this respect the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that is a mere façade concealing the true facts...”

The judgement in cases such as Woolfson v. Strathclyde Regional Council, Multinational
Gas and Petrochemical Co v. Multinational Gas and Petrochemical Services Ltd [1983] Ch 258 and Industrial Equity Ltd v. Blackburn (1977) 137 C.L.R. 567 indicated that the decision of the Court of Appeal in DHN was an anomaly (Rixon, 1986) [8]. It is judicially indisputable that each company in a group enterprise is a separate legal entity (Rixon, 1986) [8]. Notwithstanding, DHN had received approval in the cases of Amalgamated Investment & Property Co. Ltd v. Texas Commercial International Bank Ltd [1982] QB 84 and Lewis Trusts v. Bambers Stores (CA 1983) [1983] FSR 453 (Nyombi, 2014) [9]. However, the enunciation of Robert Goff LJ in Bank of Toyoko Ltd v. Karoon [1987] AC 45n encapsulated the modern approach to lifting the corporate veil and corporate groups, he posited at p. 64:

“Counsel suggested beguilingly that it would be technical for us to distinguish between parent company and subsidiary in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be abridged.”

The House of Lords decision in Harold Holdsworth & Co. (Wakefield) Ltd v. Caddies [1955] 1 W.L.R. 352 was the primary authority relied upon in DHN where Lord Denning MR contended that that case was a striking instance of the tendency to ignore the corporate personalities of members in a corporate group (Rixon, 1986) [8]. That contention was flawed since there was no evidence in the judgement that the separate personalities of companies in a corporate group might be disregarded (Rixon, 1986) [8].

The case had been criticized as permitting the parent company to blow hot and cold and also to enjoy the best of both worlds (Ford cited by Daehnert, 2007) [10]. The case law on corporate groups is confusing due to the varying attitudes of the courts on one hand blurring the distinctiveness of the companies and on the other hand firm insistence on the distinction (Sealy and Worthington, 2008) [11]. However, the courts seemed more inclined to reaffirm the Salmon principle than exercise their powers of intervention to disregard the principle as happened in DHN, which was perhaps the climax for the enthusiasm to exercise powers of intervention (Sealy and Worthington, 2008) [11].

Further, Adams v. Cape Industries and Linsen International v. Humpass Sea Transport PTE (2011) EWHC 2339 (Comm) have curtailed DHN which is perhaps now best regarded as authority for compensation for compulsory acquisition of business premises for corporate groups (Nyombi, 2014) [9]. Slade LJ was pellucid in Adams v. Cape Industries that companies in a corporate group have their separate legal personalities. In Linsen International v. Humpass Sea Transport PTE Flaux J posited that in order to pierce the corporate veil it was insufficient to show control alone, there had to be impropriety that the corporate structure was concealing. He conceded:

“...it is not enough to show that a company or a group of companies is closely controlled by an individual or a family or by a holding company. If the element of control were sufficient in itself, the English courts would have accepted the concept of the “single economic unit” which [...] has been consistently rejected by our courts. The claimant who wishes to pierce the corporate veil must show not only control but also impropriety, in the sense of misuse of the company or the corporate structure to conceal wrongdoing.”

Recently, in Prest v. Petrodel Resources Limited and others, Lord Sumption conceded that the identification of the relevant wrongdoing was difficult and illuminated the differences between the concealment principle and the evasion principle. With reference to Jones v. Lipman [1962] 1 WLR 832, he contended that specific performance was ordered against Lipman based on the concealment principle since he was the owner and controller of the company. However, the concealment principle does not invoke piercing of the corporate veil; it just seeks to identify the controller of the company. On the other hand, the evasion principle which invokes piercing of the corporate veil was used to compel specific performance by the company. He posited at para 30:

“The judge decreed specific performance against both Mr Lipman and Alamed Ltd. As against Mr Lipman this was done on the concealment principle. Because Mr Lipman owned and controlled Alamed Ltd, he was in a position specifically to perform his obligation to the plaintiffs by exercising his powers over the company. This did not involve piercing the corporate veil, but only identifying Mr Lipman as the man in control of the company. The company, said Russell J portentously at p 836, was "a device and a sham, a mask which [Mr
The Lubbe litigation exemplified the liability of a parent company for the environmental torts committed by its subsidiaries. Notwithstanding that the torts were not as a result of catastrophic events such as Amoco Cadiz and Bhopal, the case explicated liability of a parent company for corporate negligence. In Lubbe v. Cape Plc. there was an injury incurred by Mr. Lubbe while manufacturing asbestos for a South African subsidiary of Cape Plc. By the time the litigation commenced the subsidiary had no money so he sued the UK parent company in the High Court of the UK on the ground that it owed him a direct duty of care as an employee in the corporate group. Cape Plc applied for a stay on the proceedings in the UK on the basis of forum non conveniens. The stay on the proceedings was granted and there was an unsuccessful appeal in the Court of Appeal (by which time there were over 3000 plaintiffs comprising those affected by asbestos exposure- workers and residents next to the mines or factories) which propelled the appeal to the House of Lords. Lord Bingham conceded at p 1550:

“... the central thrust of the claims made by each of the plaintiffs is not against the defendant as the employer of that plaintiff or as the occupier of the factory where that plaintiff worked, or as the immediate source of the contamination in the area where that plaintiff lived. Rather, the claim is made against the defendant as a parent company which, knowing (so it is said) that exposure to asbestos was gravely injurious to health, failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group. In this way, it is alleged, the defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations (with the result that the plaintiffs thereby suffered personal injury and loss).”

The House of Lords while acknowledging that South Africa would be the more appropriate forum for the case to be heard lifted the stay on proceedings because expert evidence pointed in the direction of the denial of justice. It was held that the parent exerted sufficient control to be made liable due to the shareholding structure; control in the appointment of directors of the subsidiaries in South Africa; and involvement in budget, coordination of research, safety issues and the purchase of equipment (Muchlinski, 2001) [12]. Lord Bingham at p 1551 reformulated the plaintiffs’ claim:

“Whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company?”

The Omai case encapsulated an ultimately unsuccessful attempt to impose liability on a parent company for the environmental disaster caused by a subsidiary company. The Omai disaster is one of the worst gold mining disasters in the history of gold mining. Omai Gold Mines Ltd was 65% owned by Cambior, 30% by Golden Star and 5% by the Guyana Government. Gold was extracted using the heap leaching method which involved the gold being soaked in cyanide solution in open pits. Heap leaching is a low cost method of extraction that is associated with problems such as dams leaking, over flowing or rupturing which may result in cyanide spill. Roopnarine (2002) [13] contended that it was unfortunate that Guyana, one of the poorest nations in the Western Hemisphere, permitted the use of such a dangerous activity in the absence of comprehensive environmental standards.

In 1995 approximately 838 million gallons of cyanide escaped into the Essequibo River due to a failed tailings dam, putting more than 15,000 Guyanese at risk directly via the pollution of water systems, forests and agricultural lands (Roopnarine, 2002) [13]. It was reported that dead fishes were floating in the river and children that were miles away from the pollution complained of sores, diarrhea and rashes (Roopnarine, 2002) [13]. A history of corporate negligence which was concealed with bureaucratic obfuscation was
revealed by international investigations since there were two smaller spills that predated the catastrophe in August 1995 which gravity was downplayed (Roopnarine, 2002) [13]. However, Jodah (1995) [14] claimed that there were three smaller spills predating the major one. The area was declared an environmental disaster zone by the then government who were anxious to recommence operations under seemingly safer conditions due to the contribution of gold to the economy (Roopnarine, 2002) [13].

The Commission of Inquiry set up to investigate the spill ruled it as an industrial accident and did not attribute blame for the spill but made Omai liable for all foreseeable loss and damages (Seck, 1999) [15]. That finding was somewhat peculiar given the substantial evidence that pointed to corporate negligence by Cambior. Apart from owning 65% of the subsidiary which made it the major shareholder, Cambior made decisions in Quebec pertaining to the design, construction, management and operation of the tailings dam at Omai (Seck, 1999) [15]. The tailings dam was made only of clay which when dried would contract resulting in cracks; also there was no lining of the dam with impermeable material to mitigate seepages (Ramraj, 2001) [16]. Some Guyanese engineers opined that it is possible the failure of the lining of the dam was due to the explosions in the nearby Fennel Pit where ore was extracted while Hocker (cited by Jodah, 1995) [14] conceded that either the engineers erred in construction or they profoundly misunderstood the construction material or the underlying soil; he contended “The failure is dramatic, “it’s like standing on top of a glacier and looking down into crevasses extending across almost the entire width of the dam.”

Twenty three thousand Guyanese who were victims of the spill to initiated a class action in Quebec suing Cambior (Recherches Internationales Quebec v. Cambior Inc.). The court declined to adjudicate the matter on the ground of forum non conveniens. Notwithstanding, it acknowledged if jurisdiction was granted it could have deliberated on the issue given the substantial evidence that Cambior had over Omai. The case was ultimately dismissed in 2006 in Guyana’s High Court with Cambior being ordered to pay the legal fees of the victims.

As regards, Recherches Internationales Quebec v. Cambior Inc., it appeared that Maughan J viewed Cambior’s liability as vicarious as opposed to direct since he posited: “Any act of negligence in the construction, management and operation of the mine which Omai committed and which Cambior as principal, could be held liable would have occurred in Guyana.” Maughan J seemed to misunderstand the jurisdiction where the fault occurred since he was unable to grasp the arguments by Recherches Internationales Quebec that corporate negligence as to the design, construction, management and operation of the tailings dam was perpetrated by Cambior in Quebec (Seck, 1999) [15]. This misunderstanding was unfortunate given the persuasive precedent of the Amoco Cadiz case.

The common law concept of assumption of responsibility has been used to impose direct liability on a parent company for acts and/or omissions of subsidiaries. The landmark case of Chandler v. Cape Plc. [2012] EWCA Civ 525 was the genesis for the imposition of liability on a parent company for breach of a direct duty of care to an employee of a subsidiary company on the basis of the parent company assuming responsibility for the health and safety of employees within the corporate group. The case marked a substantial expansion of the possible liabilities that parent companies may incur for their subsidiary companies (Pearse, Sweigart and Adam, 2012) [17].

As regards Chandler v. Cape Plc., Chandler was employed by Cape Building Products Ltd (a wholly owned subsidiary of Cape Plc.) which manufactured asbestos between 1959 and 1962. However, it was not until 2007 that Chandler was diagnosed with asbestosis (caused by exposure to the dust from asbestos) and by that time the subsidiary had ceased to exist which propelled Chandler to sue the parent company in the tort of negligence for breach of duty of care to provide a safe working system. The High Court agreed with Chandler and using the test for negligence prescribed in Caparo Industries v. Dickman [1990] 2 AC 605 held that the damage was foreseeable, there was sufficient proximity between Chandler and the parent company, and the existence of a duty of care was fair, just and reasonable. According to Williams J:

“49 It does not seem to me, however, that the Claimant’s case stands or falls simply upon whether he can establish that the Defendant controlled all the activities of Cape Products. It is enough, in my judgment, if he can establish that the Defendant either controlled or took overall responsibility for the measures adopted by Cape Products to protect its employees against harm from asbestos exposure… 71 It is true that generally the law imposes no duty upon a party to prevent a third party from causing damage to another. That emerges clearly from Smith v Littlewoods Organisation Ltd [1987] A.C. 241.
However, that same case makes it clear that there are exceptions to the general rule. In his speech Lord Goff identified the circumstances in which a duty might arise. They were:

(a) where there was a special relationship between the Defendant and Claimant based on an assumption of responsibility by the Defendant;
(b) where there is a special relationship between the Defendant and the third party based on control by the Defendant;
(c) where the Defendant is responsible for a state of danger which may be exploited by a third party; and
(d) where the Defendant is responsible for property which may be used by a third party to cause damage.

In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present 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.

According to Sanger (2012) [18] the case is significant in that the courts were inclined to take a wide view of the relationship between two companies which is indicative of the expectation that parent companies should be active in the operation of their subsidiaries. Further, for the duty of care owed to the employee of the subsidiary to be established, actual control need not be proved; however, it is vital to show that the parent company had the ability to control the subsidiary company since the emphasis is on what the parent company knew or ought to have known (Sanger, 2012) [18]. The duty of care owed to the employee by the parent company differs from the duty of care owed by the subsidiary company (Sanger, 2012) [18]. Notwithstanding, these significant developments the case is not without criticisms, for instance, Pertin (2013) [19] while acquiescing that parent companies should not be free from liability to the employees of their subsidiary companies criticized the decision as failing to develop a proper legal framework for establishing such liability.

3. CONCLUSION

The law is pellucid that a subsidiary company once incorporated possesses its own legal personality even if it is a wholly owned subsidiary as explicated in Adams v. Cape Industries Plc. However, there exist certain circumstances where a parent company may incur liability for the acts and/or omissions of its subsidiary company. In those circumstances, it would be immaterial whether the subsidiary company was located in another jurisdiction or whether it had ceased to operate as epitomized in the Lubbe Litigation. The cases showed that the parent company of a multinational corporate group may incur direct or derivative liability for the acts and/or omissions of its subsidiaries. Derivative liability may be imposed on a parent company who is the dominant shareholder of the subsidiary company by lifting the corporate veil as exemplified in Amoco Cadiz and to a lesser extent in the Bhopal case. Notwithstanding, the jurisprudence on lifting the corporate veil was permeated by arbitrariness and uncertainty which made it difficult to adduce the legal principles governing the area especially when dealing with group enterprises. That area was plagued with controversies as exemplified by the contrasting approaches in The Albazero where the veil was not pierced and DHN where the veil was pierced. Further, there was the issue of whether control alone was sufficient to pierce the corporate veil. Linsen International v. Humpass Sea Transport PTE and Prest v. Petrodel Resources
Limited and others suggested it was not and that there had to be impropriety. However, the case law was unclear on the level of impropriety required to facilitate the piercing of the corporate veil.

Direct liability may be imposed on the parent company for corporate negligence due to the failure of the parent company to prudently manage its subsidiary company which it exerted substantial control over. Thus, due to that control the parent company becomes tasked with the responsibility of preventing harm if they could as elucidated in the Lubbe Litigation. More recently, the doctrine of assumption of responsibility has been used to impose direct liability on a parent company for acts and/or omission by its subsidiary company because the parent company was deemed to take on responsibility for the health and safety for employees in a corporate group as epitomized in Chandler v. Cape Plc. Nevertheless, one of the greatest challenges plaintiffs especially those from developing countries had to overcome when suing a parent company in a developed country for damages as a result of an environmental disaster caused by its subsidiary company was that of jurisdiction. This was due to the fact that it was within the discretion of the courts to refuse to adjudicate the case on the basis of forum non conveniens as exemplified in the Bhopal and Omai cases.

REFERENCES