CLASS ACTION ASSAULT ON UK PLCS FOR ACTS OF SUBSIDIARIES

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Legal Briefings – By **John Ogilvie, Neil Blake and Alec Milne**

A recent trio of decisions[1] from the Court of Appeal of England and Wales has provided insight into the circumstances in which an English-domiciled company may be held liable in negligence to individuals affected by the acts of its overseas subsidiaries.

The decisions are relevant to all multinational corporate groups with English parent (or intermediate holding) companies who might potentially be sued in the English courts in connection with their overseas operations. The decisions form part of a growing litigation trend known as "class action tourism", wherein claimant groups from jurisdictions around the world (for example, Nigeria, Peru, South Africa, Ivory Coast and Colombia) have sought to bring such claims in the English courts, with the assistance of English law firms often acting on the basis of "No Win, No Fee" agreements. Mining and energy firms are frequently the targets of such claims given the commonplace corporate structure in those industries of an English holding company and overseas operating subsidiaries.

This update gives a high-level summary of the factual background of these decisions and the primary legal issue considered therein, and provides a view of expected developments in this significant and still developing area of law.

BACKGROUND

All three cases feature groups of individual claimants based overseas seeking to recover damages in the English Courts from English-domiciled companies in connection with the actions of their overseas subsidiaries. For example, in *Okpabi v Shell*, the claimants (individuals residing in the Niger River Delta region) have sought damages against Royal Dutch Shell Plc (a company incorporated in England) in connection with alleged environmental damage said to have been caused by an oil and gas joint venture operated in Nigeria by Shell's Nigerian-incorporated subsidiary.

DUTY OF CARE

In each of the cases the claimants must prove that there is a "real issue" to be tried as between them and the English-domiciled parent company in order to bring their claims within the jurisdiction of the English Courts. The determination of this issue has primarily turned on whether the English parent company can be said to owe a duty of care (as a matter of English common law) to the claimants based on the principles in *Caparo Industries plc v Dickman [1990] 2 AC 605*. *Caparo* held that a duty of care will be owed where the claimant can establish i) foreseeability of damage, ii) a sufficiently proximate relationship between the parties, and iii) that in the circumstances it is fair, just and reasonable to impose a duty of care.

As regards the *Caparo* test, the Court of Appeal in each of the cases was predominately concerned with whether the second branch (proximity) had been satisfied. Taken together, the cases suggest that in considering this issue the Court may have regard to whether the parent company:

a. provided a high level of direction and oversight of, or took over management of, the relevant activity of the subsidiary;

b. issued and imposed mandatory policies on the foreign subsidiary;

c. imposed a system of supervision and oversight of the subsidiary's implementation of the parent company's policies;

d. gave advice to the subsidiary about how to manage a particular risk; and

e. imposed sufficient financial control over the subsidiary.

In considering whether the *Caparo* test was satisfied, the Court of Appeal also had regard to guidance from *Chandler v Cape Plc [2012] EWCA Civ 525*, in which the *Caparo* test was applied to the question of whether, on the particular facts of that case, a parent company owed a duty of care to its subsidiary's employees. In holding that a duty of care was owed, *Chandler* identified the following factors as relevant:

a. the businesses of the parent and subsidiary are in a relevant respect the same;

b. the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;

c. the subsidiary's system of work is unsafe as the parent company knew, or ought to have known, and

d. 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.

While the cases suggest that the factors set out in the foregoing paragraphs may be relevant in assessing parent company liability, whether or not a duty of care is owed will turn on the specific facts of each case. Further guidance from the English Courts is likely to assist multinational companies headquartered in London in arranging their affairs such as to ensure the effective co-ordination of the activities of their foreign subsidiaries, but without materially increasing the litigation risk of doing so.

FURTHER DEVELOPMENTS

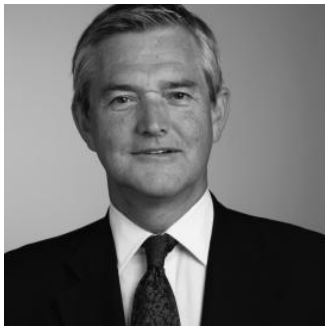
Each of the cases has been appealed, or may be appealed, to the UK Supreme Court. The UK Supreme Court is expected to issue its ruling in the first of these cases in early 2019. The ruling will be of special interest for mining and natural resource companies with foreign operations and English-domiciled parent companies (or indeed, parent companies domiciled in other common-law jurisdictions, such as Australia).

ENDNOTES

1. *Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2018] EWCA Civ 191 ("***Okpabi v Shell*** "), *AAA and others v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532, and *Lungowe and Ors v Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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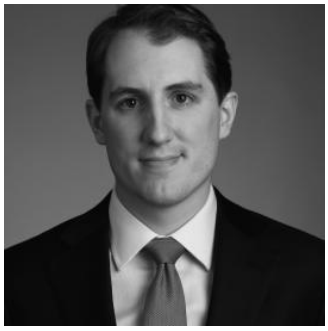

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