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Case Comment

Duties of care and corporate groups

James Goudkamp

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Cases:

His Royal Highness Okpabi v Royal Dutch Shell Plc [2017] EWHC 89 (TCC); [2017] Bus. L.R. 1335 (QBD (TCC))

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

Caparo Industries Plc v Dickman [1990] 2 A.C. 605; Independent, February 16, 1990 (HL)

***L.Q.R. 560** Recent years have witnessed a surge of litigation involving the following structure: (1) a subsidiary company tortiously injures a claimant, who may or may not be its employee; (2) for one reason or another, the claimant is unable to obtain redress (or unable conveniently to obtain full redress) from the subsidiary; (3) accordingly, the claimant seeks relief from another company that is within the same corporate group as the subsidiary, usually the ultimate parent company. Although it is not the first case in Britain to involve this pattern, the landmark decision in *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111 is widely recognised as having opened the door to such claims. The claimant in *Chandler* had contracted mesothelioma due to the negligence of his employer, a subsidiary company. The employer had been wound up by the time that the disease manifested itself and so the claimant sought relief from his erstwhile employer's parent company, which was still in existence. The case turned on whether the parent owed the employee a duty of care. The Court of Appeal unanimously held that the parent owed a duty on the basis of the *Caparo* test. Arden L.J., with whom Moses L.J. and McFarlane L.J. concurred, said (at [80]):

"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."

Chandler precipitated a stream of claims with essentially the same structure, which claims have met with varying degrees of success (see e.g., *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635; [2015] B.C.C. 855; *Lungowe v Vedanta Resources Plc* [2016] EWHC 975 (TCC); [2016] B.C.C. 774; *AAA v Unilever Plc* [2017] EWHC 371 (QB)). These decisions triggered a deluge of academic commentary (see e.g., Sanger [2012] C.L.J. 478; Petrin (2013) 76 M.L.R. 603; Day [2014] L.M.C.L.Q. 545; Witting and Rankin (2014) 22 Tort L. Rev. 91; Turner (2015) 33 C.&S.L.J. 45).

His Royal Highness Okpabi v Royal Dutch Shell Plc [2017] EWHC 89 (TCC); [2017] B.L.R. 136 is a recent decision of this stripe and a significant development in this nascent area of the law. In this matter, approximately 42,500 claimants in ***L.Q.R. 561** Nigeria alleged that they had suffered damage as a result of oil spills that had been negligently caused by the Shell Petroleum Development Co of Nigeria Ltd (the subsidiary). The claimants potentially had rights to compensation good against the subsidiary in Nigeria under a strict liability statutory regime. However, the claimants (doubtlessly encouraged by their English-based legal representatives) instead chose to sue in the High Court of England and Wales. They contended that the High Court had jurisdiction over the claim against the subsidiary because its ultimate parent and the holding company of the Royal Dutch Shell group, Royal Dutch Shell Plc (the parent), had been incorporated in England and was jointly responsible for the damage caused (see CPR PD 6B r.3.1(3)). The parent and subsidiary disputed the court's

jurisdiction to decide the claim against the subsidiary. They contended that the parent was not liable and that, consequently, there was no "anchor" defendant in England. The resolution of the jurisdictional challenge thus required the court to decide whether the claimants had "legitimate claims in law" (at [20]) against the parent. The court's focus in this regard was on whether the parent owed the claimants a duty of care.

The judge, Fraser J., considered that *Chandler* and the authorities that had followed in its wake, properly understood, called for a two-stage enquiry in this regard. His Lordship wrote that the issue that he had to decide turned on (1) "whether 'the parent company is better placed [to avoid the damage], because of its superior knowledge or expertise' than the subsidiary" and (2) whether the subsidiary "'will rely upon the parent deploying its superior knowledge' in order to avoid the harm" (at [79]). Applying that approach, Fraser J. concluded that no duty of care was owed. In arriving at that conclusion, his Lordship emphasised seven points (see, especially, at [114]–[116]). First, the parent was a mere holding company without any operations or employees of its own. Secondly, the parent held shares in the subsidiary indirectly (that is, via another company within the Royal Dutch Shell group). Thirdly, the parent (unlike the subsidiary) did not have a licence to conduct oil operations in Nigeria. Fourthly, although two officers of the parent were members of the group's executive committee, that executive committee was composed mainly by officers of other companies within the group. Fifthly, the group operated on a global scale with the result that (in Fraser J.'s view) there was a risk of imposing indeterminate liability on the group as a whole if a duty of care were recognised in the instant case. Sixthly, the claimants potentially had a right to redress via the Nigerian statutory scheme. Finally, the subsidiary was "wholly autonomous ... with considerable income and sizeable assets of its own" (at [116]).

Before engaging with Fraser J.'s reasons and the impact of his decision, it is important to clarify the basis on which liability arises in a *Chandler*-type claim. It has sometimes been suggested that cases of this variety involve piercing the subsidiary's corporate veil (see e.g., Grusic [2015] C.L.J. 30 at 30–31). However, that is not so. As much is clear given that the conditions for veil-piercing are plainly not satisfied (as to those conditions, see *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 A.C. 415 at [35]). Neither do *Chandler*-type claims involve imposing vicarious liability on the parent for the subsidiary's wrongdoing. That is evident from the fact that there is no engagement in the cases concerned with the criteria that must be satisfied in order for vicarious liability to arise. ***L.Q.R. 562** *Chandler*-type claims do not involve vicarious liability for the further reason that, under the law as it presently stands, a company cannot incur vicarious liability in respect of torts of another company (for discussion of this rule, see Morgan (2015) 31 J.P.N. 276). Rather, when liability arises on the basis of the *Chandler* line of authority, the parent company is responsible because it personally owed the claimant a duty of care. The concepts of veil-piercing and vicarious liability are distractions for present purposes and must be recognised as such.

Having distinguished *Chandler*-type cases from veil-piercing and vicarious liability situations, attention can now be turned to Fraser J.'s reasons in *Royal Dutch Shell*. Numerous points of considerable interest emerge from his Lordship's opinion. The first is that it is now tolerably clear that where, as in *Royal Dutch Shell*, the parent company is a mere holding company, the prospects of establishing that it owed a duty of care to persons who were injured by the operations of a subsidiary are slim. That is because, in these circumstances, the parent is very unlikely to have superior operational knowledge relative to the subsidiary regarding the circumstances that resulted in the damage given that the latter will be the entity that is carrying on the trading operations. The likelihood of a holding company incurring liability for damage caused by a subsidiary will be further diminished where the holding company holds shares in the subsidiary via another entity. These rules afford corporate groups with obvious opportunities to immunise certain entities within the group from liability that may otherwise arise pursuant to the *Chandler* line of authority.

A second point concerns the relationship between the two-stage approach that Fraser J. endorsed and the *Caparo* test (after *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605; [1990] 1 All E.R. 568) for the existence of a duty of care. As discussed above, Fraser J. distilled from the authorities (and especially from Arden L.J.'s analysis in *Chandler*, the crux of which is set out at the beginning of this note) a two-step test that is to be applied to determine when a parent company will owe a duty of care to a person who was injured by a subsidiary. Nevertheless, his Lordship also considered that the *Caparo* test:

"is the correct place to start when considering the question of whether a parent company owes a duty of care in respect of acts or omissions by its subsidiary" (at [107]).

This is somewhat puzzling since the two tests are plainly not the same. Fraser J.'s two-stage test channels considerations of knowledge and reliance. While those considerations are, it is true, also relevant to the *Caparo* test, the *Caparo* test is sensitive to many more criteria, such as whether the defendant was in a position of control, whether imposing a duty of care would encourage the taking of defensive practices and whether recognising a duty of care would tend to frustrate the realisation of a statutory policy (for a recent discussion of the range of factors to which the *Caparo* test responds, see Robertson (2013) 33 O.J.L.S. 31 at 34). One obvious question that arises in view of the foregoing is what happens when Fraser J.'s two-stage test and the *Caparo* test require different outcomes. That question does not admit of a straightforward answer.

Regardless of the foregoing, it seems from *Royal Dutch Shell* that the resolution of *Chandler* -type cases is not to be left entirely in the hands of the more general ***L.Q.R. 563** *Caparo* test. In this connection, *Royal Dutch Shell* is symptomatic of a pronounced tendency of the courts to develop specific duty of care tests for individual contexts. Perhaps the most prominent illustration of that propensity can be found in claims in respect of psychiatric injury suffered by secondary victims. In asking whether a claimant was owed a duty of care in that setting, the courts do not, for the most part, ask whether the *Caparo* test is satisfied. Judges instead apply the criteria that were laid down in *Alcock v Chief Constable of South Yorkshire* [1992] 1 A.C. 310; [1991] 4 All E.R. 907 (discussed in Lynch (1992) 108 L.Q.R. 367). The inclination of the courts to develop specialised duty of care tests is arguably regrettable since the development of such tests diminishes the generality of the law. Furthermore, the courts invariably leave the precise nature of the relationship between specialised and more general tests obscure, as occurred in *Royal Dutch Shell* itself. (For further criticism of specialised approaches to the duty of care issue developed along somewhat different lines, see Weinrib (2006) 31 Advocates' Q. 212.)

Thirdly, it merits emphasis that Fraser J. stressed that a duty of care can arise in a *Chandler* -type case even where the claimant is not an employee of the subsidiary (at [116]). This dictum is important because most of the previous cases had involved claims by the subsidiary's employees and some doubt consequently existed as to whether or not only employees could sue the parent (cf. *Lungowe v Vedanta Resources Plc* [2016] EWHC 975 (TCC); *CSR v Young* [1998] Aust. Torts Rep. 81-468). For example, the analysis of *Chandler* -type claims in *Clerk & Lindsell on Torts* seems to suggest that only employees of the subsidiary could recover (*Clerk & Lindsell on Torts*, edited by M.A. Jones, A.M. Dugdale and M. Simpson, 21st edn (2016), at para.5-80). The fact that the principle in *Chandler* is not limited to employees gives it a considerably wider scope than would otherwise be the case. Nevertheless, although persons other than employees of the subsidiary can avail themselves of the rule in *Chandler*, it remains relevant whether or not any given claimant is an employee of the subsidiary, with Fraser J. remarking that the prospects of establishing a duty will be better, all other things being equal, in employee cases. His Lordship was presumably of this view on the basis that it is more likely in such cases that a close relationship will exist between the parties.

Fourthly, a question arises as to whether certain of the factors that led Fraser J. to hold that the parent did not owe a duty of care to the claimants are convincing both in the context of *Royal Dutch Shell* and also in connection with *Chandler* -type cases more generally. Consider, for example, the reliance that Fraser J. placed on the fact that only two officers of the parent sat on the executive committee of the Royal Dutch Shell group. It is unclear why that fact should have mattered in light of the two-stage test that Fraser J. expounded. That is because it is not obvious how that consideration is relevant to either of the matters to which the two-stage test is sensitive, namely, knowledge by the parent of the risk and reliance by the subsidiary on that knowledge. Neither is it clear, for the same reason, why it mattered that another company within the group was interposed between the parent and the subsidiary. That fact is simply immaterial to the two-stage test (and perhaps represents an unduly formal approach in any event).

As to factors on which Fraser J. placed weight that are arguably unconvincing across the full range of *Chandler* -type cases, observe that his Lordship was influenced by the possibility that the claimants might be eligible for redress in ***L.Q.R. 564** Nigeria pursuant to the statutory scheme. It is true that the authorities clearly establish that the availability (or unavailability) of alternative redress is material to the duty of care enquiry (see e.g., *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 A.C. 181 at [101]–[102]). However, taking cognisance of that consideration is arguably inappropriate. The fact that X has a claim in tort against Y does not ordinarily mean that X cannot claim also against Z if Z has tortiously caused X damage. Why, therefore, should a different rule obtain in relation to duty of care jurisprudence?

Finally, one aspect of the *Chandler* -type cases that has not been satisfactorily explained is why the

focus is on the relationship between the parent company and the subsidiary company. This focus was highly visible in *Royal Dutch Shell* on account of Fraser J.'s two-stage test. Pursuant to that test, reliance by the subsidiary on the parent's knowledge is of paramount importance. However, what, ultimately, is in issue in cases that have the structure in question is whether the parent company owes a duty of care to the claimant. So why should the precise parameters of the relationship between the parent and the subsidiary (which is a third party in so far as the claim against the parent is concerned) matter? At the very least, should not the focus instead be on the nature of the connection between the defendant parent and the claimant? It seems that things may have gone awry from the very beginning in this field on account of an unjustified—or at least unexplained—departure from what usually matters when the duty of care element of the action in negligence is in issue, namely, whether the claimant and defendant are in a sufficiently close relationship to warrant the imposition of a duty of care.

Litigation based on *Chandler* and its progeny, while apparently relatively common, is still in its infancy. In these circumstances, it is curious that British courts have not looked for guidance to other jurisdictions in which *Chandler* -type claims have a much longer lineage. Australian courts, in particular, have grappled with claims involving the structure concerned over a lengthy period (see e.g., *CSR Ltd v Wren* (1997) 44 N.S.W.L.R. 463). The Australian courts have generally embraced a far more restrictive approach (for a judge's account of the Australian authorities, see Warren (2016) 40 M.U.L.R. 657). Canadian courts, too, have considered *Chandler* -type claims with some regularity (see e.g., *Choc v Hudbay Minerals Inc* [2013] ONSC 1414; (2013) 116 O.R. (3d.) 674). While it is of course true that the Australian and Canadian courts have adopted rather different approaches from British courts to the duty of care question generally (see Goudkamp and Murphy (2015) 21 L.T. 47 at 59–60), with the result that it is doubtful that authorities from those jurisdictions should be applied directly in Britain, it would be unlikely if some insight could not be gleaned from the Australian and Canadian cases.

It is unsurprising, given that the relevant case law in Britain is underdeveloped, that many issues in this area remain to be explored. The focus so far in this context has been on when a parent company will owe a duty of care to persons injured by the negligence of one of its subsidiaries. But there are several closely related scenarios that are yet to attract judicial consideration. One such situation concerns the circumstances in which one entity in a supply chain will owe a duty to persons with whom another member of the chain engages where the companies concerned do not belong to the same corporate group. That issue has received some scrutiny, **L.Q.R. 565* judicial and academic, in other jurisdictions (see e.g., *Doe v Wal-Mart Stores Inc* 572 F. 3d. 677 (9th Cir., 2009); Revak (2012) 63 Hastings L.J. 1645; Farrell (2013) 44 Georgetown J. Int. Law 1491; Conway (2015) 40 Queen's L.J. 741). It remains to be addressed in Britain.

James Goudkamp

Keble College, University of Oxford

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