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Duty of Care – Parent Companies

25 July 2019

Supreme Court seeks to resolve international mass tort/parent company group actions

On 17 July 2019, the Supreme Court rejected the Claimants' application for permission to appeal the decision of the Court of Appeal in *AAA v Unilever* [2018] EWCA Civ 1532. The Court of Appeal held that the Claimants were *"nowhere near being able to show that they have a good arguable case"* in establishing that an English-domiciled parent company owed a duty of care to protect them from the horrific crimes of third parties who invaded a tea plantation owned by a Kenyan subsidiary company. The Supreme Court relied upon both its recent decision in *Lungowe v Vedanta* and the *"formidable obstacles"* presented by the conclusions reached by the Courts below as reasons for refusing permission. Accordingly, jurisdiction has not been established and the claims fail in this jurisdiction.

Charles Gibson QC, Adam Heppinstall and Ognjen Miletic were instructed by DLA Piper UK LLP on behalf of the Defendants / Respondents.

In further news, the Supreme Court has granted permission to the Claimants to appeal the Court of Appeal's upholding of Fraser J's refusal of jurisdiction for lack of a duty of care against the parent company, Royal Dutch Shell, in relation to oil spills in Nigeria – *Okpabi v Royal Dutch Shell and the Shell Petroleum Development Company of Nigeria* [2018] EWCA Civ 19.

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BACKGROUND - the Unilever Action

1. The First Defendant, Unilever Plc, is an English-domiciled holding company. The Second Defendant, UTKL, is its Kenyan subsidiary which operated a tea plantation in Kericho (located in the Rift Valley in the Republic of Kenya). The Claimants are 218 individuals who had been employees at or visitors to the tea plantation at the material time in 2007. The workers were drawn from a number of ethnic groups in Kenya, including the Kalenjin, Kikuyu, Kisii and Luo tribes.

2. The claims arose as a result of the aftermath of the 2007 presidential elections in Kenya. Following the announcement of the election results, a nationwide breakdown in law and order ensued, stemming from sensitive political and ethnic tensions in the country. Across Kenya 1,333 people were killed, many more were injured and there was extensive damage to property. Criminal rioters drawn from the Kalenjin and Luo invaded the UTKL tea plantation in large armed mobs and targeted people from other tribes who were living there, including the Claimants. The mobs committed murders, rapes and other violent assaults and damaged property.

3. The Claimants brought a claim in this jurisdiction against both Unilever and UTKL, with the former acting as an 'anchor defendant' in order to allow a claim to be brought against the latter. The relevant jurisdictional rules can be found at CPR 6.37 and Practice Direction 6B, para 3.1. In essence, in order to ground the claim against the Kenyan subsidiary in this jurisdiction, the Claimants needed to demonstrate the following:

    3.1. that the claims against the foreign party had a reasonable prospect of success – CPR 6.37(1)(b);

    3.2. that there was a real issue between the Claimants and the English-domiciled party which it is reasonable for the Court to try – CPR PD6B, para 3.1(3);

    3.3. that England and Wales is the proper place to bring the claims – CPR 6.37(3).

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4. Ultimately, it was the requirement at paragraph 3.2 above (the 'jurisdictional gateway') that took centre stage. The test for demonstrating a real issue is the same as that applied in applications for summary judgment.

5. The Claimants argued the Defendants should have foreseen the risk of the violence which they suffered, and that they breached their duty of care to protect the Claimants by failing to have in place adequate crisis management plans.

6. As it relates specifically to the alleged duty of care on the part of the English-domiciled parent company, the Claimants relied upon the principles established in *Caparo v Dickman* [1990] 2 A.C. 605 and *Chandler v Cape* [2012] EWCA Civ 525. It was argued that Unilever Plc had assumed a responsibility in relation to its subsidiary's crisis management policies which triggered a duty of care. It was further argued that, because determining the existence of a duty of care against a parent company is inevitably a complex and fact-specific exercise, the Court should be hesitant to strike out a claim at the jurisdiction stage. To do so was said to be engaging in a premature and impermissible mini-trial.

DECISION AT FIRST INSTANCE

7. At first instance, Elisabeth Laing J found in favour of the Defendants ([2017] EWHC 371 (QB)), holding that the Claimants did not establish a real issue to be tried against Unilever Plc. The net result was setting aside the Order establishing jurisdiction against UTKL and striking out the claims against Unilever Plc. The material reasoning was as follows:-

    7.1. Foreseeability: The Judge held that there was no evidence that the violence was foreseeable. It was inconceivable that at trial a Court would hold that UTKL, let alone Unilever, should have foreseen the loss. Accordingly, the alleged duty had no real prospect of success (para 94).

    7.2. Proximity: On the material she had seen, the Judge *"would have some hesitation in concluding"* that the Claimants had demonstrated the sort of control and superior knowledge which the Court of Appeal described in *Chandler* as being indicia of an assumption of responsibility

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and resultant duty of care. Nevertheless, at the jurisdiction stage, and again with *"some hesitation"*, the Judge concluded that, by reference to *Chandler*, the claims did raise a real issue to be tried as far as the requirement of proximity was concerned (para 103). This was, however, inconsequential given the above holding on foreseeability.

THE COURT OF APPEAL'S DECISION

8. The Claimants appealed the above decision on foreseeability. The Defendants put in a respondents' notice to argue that the Judge should have found that there was no duty of care owed by Unilever Plc on the additional ground that there was no proximity.

9. The Court of Appeal unanimously found in favour of the Defendants ([2018] EWCA Civ 1532), and dismissed the Claimants' appeal by relying on grounds different from those relied upon by the Judge at first instance.

10. The key section of the Court of Appeal's analysis appears at paragraphs 36 to 37, and can be distilled as follows:-

    10.1. There is no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-à-vis persons affected by those activities. The legal principles are the same as would apply in relation to the question whether any third party was subject to a duty of care in tort owed to a claimant dealing with the subsidiary.

    10.2. The particular facts of a case may indicate that a parent has greater scope to intervene in the affairs of its subsidiary. Such cases where a duty of care might be capable of being alleged usually fall into two basic types:

        a. where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of (or jointly with) the subsidiary's own management (**"Category 1"**); and

        b. where the parent has given relevant advice to the subsidiary about how it should manage a particular risk (**"Category 2"**).

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11. Sales LJ (as he then was) noted at paragraph 38 the Claimants' concession during the hearing that they could not fall within Category 1. It was plain that the management of the affairs of the subsidiary was conducted by UTKL alone.

12. As for Category 2, the Claimants sought to rely upon advice which they argued was given by Unilever to UTKL in relation to the management of risk in respect of political violence in Kenya. The witness and documentary evidence, which was reviewed in detail by the Court of Appeal, clearly demonstrated that UTKL did not receive relevant advice from UTKL on such matters and that UTKL understood that it alone was responsible for devising its own risk management policies and for handling crises (paras 39 to 40).

THE SUPREME COURT'S REFUSAL

13. The Claimants applied to the Supreme Court for permission to appeal.

14. In the intervening period before a decision on permission was made, the case of *Lungowe v Vedanta* [2019] UKSC 20 was heard. *Vedanta* involved an analysis of the same jurisdictional gateway and similar arguments on parent company duty of care. The Supreme Court considered the dicta of Sales LJ in *AAA v Unilever* as part of its analysis. On the particular facts of *Vedanta*, and in the context of the decisions reached at first instance and in the Court of Appeal, it was held that a duty of care on the part of the parent company was arguable. This was sufficient to establish jurisdiction.

15. The Supreme Court allowed the parties in *AAA v Unilever* to put forward further submissions on the impact of *Vedanta* to the Claimants' application for permission to appeal. The parties duly took this opportunity.

16. On 17 July 2019, a Supreme Court panel comprised of Lady Black and Lords Reed and Briggs rejected the Claimants' application for permission to appeal. Specifically, permission was rejected because:

> *"the application does not raise a point of law of general public importance to be considered at this time. The relevant principles have now been clarified in Vedanta, and in so far as this case raises distinct issues, the factual conclusions both of the judge and of the Court of*

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Appeal create such formidable obstacles to success that the refusal of permission to appeal will not cause injustice."

Okpabi v RDS and SPDC

17. In the meantime, the Supreme Court (the same Panel as that which refused permission in *Unilever*) has given the Claimants' in *Okpabi v RDS* permission to appeal the Court of Appeal's judgment in that case. *Okpabi*, like *Unilever*, turned on a finding that there was no real prospect of a duty of care being owed by the Ango-Dutch parent company, Royal Dutch Shell, in respect of its Nigerian subsidiary's oil pipe line operations in Nigeria, which are alleged to have caused environmental damage. Only time will tell why the Court took a different approach in *Okpabi* to that taken in *Unilever*. It can be observed and speculated that Lord Sales JSC, as he is now, was in the majority in the Court of Appeal in *Unilever*, but in a minority of one in *Okpabi*, and that might have had some effect. Furthermore, the factual allegations in *Okpabi* fall within Shell's core business (oil extraction) whereas the factual allegations in *Unilever* (post-election violence) fell well outside Unilever Plc's core business. The picture will become clearer when the Supreme Court hears the case in due course.

Conclusion

18. It is evident following the Supreme Court's decision on permission that, despite the conclusion reached in *Vedanta*, it is not the case that all alleged parent company duties of care will pass the threshold of demonstrating a real issue to be tried at the jurisdiction stage. In particular, much deference will be paid to the evaluative exercises carried out at first instance.

19. The Court of Appeal's judgment in *AAA v Unilever* should be read in conjunction with the Supreme Court's judgment in *Vedanta*. The two provide a far reaching analysis of the position on the anchor defendant jurisdictional gateway and parent company duties of care. We will have to see what is added to the position following judgment in the *Okpabi* case, perhaps in the new term.

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