When is a parent company liable in tort for acts of its subsidiary? AAA and Others v Unilever PLC and Another [2018] EWCA Civ 1532

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- This case looks at the circumstances in which a parent company may be liable in tort for the acts of its, usually foreign, subsidiary.
- There is no special doctrine in tort that is applicable to parent companies when considering whether they owe a duty of care and the general principles relating to establishing a duty of care applies.
- Even if a duty of care arises, such a duty is a direct duty and it is not a matter of piercing the corporate veil.
- Factors to consider include whether a parent company has scope to intervene in the affairs of a subsidiary and whether it has, in fact, taken certain actions.
- Parent companies with operating subsidiaries overseas need to be mindful of balancing their need to control their subsidiaries while allowing them sufficient freedom to manage their own affairs.

On 4 July 2018, the Court of Appeal in the UK handed down its judgment in ***AAA and Others v Unilever PLC and Another*** [2018] EWCA Civ 1532, in which the claimants sued Unilever PLC (***Unilever***) in tort for acts of its subsidiary in Kenya. The Court of Appeal upheld the first instance decision that Unilever did not owe a duty of care to the claimants, who were employees and former employees of its Kenyan subsidiary.

Background

After the presidential election in Kenya in 2007, there was a nationwide breakdown in law, and order and riots spread onto a tea plantation run by a subsidiary of Unilever, Unilever Tea Kenya Limited (UTKL), in the southern Rift Valley. Armed rioters committed violent acts on the plantation, including murder, rape, and damage to property. The 218 appellants in this case were employees of UTKL or their relatives living on the plantation, who suffered in various ways during this period of violence. The appellants attempted to sue Unilever in the UK as an "anchor defendant". They argued that Unilever and UTKL owed them a duty of care and had failed to fulfil that duty by failing to put in place adequate crisis management policies.

The judgement

The Court emphasised that in deciding whether a duty of care is owed by the parent company, there is no special doctrine in tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary. The applicable principles are found in the classic case of ***Caparo Industries Plc v Dickman*** [1990] 2 AC 605. Under the principles in ***Caparo***, three elements have to be satisfied for a duty of care to be found in tort:

1. the damage has to be foreseeable;
2. there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighborhood"; and
3. the situation should be one in which the Court considers it fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other.

At the first instance, Elisabeth Laing J ruled that the damage suffered was not foreseeable and that it would not be fair, just, and reasonable to impose a duty of care. However, Laing J ruled that there was a sufficient degree of connection between the activities of (and omissions to act by) Unilever and the damage suffered by the appellants in order to satisfy the test of proximity, according to the guidance given by the UK Court of Appeal in ***Chandler v Cape Plc*** [2012] EWCA Civ 525.

In this appeal, the appellants appealed against the finding that there existed no duty of care; Unilever argued that the judge should have ruled that there was no duty of care on the additional ground that there was no proximity.

The Court remarked that if a parent company has greater scope to intervene in the affairs of a subsidiary and has taken certain actions, a duty of care may more likely be established. The two examples of the types of actions are:

1. 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; and
2. where the parent has given relevant advice to the subsidiary about how it should manage a particular risk.

The appellants were trying to make their case out of the second scenario above.

The Court of Appeal dismissed the appeal and held that there was no proximity. In reaching this conclusion, the Court considered the following factors:

1. Nothing remotely comparable had ever before happened on the plantation in question;
2. Unilever did not have superior knowledge or expertise in relation to local political or ethnic matters;
3. Documentary evidence including a number of Unilever policies, including risk management policies, at different levels of the group was considered. At the material time, Unilever had at the top level a set of policies that is applicable to all entities within the Unilever group. Among other things, the policies mandate that written crisis management procedures be put in place in operating companies, regions and centrally. It is the responsibility of national and regional managements (such as UTKL) to ensure that all operating units are covered by appropriate crisis management plans. The head office of the Unilever group did not dictate the policies to be applied at local level or provide advice as to the content of the policies, but

it simply relied on an annual assurance provided by the unit head that risks have been reviewed and appropriate measures have been put in place;
4. UTKL had its own set of crisis management policy, which was compiled by UTKL's management without input or directions from Unilever. UTKL also carried out its own crisis management training program; and
5. The advice provided by the external risk consultants retained by Unilever (provided to UTKL) was too broad and cannot be regarded as instructions given to UTKL on how to construct their risk management policies.

What does this mean for parent companies in the region?

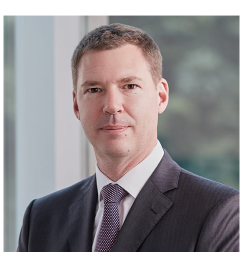
AAA & Others v Unilever PLC & Another is yet another example of overseas claimants attempting to sue an English parent company as the anchor defendant in the UK for acts of its overseas subsidiary. The Courts have emphatically held that even if an English parent company was held to have owed a duty of care, it could not be said that the corporate veil was pierced. It is well-established that each company is a separate legal entity and that the nature of the duty of care owed by a parent company is a "direct" one. Such duty is found on general principles of tort and there is no special test or legal doctrine in tort applicable for parent companies.

For companies with substantial overseas presence headquartered in the UK or in Hong Kong, this line of cases adds to the management's concerns on how to minimize legal risks while maintaining effective control of operations in the different parts of the world. It appears from this case that when the head office has put in place high-level general policies and has left its subsidiaries to implement the policies on the ground to suit the particular location, it is less likely that a duty of care would be established.

However, this of course needs to be balanced with the corporate responsibilities of the parent company to its subsidiaries, retaining control over the subsidiaries and the need to ensure consistency among the operating entities in the implementation of the parent entity's worldwide policies. Careful planning of the level of involvement of the subsidiaries is required.

Although the applicable principles were not disputed in this case, i.e. the ***Caparo*** test, the case law in this area will develop incrementally resulting in clearer guidance for multinational companies like Unilever. ***Lungowe and others v Vedanta Resources Plc and another*** [2017] EWCA Civ 1528 is another keenly anticipated judgment of the Supreme Court in the UK.

Contacts



Chris Dobby

Partner

Timothy Hill

Partner

James Kwan

Partner

Mark Lin

Partner

Damon So

Partner

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