Article

Holding Multinationals to account: Recent Developments in English litigation and the Company Law Review II

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THE COMPANY LAW STEERING GROUP AND GROUPS OF COMPANIES

The Steering Group's treatment of corporate group matters will be analysed under three sub-headings. First, the Group's views on corporate group liability in tort will be considered, followed by an assessment of the wider governance proposals for groups in the light of their likely impact on the risk of negligent action being taken by the company and its officers. Thirdly, the possible reasons behind the silence of the Final Report on group issues will be discussed.

Group Liability in Tort

The Steering Group accepts that the arguments for permitting parent companies to take advantage of limited liability in relation to tort liability are less strong than in the case of liability to creditors, given that the latter can exact a price for the credit to reflect the risk, while in cases of tort liability the parent can externalise the risk without the need to compensate. Furthermore, it is recognised that torts may protect very important interests such as freedom from wrongful personal injury. (See Completing the Structure, DTI, at para.10.58). However, the Steering Group also notes that the British courts are unwilling to 'lift the corporate veil' in such cases, citing the case of *Adams v Cape Industries* [1990] Ch 433 in support. The Steering Group continues:

'However, there are circumstances in which we regard it as entirely proper for a holding company to segregate an activity in a subsidiary with the risks of liability, including tortious or delictual liability, in mind. Many torts are closely linked with contractual liabilities, for example liability for professional services and misrepresentation and product liability. We are also not aware of any jurisdiction providing for parent companies to be automatically liable for the torts or delicts of their subsidiaries. Defining the circumstances in which the use of limited liability in this way should be regarded as abusive would be difficult. Nor are we aware of cases where parent companies have engaged in such abuse. The under-capitalisation of subsidiaries, and their operation in a way, which creates undue risks of insolvency, are matters best dealt with by insolvency law. We do not propose any reforms in this regard'. (See "Completing the Structure", at para. 10.59.)

That is all the Steering Group says. There are many shortcomings in this approach. First, reliance on the hesitation of judges to 'lift the corporate veil' seems overcautious for a law reform committee. A review of the validity, in policy terms, of the approach taken in *Adams v Cape Industries* would be entirely proper for such a body. There are, indeed, a number of reasons for reconsidering whether the strict approach to corporate separation taken in that case should be followed.

The main issue in the *Adams* case was whether a US personal injuries court award, that used quantification

techniques regarded as contrary to principles of justice in England, should be recognised here. By emphasising the legal separation between Cape and its US sales subsidiary, and the independently owned associated sales company that replaced it, such recognition could be avoided on the ground that the English based parent company was not present in the US through its subsidiary, or through the independent sales company with which it had business links. It is likely that the refusal by the Court of Appeal to 'lift the corporate veil', or to see the apparently independent sales company that replaced the sales subsidiary in the US as *de facto* controlled by Cape, was motivated by a desire to prevent recognition of an award that was tainted in the eyes of English principles of justice. If so, then the case turned on issues of private international law, to which the corporate separation between Cape, its overseas subsidiary and subsequent associate company was a convenient justification for non-recognition.

As such, the case did not turn on the issue of substantive liability in tort, where, given the seriousness of the risk that Cape could externalise its liability in negligence through the interposition of a separate corporate entity, the very question of whether the corporate veil should be lifted is central. It is true that in recent years the courts have tended to follow the narrow approach to 'lifting the corporate veil' championed by *Adams v Cape Industries*. This includes cases involving the tortious responsibility of corporations. (See *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL). But note that this case involved negligent misstatement, not liability for personal injuries, and so may be seen as coming within the commercial sphere where control over risk of liability, by way of corporate separation, may be more easily justified. Similarly the case of *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia (The Rialto)* (No.2) [1998] 1 WLR 294 involved issues of insolvency and alleged conspiracy in a commercial context). However, this does not mean that such an approach must be written in stone for all time. In an earlier period, the courts have been more willing to 'lift the corporate veil' to do justice. (See further Alan Dignam and David Allen *Company Law and the Human Rights Act* 1998 (London, Butterworths, 2000) at pp.215-21 and the cases cited therein). There is no reason why they should not do so again. Indeed, it could be said that the outcome of the recent *Connelly* and *Cape* cases suggests that the parent company may be answerable in court for certain actions of its subsidiary, (as do Dignam and Allen *ibid* at pp.218 .221) though it is dangerous to read too much into these decisions, being decisions on private international law and not on the substantive company law points that underlie them. However, there are at least two persuasive legal reasons why the courts might have to reconsider their attitude to this doctrine, at least in cases such as *Cape*. Firstly, the idea of separation between the company and its shareholders, which underlies the separate entity doctrine, (see P Ireland 'Company Law and the Myth of Shareholder Ownership' 62 *Modern Law Review* 32 (1999)) has no place in the parent/subsidiary relationship. As noted in earlier parts of this paper, the parent is not an individual, with little or no interest in the running of the subsidiary as if it were no more than a portfolio shareholder. It is the actual manager of the subsidiary. It is a direct investor and that means something very different in terms of responsibility. It means the parent controls and is, in a real business sense, responsible for that which it controls. To ignore this is to condemn the law to abuse by the unscrupulous. Furthermore, given that a small trader cannot usually hide behind their company and often has to put up their family home as a guarantee for their business - probably the largest single exception to the doctrine of corporate separation - the case of the affiliate of a MNE having the assets of its parent behind it seems an *a fortiori* case. After all the shareholders of the parent are still safe. In fact they are probably safer from ruin than the small trader's own partner and children!

Secondly, the *Human Rights Act* 1998 may require that, in certain cases, the corporate veil will have to be lifted in order to ensure the protection of the human rights of claimants (see Dignam and Allen *ibid*). This may involve, for example, the need to protect: the right to peaceful enjoyment of their property on the part of the claimant, preventing the abuse of the corporate form to shield the defendant from liability to the claimant; the right to a fair trial, in that the parent may have to answer claims brought against their affiliate where there exists evidence of parent company involvement in the course of action and of decision leading to the claim; the right to an effective remedy before the courts, which requires a court, in the exercise of its discretion, to ensure that the claimant is able to have their claim effectively considered. Thus, an over-restrictive denial of the 'lifting of the corporate veil' could, in turn, deny such a remedy. Yet, despite such arguments, at the hands of the Steering Group, *Adams v Cape Industries* has grown into a device for the avoidance of a full discussion as to whether that case went too far in protecting the legal separation between parent and subsidiary. It is submitted that that case did indeed go too far, by accepting an act that can be fairly described as a 'sharp practice': the deliberate interposition of a seemingly independent company between the English parent and its US customer for asbestos, in anticipation of the claims that Cape Industries was going to face there from employees of the customer, who alleged that they had been injured by the asbestos. Is this the kind of activity that English company law seeks to encourage?

In addition, the Steering Group conflates torts committed in breach of contract with other types of tort. Clearly, this fails to appreciate some very fundamental distinctions between different types of torts. While the

trend in commercial law has been to control the rise of tort liability by means of contractual provisions, so as to return to the contracting parties a degree of control over their allocation of risks on the transaction, this cannot be taken to represent good policy across all types of torts. In particular, not all contractual regimes are appropriately seen as the outcome of an equal bargain. In such cases, the law accepts that some protection is needed for the weaker party. Thus, the specific mention of product liability cases seems rather puzzling. The deliberate use of a subsidiary to insulate the parent against liability for a negligently manufactured product would appear to be a good case for considering the lifting of the veil and making the parent responsible, at least so far as private consumer claimants are concerned. The case of commercial consumers may be different on the grounds of more equal bargaining power, which should lead such consumers to require guarantees from the parent or to accept their own risk in purchasing the goods, though even here complex questions as to the distribution of knowledge of risks may require some protection for the business consumer. Equally, in the case of employment contracts, the reasoning implicit in the opinion of the Steering Group would be inapplicable given the demise of doctrines such as those of 'common employment' or of voluntary assumption of risk by employees.

Furthermore, when liability for hazardous industrial processes is in question, as in the Cape and Thor Chemicals cases, the potential seriousness of the foreseeable harm caused by the negligent operation of industrial processes on the part of subsidiaries to employees and third parties goes beyond contract. Here the public policy of the law will dictate the nature and extent of the duty of care. It is here that the interposition of separate corporate entities may be used in an excessive or abusive manner. However, instead of examining this question the Steering Group shies away from it on a number of indefensible grounds. Firstly, it says that no other jurisdiction has accepted automatic parent liability for the torts of its subsidiary, ignoring the development, in India, of a concept of absolute enterprise liability for injury caused by the conduct of ultra-hazardous industrial processes. (See *Mehta v Union of India* AIR 1987 SC at p.1086 and see, for a discussion of the problems associated with this doctrine, Muchlinski, *Multinational Enterprises and the Law*, at pp.326-8). While this doctrine may not be the answer to the problems under discussion, it nonetheless warrants an examination. Furthermore, the Steering Group's assertion appears to equate the absence of a particular rule of law in any other legal system with the desirability of that situation. That flies in the face of the way in which company law has grown, as a response to problems perceived at any particular time with the governance and operations of companies. (See DTI *Modern Company Law for a Competitive Economy* (London, DTI, March 1998) at para.2.5; hereafter *Competitive Economy*). Perhaps it is only now that the problem of the abuse of the corporate legal form by groups to insulate against the legitimate application of tort liability is coming to be seen as a problem. Perhaps, too, no legal system has tried to take a lead given the fear of undermining the competitive position of its economy if it is seen as creating increased operating risks for groups subject to its laws. That, however, is an argument for a co-ordinated international policy on group liability in tort in hazardous industries, on which the Steering Committee could have taken a lead.

Secondly, the Steering Group says that defining the circumstances where the abuse of limited liability occurs would be difficult. If difficulty were a bar to legal reform then very little of it would ever occur! In any case, is it so difficult to see that it is morally repugnant for a large, profitable, corporate group to hide behind the legal fiction of corporate separation in order to externalise risks onto involuntary creditors, who may not be able to bear those risks, especially in poorer communities and/or in developing countries? Perhaps it is, if one's focus is too much on making company law as cost-free as possible for corporations to improve their 'competitiveness'. Thirdly, the Steering Group asserts that it is unaware of cases where parent companies have engaged in such abuse. Three points can be made in response: firstly, if the Steering Group is referring to the lack of any judicial findings of such abuse then it has been made clear above why this is so – cases mostly settle out of court; secondly, at the very least, the Steering Group could have expressly considered such evidence of abuse as might be available from claimants, their lawyers and pressure groups engaged in this field; thirdly, an abuse remains an abuse even if it is, thankfully, a rare event, a fact that is not to be doubted in relation to the vast majority of responsible corporate groups.

Governance of Groups and Risk Reduction

In the light of the foregoing discussion it should be remembered that litigation ought to be the last resort as a means of ensuring that MNE groups comply with standards and duties of care in relation to their hazardous operations. A better approach is to provide corporate governance structures that help reduce the risk of negligent corporate behaviour from arising in the first place

In this regard the Steering Group offers a suggestion for reform of the parent/subsidiary relationship by means of an 'elective' regime for groups. (See *Completing the Structure* at paras.10.19-10.57). The suggestion is that, 'in exchange for a guarantee by the parent company of the liabilities of a subsidiary and satisfaction of certain publicity requirements, the subsidiary shall be exempted from the requirements under the [Companies] Act relating to annual accounts and audit'. (See *Completing the*

Structure at paras.10.19-10.57). The Steering Group saw no merit in a more integrated regime for corporate groups as this would detract from flexibility in the way businesses organised themselves and would strike at the limited liability basis for company law. (See *Completing the Structure* at para.10.20). To be a member of an 'elective' group an 'elective subsidiary' must be wholly owned and exclusively controlled by the elective parent. The administering group should be free to decide which wholly owned subsidiaries make the election. Third parties must be informed of the election by means of clear information.

The elective parent's guarantee applies to all the liabilities of the elective subsidiary, including liabilities in tort or delict, (see *Completing the Structure* at para.10.28) but there is no reciprocal guarantee of the parent's liabilities by the subsidiary. The guarantee is a 'simple bilateral guarantee' making the assets of the elective parent and subsidiary available to settle liabilities. The Steering Group rejected a 'pooling' of liability across the group as a whole. Such a wider pooling of assets would, in the Steering Group's opinion, raise some significant difficulties for overseas parents in particular, in that an elective parent located in another EU Member State might have to be sued there by a creditor, subject to the rules of the Brussels Convention. (See *Completing the Structure*, at paras. 10.34-10.36. The 'elective' regime would only be available to EU based parent companies on the basis of the non-discrimination rule in EU law, but not to parents based outside the EU; see at para.10.37).

The Steering Group's proposal is significant, in that for the first time, consideration is being given to the question whether English law should have a specialised regime for group liabilities, though the proposal expressly falls short of the types of regime found in the German *Stock Corporations* Act 1965 or the now shelved draft Ninth *Directive on Company Law* of the EU. However, the proposal appears to offer little that might help to avoid the kind of mass tort litigation seen in Cape or Thor Chemicals. Though an express election by the parent to guarantee the liabilities of its subsidiary is a means of avoiding the use of corporate separation as a defence to direct claims against the parent, the proposal fails to address other very important matters. Firstly, there is no compulsion on the parent to make an election. Thus, it would be perfectly legitimate to leave out subsidiaries undertaking high-risk operations, where full limited liability would continue. Secondly, the proposal is silent on whether election could extend to any subsidiary, including an overseas subsidiary of an English based parent company. It may be presumed that it extends to UK based subsidiaries only as otherwise the proposal will have an extraterritorial dimension that would be inconsistent with earlier case law. (See: *Adams v Cape Industries* [1990] Ch 433, *Multinational Gas and Petrochemical Services Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258 (CA)). On the other hand, as the House of Lords decision in *Lubbe v Cape Plc* [2000] 1 WLR 1545 shows, an English based parent can be taken to court to determine whether it is liable for the acts of its overseas subsidiaries. If the elective regime were to be unavailable in such cases, a difference would arise in the legal regime applicable to English domestic groups and English based multinational groups. The former would be subject to greater potential liabilities than the latter should they chose to confer elective status on their English based subsidiaries as compared to the liabilities faced by English based parents for their overseas subsidiaries upon whom such an election could not be made. The Steering Group does not explain why such a difference of treatment between domestic and overseas subsidiaries might arise. Indeed, the proposal as a whole is remarkable for the absence of any serious consideration of the jurisdictional matters it raises, save for the point that the elective regime would apply only to other EU based parent companies, but not to groups whose parent company was from outside the EU. (See *Completing the Structure*, at para.10.37).

Thirdly, the rejection of a 'pooling' approach to the delineation of the 'capital boundary' (on which see further H Collins 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration' (1990) 53 *Modern Law Review* 731) of assets available to claimants ignores a basic problem in mass tort litigation: where the economic activity of the group as a whole is involved in the hazardous processes that lead to the harm causing the claims, then the entire asset base of the group should be available on the ground that the group as a whole is involved in the harm. Furthermore, as in the Bhopal litigation, the sheer number of claimants may be so great that the assets of the entire group may be needed to meet their claims. Moreover, as in Cape, the subsidiaries that are alleged to have caused the claimants' injuries may no longer be in operation but the assets of the group, which have been enhanced by the operation in the past of those subsidiaries, still exist.

Fourthly, even where the parent does elect to cover the liabilities of its subsidiary, this means very little if it is not asset rich. It would be relatively easy to insulate the parent from liability by removing its assets offshore, rather as in the *Multinational Gas* [1983] Ch 258 case where the assets of the joint venture company in question were located in Liberia, while the main business operations occurred in England through a services only company. In the absence of clear minimum asset requirements on the part of the elective parent and subsidiary the election would be meaningless. Furthermore, as pointed out by respondents to the proposal, unless the guarantee is contained in a standardised statutory form, it could be rendered ineffective given that guarantees offered by a parent on behalf of its subsidiary are notoriously difficult to enforce unless they are very clearly worded. (See *Company Law Review: Responses to the Consultation*

Document Completing the Structure at Chapter 10 question 10.1; hereafter Responses. See also: *Re Augustus Barnett* [1986] BCLC 170; *Kleinwort Benson Ltd v Malaysia Mining Corporation* [1989] 1 WLR 379; *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84).

Thus the capacity of the 'elective group' concept to deal with the issues underlying mass tort litigation in England against English based parent companies is limited. However, there is one further aspect of the Steering Group's proposal that needs to be mentioned. Elective group membership does not obviate the need, on the part of an elective subsidiary, to comply with the proposed new operating and financial review (OFR). (See *Completing the Structure*, at para.10.42). According to the Steering Group the OFR is a pillar of the new approach to corporate governance, alongside the proposed statement of directors duties which includes not only a duty to take account of shareholder interests but also those of others. (See *Completing the Structure*, at para.3.2. See further *Final Report*, at Chapter 8). The OFR is to be published by all public and very large private companies (defined as having an annual turnover of more than £500million) as part of the annual report. It is to give an account by the directors of:

'the performance and direction of the business, including in all cases a fair review of achievements, trends and strategic direction, and covering other matters, including wider relationships, risks and opportunities and social and environmental impacts where these are relevant to an understanding of the performance of the business' (See "Completing the Structure", at para.3.2, and see further "Final Report", at Chapter 8).

The aim of the OFR is to 'account for and demonstrate stewardship of a wide range of relationships and resources which are of vital significance to the success of modern business, but often do not register effectively, or at all, in financial accounts'. (See *Completing the Structure*, at para.3.4). The question arises, how far can the OFR be used as a vehicle for ensuring more responsible corporate practice, especially in relation to the operation of overseas subsidiaries in areas prone to the creation of risks of personal injury such as health and safety, employment and environmental practices? In principle the OFR should provide a more transparent and accountable approach to these matters. However, the directors retain considerable discretion in relation to how they report the wider issues of corporate performance. The Steering Group has recognised that this discretion must be exercised in good faith on the basis of a test as to the materiality of the information to be disclosed. (See *Completing the Structure*, at para.3.7). Equally it accepts that certain matters will need more detailed and mandatory treatment. Thus, the Steering Group recommends that requirements on disclosure of risk should be made a matter for mandatory disclosure standards under the aegis of the proposed new Companies Commission. (See *Completing the Structure*, at para.3.35). This offers some scope for clear requirements as to the disclosure of high-risk practices. In the process it might be possible to hold parent company directors to account on how those risks are being dealt with as, for example, through the health and safety practices of overseas subsidiaries.

Why are these Ideas Not developed in the Final Report?

As noted in the introduction to this paper, the Final Report does not contain any further development of the above ideas. This can be explained by reference to two main factors: first the whole philosophy underlying the Review was unlikely to lead to a comprehensive reconsideration of group liability, and, secondly, the 'elective' regime for groups is a weak idea that is unlikely to offer any significant overall benefit to the development of modern company law. Each of these two matters will now be considered in more detail.

The Philosophy of the Review and Group Liability

The Company Law Review was initiated in 1998 with the aim of creating 'a more effective, including cost effective, framework of law for companies to improve their competitiveness and so contribute to national growth and prosperity'. (See *Modern Company Law for A Competitive Economy* (London, DTI, 1998) at para.3.1; hereafter *Modern Company Law for A Competitive Economy*). In addition, the new framework had to compare favourably with the company law frameworks of other developed economies and avoid any disincentives to inward investment into the UK by foreign firms caused by the obsolescence of parts of the existing law. (See *Modern Company Law for A Competitive Economy* at para.4.4). As part of this review, the question was raised whether the rights and duties of companies and their directors should extend to a wider range of 'stakeholders' going beyond shareholders and encompassing employees, creditors and other participants. However, this issue would be bounded by a presumption against interventionist legislation, and in favour of facilitating markets, and by the overriding concern with law reform and not the wider ethical or managerial issues about the behaviour and standards of participants in companies, except to the extent that this could be reflected in company law. (See DTI Consultation Document *Modern Company Law for a Competitive Economy-The Strategic Framework* (1999, URN 99/654) at para.5.1.2). Therefore, the basic framework of analysis did not envisage a wholesale reconsideration of the ethical foundations of company law, nor of the nature and role of the company in society. Indeed, the Steering Group made clear in their March 2000 Consultation Document that a wider 'pluralist' approach to governance issues, requiring directors to take into account wider stakeholder interests, would not be the

basis for the reform proposals. At most they felt that the best way to achieve the objective of ensuring that companies contributed to the overall health and competitiveness of the economy was to have a shareholder oriented, inclusively framed, duty of loyalty, in the context of significant public policy oriented mandatory provisions on care and skill, conflict of interest and extended disclosure. (See DTI Consultation Document *Modern Company Law for a Competitive Economy-Developing the Framework* (London, DTI, 2000) document URN 00/656, Chapter 3 especially at para.3.22). The thinking of the Steering Group does not appear to have been strongly influenced by concerns such as those of involuntary creditors who have suffered personal injuries at the hands of the overseas subsidiaries of UK based MNEs. Rather, it was oriented towards the traditional, shareholder based, model of company law and towards a cost effective, pro-business, and approach to regulation.

This view is strongly re-stated in the Final Report, which stresses three 'core policies' over all others: a 'think small first' approach, which places the interests of small companies in a simple, less burdensome, system of company law at the fore, an inclusive, open and flexible regime of company governance and a flexible and responsive institutional structure for rule-making and enforcement. (See *Final Report*, above n 3 at para.1.52). Against such a backdrop, there would have been little room for the re-regulation of group liability; a policy mainly aimed at large corporations and one, which increases the 'burden on business'.

Yet if one examines more closely the terms used by the Steering Group in their Final Report, there would, in fact, be little incompatibility between the Steering Group's aims and the development of a stronger regime for national and multinational group liability. In particular, the Final Report (while accepting that in many cases the result of the Steering Group's scrutiny has been de-regulation) asserts that where patterns of abuse exist, which disrupt and add cost to effective economic activity, rules have been recommended which restrict economic freedom to the extent necessary to prevent such abuse. (See *Final Report*, at para.1.16). The Final Report continues:

'We also recognise that abuse may lead to a more indirect and intangible threat to our economic system – the loss of public confidence in the legitimacy of the exercise of the huge economic powers which are involved. It is right and in the longer term interests of the economy that the law should respond to these concerns…' (See Final Report, at para.1.16).

Sadly, this sentiment does not extend to the issue of MNE group liability for the tortuous acts of overseas subsidiaries. Surely, in a world where the legitimacy of global capitalism is being increasingly questioned, such an approach is unacceptable. Clearly, if the avoidance of group liability for mass torts does not lead to a loss of 'public confidence in the legitimacy of the exercise of huge economic powers…' what does?

Furthermore, the Final Report asserts that the effective management and control of resources requires taking into account a wide range of factors including, 'the need to manage relationships with employees, with suppliers of all kinds of resources…. and with customers, both direct and indirect.' (See "Final Report", at para.1.23).

The Final Report continues:

'They include the need to manage wider impacts on consumers, the community and the environment. Reputational assets are also of critical importance in a world where external perceptions can transform business prospects for better or worse.' (See "Final Report", at para.1.23).

The Final Report concludes on this point by noting that many of these resources and assets are not reflected fully in the rules relating to corporate accountability. (See *Final Report*, at para.1.24). This would suggest, again, that the governance questions raised by the transnational operations of MNEs need to be reconsidered. Not least of these is group liability, which, perhaps more than most areas of group action, will affect the firm's reputational assets.

The Weakness of the 'Elective Regime' for Groups

Apart form the specific criticisms offered above as to the unsuitability of the 'elective regime' to deal with risk reduction, other criticisms of a more general kind have been voiced against this proposal. In particular, responses received by the Steering Group highlighted two further matters of concern: firstly, that the proposal would lead to an overall reduction in the transparency of group activities which would be damaging to shareholder accountability and, secondly, that the proposal was probably dead in the water unless the Inland Revenue ceased to require each company in the group to submit individual accounts for tax purposes. Otherwise, any apparent cost saving arising from the reduction of reporting requirements under the elective regime would be neutralised by the need to continue to draw up accounts for revenue purposes. In the light of such wide criticisms it is safe to assume – though the Final Report does not say anything on the matter, not even in a footnote – that the idea has been quietly dropped. No other inference can be made on the basis of the publicly available information from the Steering Group.

Concluding Remarks

From the above it can be said that English law still has a long way to go before a comprehensive doctrine of parent company liability for the acts of overseas subsidiaries or affiliates is in place. So far, the outcome of litigation has clarified some of the issues relating to jurisdiction. It is now possible for an English based parent company to be sued before the English forum for the acts

of its subsidiaries or affiliates, even where a more appropriate foreign forum in the host country of the subsidiary/affiliate may be said to exist, if it can be shown that the foreign forum in question is unable to provide an environment for the litigation such that substantive justice can be done. However, English law has not yet gone so far as to accept a mandatory rule of jurisdiction over English domiciled parent companies for torts or other unlawful acts committed abroad by their affiliates.

As regards substantive liability, it remains to be seen whether - assuming the case does not settle first - the court in Cape will be moved by the kinds of policy based arguments put forward in this essay for an extension of the duty of care to parent companies for the acts of their affiliates. These policies can be summarised as follows: Firstly, limited liability was never intended to be used as a means of insulating succeeding layers of corporate group organisation from liability. Only the ultimate shareholders were to enjoy this protection. Acceptance of this wide interpretation of limited liability allows for an illegitimate shifting of risk to the involuntary creditors of the company among whom the most conspicuous category are victims of personal injury caused by the negligent acts of affiliates. Secondly, in mass tort cases, the assets of the entire group may be needed to ensure a sufficient capital fund from which to satisfy claims. This is especially justifiable where it can be shown that the group acts as an integrated economic entity, which together creates the wealth of the group enterprise. Thirdly, there is a growing expectation of public policy that corporations, including MNEs, should act in a socially responsible way. This may require *inter alia* acceptance of group liability for cases of gross corporate negligence leading to mass tort claims. In response to such an extension of the duty of care, the parent company may be able to rebut the allegation of liability by showing that, in the conduct of its management of the overseas affiliates involved, it acted reasonably in all the circumstances or that the chain of causation leading to the alleged harm was broken in a way that indicated the non-involvement of the parent. An alternative solution might be to impose strict liability on the parent for the acts of its subsidiaries, though such an outcome is unlikely in the Cape litigation and legislation to this effect is not forthcoming.

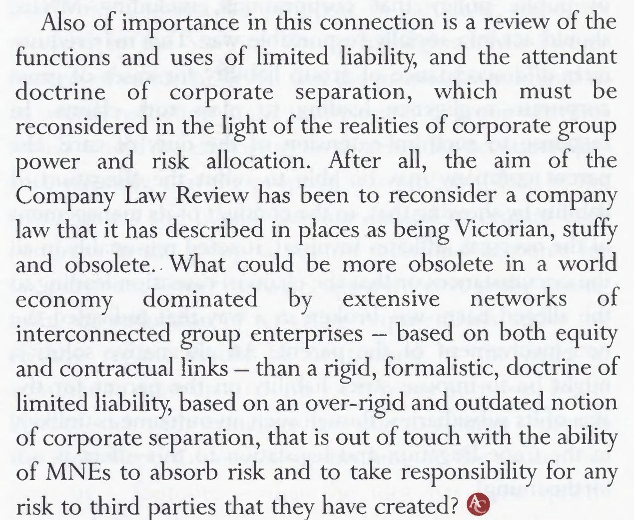
As regards the contribution of the Company Law Review Steering Group to the question at hand, this paper must end with a strong expression of dissatisfaction. The Steering Group has inexplicably avoided a proper analysis of the wider issue of parent company liability in tort for the acts of its affiliates (relying too much on a recently strict judicial approach to the 'lifting of the corporate veil' which may not, in fact, be justifiable in such cases, at least in relation to liability for personal injuries. It has put forward a weak proposal for an 'elective' regime of group liability and the extent of the accountability obligations to be placed on directors when drawing up the OFR remains obscure. Furthermore, it might be added that a legal reform process of this importance must be sufficiently transparent for any interested person to be able to determine the precise course of the analysis without having to resort to any sources other than those made publicly available. This is not a case in which 'insider information' should be needed to complete the picture. Unfortunately, it cannot be said with confidence that the public record offers a clear picture of what, precisely, the Steering Group thinks now about the 'elective regime' or of its other views on corporate groups. It is simply unacceptable for such a high-level review process to end with the omission, from its *Final Report*, of a major question addressed in earlier consultation papers. To plead, as the *Final Report* does, that certain matters had to be left out to avoid an unmanageably large document (See *Final Report*, at para.1.7) appears to be disingenuous. In all a missed opportunity, though, perhaps, a not unexpected outcome given the aims of the Company Law Review process.

This leaves a final question – in which direction could the law develop? As it stands the Review process has defended the *status quo*. However, it may be necessary, at some future date, to return to the issues raised in this chapter as part of a wider ranging review of basic principles of corporate social responsibility. In this connection, a possible starting point may be to refer to the *OECD Guidelines for Multinational Enterprises*, as the background for a new UK Code of Conduct for corporate groups to be undertaken by the proposed Companies Commission, should this beast ever be born. Such a Code could form the basis of guidance for directors as to the content of OFRs and of the general statement of director's duties. This is not to say that the *OECD Guidelines* are, in themselves, a comprehensive or sufficient statement of principles. However, they do offer a minimum of agreed international standards of corporate social responsibility from which a developed body of national principles can emerge. This is significant, in that following the agenda set by the *OECD Guidelines* takes care of the argument that greater regulation acts as a competitive disadvantage for the regulating system, given that the *Guidelines* represent an international consensus among the major capital exporting countries as to the proper conduct of MNEs, domiciled therein, in their global operations.

Such an international orientation should also reduce the power of any objection based on the notion that developing countries may become disadvantaged by the raising of corporate responsibility standards, enforced through litigation in the home country against the parent, in that they will become less attractive as locations for foreign investors given the rise in labour costs, and regulatory costs, that may follow. This argument cannot stand, as the observance of international minimum standards in developing country locations would still leave much room for competition over labour costs among

countries and firms. The point is that, in observing such standards, MNEs would ensure that their activities do not amount to violations of fundamental labour and human rights standards that are condemned by the *OECD Guidelines* and, indeed, by other international standard setting instruments. Furthermore, the risk of litigation would be much reduced, as observance of international minimum standards by MNEs would provide evidence of practice that is in conformity with general legal standards, even where the host country fails to regulate by way of national legislation and/or adequate monitoring and enforcement.

This approach should also weaken arguments to the effect that litigation in the home country amounts to an illegitimate extraterritorial extension of home country standards to host countries. The issue would not revolve around the existence of lower labour and regulatory standards in the host country, and whether these can be ignored in favour of higher home country standards, but on whether international standards have been violated. It may well be that a dual system of standards could eventually emerge – higher level standards contained in the domestic law of the home (or, indeed, host) country which would normally apply, and lower level international minimum standards that can be applied in cases where the home/host country fails to apply such standards in its own law. It may be the only way to accommodate the needs of justice for foreign claimants who allege they have suffered harm at the hands of the local affiliate of a foreign MNE, and the freedom for countries, whose major comparative advantage lies on lower labour and regulatory compliance costs, to develop their economic policy in a way that exploits such an advantage. On the other hand, the significance of such an advantage should not be overstated. Competition over labour and regulatory costs is not a viable long-term strategy in the modern global economy, where capital-intensive production continues to displace unskilled and semi-skilled labour. The real objective must be to add value to the productive process and this requires development in skills and technology. (See further UNCTAD *Foreign Direct Investment and Development* UNCTAD Series on issues in international investment agreements (New York and Geneva, United Nations, 1998)). Thus, too much heed should not be given to claims that the adequate provision of health, labour and human rights standards undermines the competitive advantages of developing countries. It is an argument in support of failure and should be treated with the suspicion it deserves, especially when it comes from countries where the real problem is not underdevelopment but authoritarian and elitist government, which does not place high value on equity and fairness towards its population. On way around such problems is to place a higher responsibility on MNEs to use their cross-border management network as a conduit for higher standards. Indeed, such firms generally apply higher than local standards in their treatment of workers in developing countries. Cases of lower local standards being applied are rare, but, as cases like *Bhopal* show, the results can be catastrophic. The real problem lies mainly in the treatment of local populations by local institutions, whether private businesses or public bodies, and in the effectiveness of local regulation. Imposing new responsibilities of MNEs cannot substitute for good governance by local institutions, but it can be of use in extreme cases where MNEs themselves allow their local operations to fall below acceptable minimum standards.



Finally, in relation to the question of standards of liability, should the parent company, in the conduct of its management of a subsidiary in a foreign country, have acted in a manner that violates its home country standards, then is it not unreasonable to hold it to those higher standards, even if they go far beyond what might be acceptable in the foreign host country, at least so far as liability is concerned? Differences in earning capacity and cost of living between the developed home country and the developing host country can then be taken into account at the compensation stage.

Also of importance in this connection is a review of the functions and uses of limited liability, and the attendant doctrine of corporate separation, which must be reconsidered in the light of the realities of corporate group power and risk allocation. After all, the aim of the Company Law Review has been to reconsider a company law that it has described in places as being Victorian, stuffy and obsolete. What could be more obsolete in a world economy dominated by extensive networks of interconnected group enterprises – based on both equity and contractual links – than a rigid, formalistic, doctrine of limited liability, based on an over-rigid and outdated notion of corporate separation, that is out of touch with the ability of MNEs to absorb risk and to take responsibility for any risk to third parties that they have created?

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