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Parent company liability

The recent Court of Appeal decision *James Hardie Industries Plc v White* appears to have extended the liability of holding and parent companies.

JAMES HARDIE INDUSTRIES (JHI) is the parent of a group of companies that manufacture and supply cladding products, including the past or present James Hardie products in New Zealand called Harditex, Monotek and Titan board.

Initial claims

The underlying claim was brought by claimants from two separate proceedings that own or owned buildings with weathertightness issues in which the products were used.

Most of the claims arise from use of the material between 1994 and 2003. The causes of action are negligence in supplying and promoting the products, breach of duty to warn or withdraw the products, negligent misstatement and breach of the Consumer Guarantees Act 1993 and the Fair Trading Act 1986.

Holding companies denied liability

In the High Court, the New Zealand holding companies James Hardie NZ Holdings (JHNZ) and RCI Holdings (RCI) applied for summary judgment on the basis that the companies were merely passive holding companies at the relevant times and, as such, can not be held liable. The parent company, JHI, protested the jurisdiction of the New Zealand courts, which the claimants applied to set aside.

Peters J dismissed the holding companies' applications for summary judgment. His Honour held that, if the plaintiffs amended their statements of claim to confine the claims against JHI to two of the causes of action, JHI's protest to jurisdiction would be dismissed. As a result, all three companies continued to be defendants to the proceedings.

Can a parent company be liable?

JHI, JHNZ and RCI appealed the decision in the Court of Appeal. The Court of Appeal was to determine whether a parent company can be found liable for defective products made, marketed and sold by its subsidiary company.

This raises issues as to the compatibility of the concept of a company as a separate legal entity from its shareholders with the ability to impose a duty of care on a parent company. Imposing a duty of care on a shareholder - in this case, a company - appears incompatible with the protection the corporate veil affords. While the corporate veil may be pierced in circumstances where the directors act as an agent of the shareholders, this is not the presumption.

Looking to other jurisdictions - Australian, English and Canadian - the Court determined the following:

- A parent company doesn't owe a duty of care in relation to the acts and omissions of a subsidiary merely because it has the ability to control the operations of the subsidiary. The principle of separate corporate personality must be upheld.
- A parent company may owe a duty of care where, by its actions and conduct, it has become active in the operations of the subsidiary.

Three categories for possible liability

The Court discussed *Chandler v Cape,* which sets out circumstances in which holding companies may be held liable for acts or omissions of their subsidiaries. The Court ➤

in this case agreed with the Tomlinson LJ in *Thompson v The Renwick Group* in finding that the circumstances set out in *Chandler* were not intended to be exhaustive and instead found there are three categories for possible liability:

1. Where the parent takes over the running of the relevant part of the business of the subsidiary.
2. Where the parent has superior knowledge of the relevant aspect of the business of the subsidiary, the subsidiary relied upon that knowledge and the parent knew or ought to have foreseen the alleged deficiency in process or product.
3. More generally where the parent takes responsibility - irrespective of superior knowledge or skill - for the policy or advice that is linked to the wrongful act or omission.

In determining whether these circumstances exist, the Court found there must be 'coordination that results from control by or reliance upon the parent, and that control is in some way relevant to the alleged wrong'. What factors contribute to the control or reliance is to be decided in light of the facts.

Parent company involvement

In this case, there was evidence of:

- pooling of resources across companies for research and development purposes
- the marketing of the group as one entity
- delegated authority to the CEO of JHI who, together with a team, was responsible for international operations.

Case now needs to be heard in full

The Court dismissed the appeals of each of JHI, JHNZ and RCI on the basis that there was a serious issue to be tried on all fronts. Further, the Court determined that JHI's protest to jurisdiction be set aside in full, overruling the High Court decision that JHI be removed from several causes of action pleaded by the plaintiffs.

This decision appears to extend the liability of parent companies. However, it is merely a preliminary determination dismissing the jurisdictional challenge and an application for summary judgment.

To confirm the position, the case should be heard in full, following which we may get definitive guidance as to the ability to claim against parent and holding companies.