defendant, his conviction of the offence would be unsafe" (CJA 2003, s. 125(1)). The wording of this section suggests *reliability* is again of core concern to trial judges asked to stop a trial involving hearsay evidence from a dead witness. So, naturally, the Court of Appeal focussed upon it (see, e.g., at [109]).

It might be premature, however, to conclude that the Court of Appeal has favoured the reliability-only approach in *Horncastle* over the more onerous view adopted in *Al-Khawaja*. The court was, after all, faced in *Ibrahim* with hearsay evidence that was crucial to the case against the defendant, and was clearly unreliable: the complainant's statements contained inconsistencies, and the other prosecution evidence partially contradicted them. Furthermore, there was no suggestion that the defendant could not challenge the complainant's evidence – he appears to have done so quite effectively.

Things might have been different if the other prosecution evidence had been consistent with the complainant's account, and the defence had had no means of countering it. The Court of Appeal made clear in *Ibrahim* that, had it detected a significant difference between *Horncastle* and *Al-Khawaja* (which, in these altered circumstances, it ought to have), it would have followed the Supreme Court's lead (at [87]). The Court of Appeal must *consider* relevant Strasburg jurisprudence (Human Rights Act 1998, s. 2), but is, ultimately, bound by the Supreme Court's precedents. The correct course would thus have been to refuse to quash the conviction, note the relevant aspect of the Grand Chamber's opinion, and grant the defendant leave to appeal to the Supreme Court (see, further, *R. (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 A.C. 311 at [64]). This variation on the facts of *Ibrahim* will no doubt arise in due course. Until then, trial judges should be suspicious of the ease with which the Court of Appeal claims *Horncastle* and *Al-Khawaja* may be reconciled.

FINDLAY STARK

CROSSING THE CORPORATE VEIL: THE DUTY OF CARE OWED BY A PARENT COMPANY TO THE EMPLOYEES OF ITS SUBSIDARY

IN *Chandler v Cape plc* [2012] EWCA Civ 525 the Court of Appeal upheld a High Court decision that a parent company owed an employee of its subsidiary company a duty of care to advise on, or ensure, a safe system of work.

The facts of *Chandler* are sadly similar to other well-known asbestos cases. In 1959 and again in 1961–62, Mr Chandler stacked and loaded bricks for Cape Building Products Ltd ("Cape Products"), a wholly

owned subsidiary of Cape plc. Cape Products also manufactured Asbestolux, an incombustible asbestos board, at the same site in Uxbridge, Middlesex. The manufacturing process took place in a factory with "open sides", which allowed asbestos dust to migrate from the factory to the area where Mr Chandler worked. In 2007, nearly fifty years later, he was diagnosed with asbestosis.

There was "no issue about whether the system of work in this case was unsafe" (at [3]); Cape plc admitted that Cape Products was negligent in its management of the site. However, it was not possible to sue Cape Products: by 2007 the company no longer existed and, in any event, its liability insurance excluded asbestosis (*Cape plc v Iron Trades Employers Liability Association* [2004] Lloyd's Rep I.R. 75). Mr Chandler therefore decided to sue Cape plc for breaching a duty of care that he argued the company owed to him directly as an employee of Cape Products. To address that argument, the Court applied – as the High Court had done before – the accepted three-part test for determining the existence of a duty of care (set out in *Caparo v Dickman* [1990] 2 A.C. 605), which is based on foreseeability, proximity and fairness.

The Court of Appeal held that the risk of developing asbestosis or an asbestos-related disease was foreseeable. Arden L.J. emphasised that Cape plc had actual knowledge of Mr Chandler's working conditions (it was "fully aware of the systemic failure" to prevent the migration of asbestos dust (at [57])) and that the risk of an asbestos-related disease from exposure to asbestos dust was "obvious". The Court also found a clear relationship of proximity between Cape Products and Cape plc, evidenced by several factors: (a) Cape plc employed a medical and a scientific officer, both of whom were responsible for the health and safety at the parent and the subsidiary company; (b) Cape Products had its own safety committee, policies and procedure, but Cape plc still dictated health and safety policy, and "at any stage it could have intervened and Cape Products would have bowed to its intervention" (High Court judgment at [75], cited by the Court of Appeal at [31]); and (c) Cape plc had "superior knowledge" regarding the health and safety risk of asbestos exposure to employees at Cape Products (at [75], [80]). For all these reasons, the Court held that it was "fair, just and reasonable" to impose a duty of care on Cape plc on the basis that the company had assumed a responsibility to Mr Chandler.

While previous cases had raised the question of parent companies owing a duty of care to the employees of their subsidiary companies (see *Connelly v RTZ* [1999] C.L.C. 533 and *Lubbe v Cape plc* [2000] UKHL 41), this is the first reported case in which liability on behalf of the parent company was established and an employee was awarded damages. Cape plc was ordered to pay Mr Chandler £120,000.

The Court also set out guidelines for ascertaining the existence of a duty of care, in respect of health and safety, owed by a parent company to the employees of a subsidiary company. Arden L.J. explained that a duty of care may arise where (1) the business of both corporations were in a relevant respect the same (for example, they both manufactured the same product); (2) the parent company had, or ought to have had, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the parent company knew, or ought to have known that the subsidiary's system of work was, in fact, unsafe; and (4) the parent company knew or ought to have foreseen that the subsidiary company, or its employees, would rely on the parent company to use its superior knowledge to protect the employees of the subsidiary (at [80]). Crucially, it would not be necessary to demonstrate that the parent company regularly intervened in the health and safety policies of the subsidiary company to establish a duty of care. It would be sufficient that the parent company had a practice of intervening "in the trading operations of the subsidiary, for example production and funding issues" (at [80]).

Three important observations can be made. First, the willingness of the court to look to the broader relationship between the two corporations illustrates the expectation that parent companies should play an active role in the operation of their subsidiaries. They cannot choose to be ignorant. Secondly, the emphasis on what the parent company "knew or *ought* to have known" makes the ability of the parent company to control the subsidiary, and not evidence of actual control, the crucial factor in establishing a duty of care. Finally, the duty of care owed by the parent company to the employee of a subsidiary is not identical to the duty owed by the subsidiary itself. In the case of Cape plc, the duty was based on an assumed responsibility; the company breached this duty by failing to intervene to ensure a safe system of work. On this construction, there was no issue as to whether the metaphysical corporate veil separating the parent and the subsidiary company was pierced. Indeed, the Court "emphatically reject[ed] any suggestion" that it was concerned with "what is usually referred to as piercing the corporate veil" (*per* Arden L.J. at [69]).

In *Chandler*, because Cape plc wholly owned Cape Products, the control between the parent and the subsidiary corporation was based on equity shares. However, the *Chandler* guidelines could potentially be applied to control established through long-term supply contracts. Such arrangements are common between large transnational corporations and their suppliers, especially where the corporations seek to reduce their exposure to commercial risk. Some corporations have recently been criticised for creating and/or failing to intervene in situations where the employees of a supplier are subjected to poor

working conditions. If the parent of a transnational corporation were found to owe a duty of care to the employees of a supplier, this could have a profound effect on the labour conditions in factories across the world.

The decision is also important to those involved in corporate transnational tort litigation. Pursuant to recent EU legislation, UK courts have jurisdiction in civil actions alleging tortious activity committed abroad by a corporation domiciled in the UK (see European Parliament and Council Regulation (EC) No 44/2001 (OJ 2001 L 12 p.1) ('Rome I Regulation'). English courts have previously found that common law claims can, in principle, proceed against UK parent corporations for torts committed by their subsidiaries abroad (see *Connelly v RTZ* and *Lubbe v Cape*). Following *Chandler*, a case could be made that a UK-domiciled parent company owes a duty of care to the employees of a foreign subsidiary. This would not be a straightforward argument, as the choice of law rules set out in the European Parliament and Council Regulation (EC) No 864/2007 (OJ 2007 L 199 p.4) ('Rome II Regulation'), which governs torts committed after 20 January 2007, requires, as a general rule, that courts apply the law of the country in which the damage occurred. Therefore, in order to succeed, and for English law on tort liability to apply, the case would need to be brought within one of the exceptions to the Rome II Regulation.

Chandler nevertheless joins other judgments that demonstrate a willingness on the part of UK courts to find that the separation of legal personality between parent and subsidiary does not preclude the possibility of legal responsibility on the part of the parent corporation.

ANDREW SANGER

THE DEFENCE OF ILLEGALITY IN TORT LAW: WITHER THE RULE IN *PITTS V HUNT*?

THERE are at least four types of actions in tort to which the defence of illegality might be relevant. First, there are cases in which the loss about which the claimant complains is a criminal law sanction imposed upon him (e.g., *Clunis v Camden and Islington HA* [1998] Q.B. 978). Secondly, there are actions in which the claimant seeks redress in respect of lost illegal earnings (e.g., *Hewison v Meridian Shipping Pte Ltd* [2002] EWCA Civ 1821, [2003] I.C.R. 766). Thirdly, there are proceedings in which the claimant, when he was injured, was committing a criminal offence unilaterally, that is, an offence in which the defendant was not