

Chapter 11

Exploring Spatial Justice and the Ethic of Care in Corporations and Group Governance

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1. Introduction

The corporate group is an important legal construction enabling the parent company (hereafter referred to as the parent) to prosper on the global platform.¹ The corporate veil is, for example in the UK, the legacy left by *Salomon v. Salomon*,² and enables the parent to separate itself from its subsidiaries. This principle is widely cited and applied globally to limit the parent's liability in the corporate group. In this regard, the parent owes no obligations or responsibilities to third parties. A mix of case law and legislation deriving from the Albania, United Kingdom, Norway, and the Netherlands will be used to emphasise the global reach of *Salomon*'s principle and also highlight an emerging global trend creating better corporate group governance.

This chapter argues for placing emphasis on the parent's role in regulating corporate behaviour and for better corporate group governance. There is an emerging jurisprudence from a selection of jurisdictions in case law,³ legislation,⁴ and legal procedure⁵ emphasising the parent's role. This chapter investigates whether or not the emerging jurisprudence can withstand the two legal doctrines in corporate law: the corporate veil and limited liability. The corporate veil argument still dominates the parent's role within the corporate group and it shields the parent from its subsidiaries' risks and liabilities.⁶ This shield is also referred to as the corporate group's death of liability.⁷

¹ See A. Daehnert, 'Lifting the Corporate Veil: English and German Perspectives on Group Liability' (2007) 18 *International Company and Commercial Law Review* 393-403. See also J. Dine, *The Governance of Corporate Groups* (Cambridge: CUP, 2006).

² *Salomon v. Salomon* [1897] AC 22.

³ *Lubbe and others v. Cape PLC* [2000] 4 All ER 268, *Chandler v. Cape PLC* [2012] EWCA Civ 525, *Hempel AS v. the Norwegian State* [2013] LG-2013-210482, and *Hempel AS v. the Norwegian State* [2015] HR-2015-470-U.

⁴ The Albania Law No. 9901 on Entrepreneurs and Companies 2008, and the UK Modern Slavery Act (2015 c30).

⁵ 6.20 UK Civil Procedure Rule, and Art. 2 EU Brussels Convention 1968.

⁶ L. Anker-Sørensen, 'Parental Liability for Externalities of Subsidiaries: Domestic and Extraterritorial Approaches' (2014) *Dovens Schmidt Quarterly* 102-118. See also J. Dine, 'Stopping Jurisdiction Arbitrage by Multinational Companies: A National Solution?' (2014) 11 *European Company Law* 77-80.

⁷ See L. LoPucki, 'Death of Liability' (1996) 106 *The Yale Law Journal* 8, 20. See also J. Morgan, 'Vicarious

This chapter begins in section 2 by giving a brief account of the emerging jurisprudence's direction by taking examples from the UK, Albania and Norway which seems to circumvent the doctrine of corporate personality and its related idea of limited liability.⁸ This circumvention creates a new type of robust parent-subsidary relationship and it is a sign of an evolving law. Section 3 briefly introduces the two feminist theories demonstrating a close alignment with the evolving law. Section 4 explores the corporate veil and the parent's justification for limited liability. It also discusses whether or not the emerging jurisprudence withstands the corporate veil argument. It is suggested that the parent-subsidary relationship strengthens two things; its (1) structure and (2) substance. Section 5 shows that the feminist theory of spatial justice can create a more suitable structure for the parent-subsidary relationship so that it can exist alongside the corporate veil. In the parent-subsidary relationship, spatial justice pinpoints where the subsidiary's corporate autonomy ought to be respected, and where its interdependence with the parent is permitted. Section 5 also shows that the feminist theory of ethic of care adds substance to the parent's onus within the parent-subsidary relationship in times of dependency.

In light of corporate scandals such as the BHS's pension fund deficit,⁹ Sports Direct's misuse of precarious employment,¹⁰ the Panama Papers' tax evasion scandal,¹¹ and Unioil's bribes scandal,¹² this chapter emphasises a crucial need for group governance and a corporate duty of care obligating parent companies to acknowledge and monitor their subsidiaries' operations; their impact on the environment, health and safety, and the well-being of the workers within the corporate group. Both the feminist theories would have the parent engage in the responsible cultivation of human resources, natural resources, and corporate spaces. The parent company taking these responsibilities into consideration has the potential to facilitate its respect of the planetary boundaries.¹³

Liability for Independent Contractors?' (2015) 31 *Personal Negligence* 235, 241.

⁸ Created in *Salomon v. Salomon* [1897] AC 22, and affirmed in *Adams v. Cape PLC* [1990] BCLC 479.

⁹ J. Edwards, 'How BHS Pension Fund Collapsed while Sir Philip Green made £307 Million' (26 July 2016) *UK Business Insider*.

¹⁰ A. Armstrong, 'Sports Direct Board agrees to External Review in Wake of Working Practices Row' (18 August 2016) *Telegraph*. See also M. Clarke, W. Lewchuk, A. de Wolff and A. King, 'This Just isn't Sustainable: Precarious Employment, Stress, and Workers' Health' (2007) 30 *International Journal of Law and Psychiatry* 311-326.

¹¹ UK calls for a new tax legislation to prevent tax evasion after the Mossack Fonseca (aka Panama Papers) leak. See T. Magill, 'Analysis: Corporate Failure to Prevent Facilitation of Tax Evasion' (2016) *Tax Journal* 12-13.

¹² In *World Bank v. Wallace* [2016] 1 SCR 207, the Canadian Supreme Court and the Multilateral Development Bank take on their role to fight global corruption. See J. Clark, 'Multilateral Development Bank Immunity in the Age of Anti-Corruption' (2016) 8 *Journal of International Banking and Financial Law* 481-482.

¹³ See G. Whiteman, B. Walker, and P. Perego, 'Planetary Boundaries: Ecological Foundations and for Corporate Sustainability' (2012) 50 *Journal of Management Studies* 307-336. There is a disconnect between corporate sustainability and ecology. As the former increases, the latter is decreasing. Through good practices in law, this chapter attempts to make a viable connection between the two. This connection is the corporate duty of care.

2. Corporate Group Governance: An Emerging Jurisprudence

This section briefly draws on examples of recent case law,¹⁴ legislation,¹⁵ and legal procedure¹⁶ from Albania, Norway and the United Kingdom that place emphasis on the parent's role in the corporate group. The examples drawn from various jurisdictions also emphasise that the emerging jurisprudence is not only from one specific jurisdiction. Arguably, the trend is an emerging global norm. The examples of cases demonstrate the courts' legal innovation which has imposed responsibility on the parent. The evolving law can also be seen for example in legislation in Albania and the United Kingdom (UK). The purpose of these laws is to obligate the parent to govern corporate behaviour within its corporate group. The two legal procedures referred to place importance due diligence, which serves to encourage the parent to act in the interest of its corporate group. Corporate group governance is the emerging jurisprudence. Therefore, the parent's role is to consider issues such as the corporate group's environmental impact and its workers' well-being. These considerations arguably should be the parent's responsibility.¹⁷

2.1 Case Law

2.1.1 *Lubbe v. Cape plc*¹⁸

The parent, Cape, was incorporated in the United Kingdom. It had subsidiaries operating several asbestos mines in South Africa. The claimants, with most residing in South Africa, sought redress before the UK courts. Two legal issues arose in *Lubbe*. First, the then House of Lords had to decide whether or not the claimants' choice was *forum conveniens*. Second, the then House of Lords had to determine whether or not Cape owed a duty of care to its subsidiaries' workers. In relation to the first issue, it was found that there were no other suitable forums available 'for the trial of the action'.¹⁹ It was decided that the UK courts were where 'the case may be tried more suitably for the interests of all parties and for the ends of justice'.²⁰ With the case being heard in a UK forum, the then House of Lords approached the second legal issue with care. The establishment of a duty of care between Cape

¹⁴ Above, n. 3.

¹⁵ Above, n. 4.

¹⁶ Above, n. 5.

¹⁷ Janet Dine highlighted the binary between autonomous entities in a corporate group or a group as a single economic unit. None of which establishes the parent's role. See J. Dine, *The Governance of Corporate Groups* (Cambridge: CUP, 2006), p. 42.

¹⁸ *Lubbe v Cape plc* [2000] 4 All ER 268

¹⁹ *ibid*, 274.

²⁰ *Per Sim v Robinow* (1892) 19 R 665. And see *Spiliada Maritime Corporation v Consulex Ltd* [1987] 1 AC 460.

and its subsidiaries' workers needed substantial evidence, which *Lubbe*'s claimants were expected to provide to the court's satisfaction.²¹

Although *Lubbe* focused on the issue of *forum conveniens* and that the UK forum was deemed suitable for litigation, *Lubbe*'s outcome also indicated that a parent may have an obligation to its subsidiaries' workers.²² This obligation forms the duty of care's foundation, on which the following case expands.

2.1.2 *Chandler v. Cape plc*²³

Enterprise liability²⁴ was applied in *Chandler* whereby the same parent, Cape, was liable for the harm caused by its English subsidiary; Cape Products. The underlying justification for this approach is that the benefiting enterprise is liable for the negligence caused by its subsidiary.²⁵ This approach defines *Chandler*'s parent-subsidary relationship. Owing to a non-delegable duty²⁶ being passed from Cape to Cape Products relating to health and safety precautions, Cape was found liable for Cape Products' negligence. Liability for the asbestos exposure were for two reasons; (1) the health and safety precautions required Cape's superior knowledge²⁷ and it was therefore decided that Cape could not delegate these duties to Cape Products and (2) Cape satisfied the doctrine of assumption of responsibility.

The finding of Cape's liability does not affect the separate legal personality doctrine. The preceding case of *Adams v. Cape Industries plc*²⁸ suggested the parent should not be burdened with the subsidiary's negligence. The corporate veil can only be pierced or lifted under three exceptions; a subsidiary is used for committing illegal acts, concealing obligations, or evading obligations.²⁹ None of these exceptions were present in *Chandler*, but *Chandler*'s liability still left the corporate veil intact.

A parent's duty of care owed to its subsidiary by assumed responsibility might be a solution

²¹ Above, n. 18.

²² Finding the Cape responsible was not possible because the claimants had run out of money after the House of Lords' 2000 ruling. House of Lords' Opinion of the House of Lords of Appeal for Judgement, See www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd000720/lubbe-1.htm

²³ *Chandler v Cape* [2012] EWCA Civ. 525.

²⁴ D. Brodie, *Enterprise Liability and the Common Law* (Cambridge: CUP, 2010), p. 27-44. See also J. Dine, *The Governance of Corporate Groups* (Cambridge: CUP, 2006).

²⁵ *ibid* Brodie, p. 95-113.

²⁶ *ibid*, 149. A duty that cannot be fully delegated to a third party. See P. Giliker, *Vicarious Liability in Tort* (Cambridge: CUP, 2013), p. 116.

²⁷ *Chandler v Cape* [2012] EWCA Civ 525, 659.

²⁸ Above, n. 23.

²⁹ *ibid*, 515-520.

to the corporate group's 'death of liability' problem.³⁰ By creating this 'duty of care', *Chandler's* corporate veil circumvention sits awkwardly both in company law and tort law. In company law, having a parent's assumed responsibility somehow presupposes that the parent owes its subsidiaries obligations. This raises issues as to whether or not the subsidiary's corporate autonomy and their parent's limited liability are infringed. In tort law, this circumvention does not follow the assurance, reliance, and detriment formula when establishing an assumption of responsibility.³¹ Therefore, *Chandler's* justification is weak. Furthermore, *Chandler's* parent-subsidary relationship³² is treated no differently from that of the employer-employee.³³ This treatment undermines the significance of the corporate veil and therefore it makes the enterprise liability justification unconvincing. These two relationships are fundamentally different; therefore the application of these principles should not be conflated. With this conflation, the governing of parent-subsidary in company law and employer-employee in tort law, *Chandler's* argument for parent's liability is so weak that it is difficult to replicate this liability in later cases.³⁴ Nevertheless, *Chandler's* liability outcome is evidence of an evolving law which can be seen in the recent *Hempel* cases.

2.1.3 *Hempel* Cases

The *Hempel* cases were two Norwegian environmental law cases. One was heard in 2013 before the Supreme Court,³⁵ and the other in 2015 before the Court of Appeals.³⁶ The nature of *Hempel* (the parent) and its corporate group's business was of the kind that one of its subsidiaries had polluted assets transferred into its possession from the previous owners. Two legal issues rose in *Hempel*; (1) whether *Hempel* should be responsible for the costs of investigating the extent of the pollution caused by the assets in its subsidiary's possession and (2) whether *Hempel* should also be responsible for the cost of cleaning up the pollution. In both cases, *Hempel* was found liable without fault for its subsidiary. As it was the previous owners who had caused the polluted assets, *Hempel's* subsidiary was also without fault. The courts in both cases affirmed that the Norwegian Pollution Control Act (PCA)³⁷ could hold the parent liable for these kinds of events.

The decisions of the *Hempel* cases go beyond *Lubbe* and *Chandler*. According to Anker-

³⁰ Above, n. 7.

³¹ Per *Hedley Byrne v. Heller* [1964] AC 465. See C. Witting, 'Duty of Care: An Analytical Approach' (2005) 25 *Oxford Journal of Legal Studies* 33, 52-57.

³² Born out of *Salomon*.

³³ For employer-employee relationship, see P. Giliker, *Vicarious Liability in Tort* (Cambridge: CUP, 2013), p. 55-80.

³⁴ The later discussion under 4.1 will demonstrate.

³⁵ *Hempel AS v. the Norwegian State* [2013] LG-2013-210482.

³⁶ *Hempel AS v. the Norwegian State* [2015] HR-2015-470-U.

³⁷ Pollution Control Act 1986 no. 6.

Sørensen's matrix,³⁸ *Lubbe* was extraterritorial, case-law-based and fault-based liability, and *Chandler* was domestic, case-law based and fault-based liability. The *Hempel* cases were extraterritorial, a hybrid between case-law and legislative based and non-fault-based liability.³⁹

The finding of non-fault-based liability was striking because it goes against the successful piercing of the veil argument which must require some legal form of fault-based justification.⁴⁰ The Norwegian courts have made an innovative and bold step towards a non-fault liability of a parent which might become a tool for the environmental piercing of the veil. Beate Sjøfjell cautioned that while *Hempel* 'did not fulfil the tentatively agreed upon conditions for a general piercing of the corporate veil in Norwegian company law, [she] argued that the courts, starting out and concluding with an interpretation of one provision in the Pollution Act, in reality pierced the veil'.⁴¹

For the lack of a legal basis to hold the parent liable in these environment law issues, Sjøfjell pointed out that the *Hempel* cases also 'promote due diligence with greater focus on potential environmental liability'.⁴² Perhaps this exercise of due diligence underpinned by the polluter pays principle is the foundation for the parent's duty of care to its corporate group.

There is a theme emerging from *Lubbe*, *Chandler* and *Hempel* cases. In *Lubbe*, the parent's onus is by way of *forum conveniens*. In *Chandler*, the parent's onus is by way of a parent-subsidiary relationship. In the *Hempel* cases, the non-fault-based liability creates a foundation for a duty of care through the parent's role in conducting the due diligence.

2.2 Legislation

2.2.1. Albania Law No. 9901 on Entrepreneurs and Companies 2008

The Albania Law on Entrepreneurs and Companies (ALEC) emphasises the parent's fiduciary duties in two specific corporate groups; the control group,⁴³ and the equity group.⁴⁴ Janet Dine was one of

³⁸ As it is refereed in B. Sjøfjell, 'The Courts as Environmental Champions: The Norwegian *Hempel* Cases' (2016) 5 *European Company Law* 199, 205.

³⁹ *ibid.*

⁴⁰ As it is in *Lubbe v Cape*, *Adams v Cape* and *Chandler v Cape*.

⁴¹ Above, n. 38.

⁴² Above, n. 38, p. 206.

⁴³ The Albania Law on Entrepreneurs and Companies Art 207(1), the control group describes subsidiaries which operate under the instruction of the parent. J. Dine, 'Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?' (2012) 3 *Journal of Human Rights and Environment* 44, 62.

⁴⁴ *ibid.* Art 207(2), the equity group describes the parent company having the controlling shares in its subsidiaries.

ALEC's drafters and she applied enterprise liability to ALEC's framework.⁴⁵ Unlike *Chandler*, the parent is held liable for the breach of its fiduciary duties. Dine's strategy in drafting ALEC circumvents the corporate veil better as the Albanian parent owes a direct statutory duty to its corporate group, which makes piercing the veil an obsolete exercise.

Article 207 of ALEC upgrades the parent-subsidary relationship as we saw in *Chandler* from having assumed responsibility to having fiduciary duties. Article 208 establishes the legal consequences of a parent-subsidary relationship. The parent is accountable for the subsidiary's losses, as well as for any creditors' claims against that subsidiary. Article 209 imposes fiduciary duties on the parent controlling an equity group. It can be held accountable for any decision adversely affecting the corporate group *as a whole*. Article 210 lays down joint and severable liability in the corporate group. A negligent or criminal breach caused by any board member of any subsidiary could have the parent jointly liable. Joint and severable liability is designed to ensure that the parent is the main compensator for any damage caused by its subsidiary.

ALEC adds depth and substance to the Albanian parent's role. The parent's duties include conducting due diligence on its subsidiaries' operations ensuring that they comply with health and safety and that they are also well-resourced financially. In doing so, full compensation will be given to its subsidiary's victims and creditors. As *Salomon's* globally held principle does not allow the parent to indemnify liability incurred by its subsidiary, the poor decisions made by the parent will fall under ALEC's fiduciary breaches. The parent therefore does not compensate for its subsidiary's negligence or criminal activities, rather it compensates for the poor decisions it has made which adversely affects the corporate group. The separate personality doctrine remains intact. The parent's limited liability is also respected because it still has a decision-making role within the corporate group.

2.2.2. *United Kingdom Modern Slavery Act 2015*

The UK Modern Slavery Act (MSA)⁴⁶ adopts a human rights-based approach focusing on prevention, prosecution and protection.⁴⁷ Modern slavery occurs when the perpetrator exploits the victim(s) by subjecting them to slavery or servitude, or forcing them into compulsory labour.⁴⁸ This legislation aims to expose businesses practicing modern slavery and hold them accountable. It also aims to prevent businesses being complicit in modern slavery. The latter issue is the focal point for this

⁴⁵ *ibid.*

⁴⁶ The UK Modern Slavery Act 2015 c30.

⁴⁷ A. Weatherburn, 'Using an Integrated Human Rights-based Approach to address Modern Slavery: the UK Experience' (2016) 2 *European Human Rights Law Review* 184, 185.

⁴⁸ S1 [Modern Slavery Act](#).

discussion because it establishes the UK parent's role and its obligations towards UK and non-UK subsidiaries.

A UK parent falling under the MSA is defined as a commercial organisation with a turnover of £36million or more.⁴⁹ This turnover is the accumulation of the parent and all its subsidiaries within the corporate group regardless of where they are based.⁵⁰ Transparency is promoted under section 54(5) by producing an annual slavery and human trafficking statement. The corporate group produces this statement which includes; its structure, policies in relation to human trafficking, training programmes for workers, due diligence, and risk management conducted in the operating areas which are most vulnerable to human trafficking and slavery. If the statement is found not to be satisfactory, the Secretary of State holds the parent accountable.

The UK parent has an obligation to prevent and protect staff within its corporate group from modern slavery. This onus is akin to the Albanian parent's fiduciary duties. Legislation obligates the parent to conduct due diligence in its stakeholders' interests (i.e. workers and creditors). Such duties go beyond the assumed responsibility professed in *Chandler*. A new corporate duty of care has evolved from the two legislations.

2.3. Legal Procedure

2.3.1 *Forum Conveniens for the Victims*

Lubbe's forum conveniens doctrine is clear. When a case is brought to the UK, the UK court can stay proceedings if it finds that another forum is more suitable 'for the interests of all parties and for the ends of justice'.⁵¹ Overseas subsidiaries of a UK-domiciled parent may have cases brought against them heard in UK courts. The UK legal system is therefore a point of redress for the corporate group's victims and creditors.

The UK is also *forum conveniens* when a UK-domiciled victim is injured whilst being overseas and using a third-party business with UK-domiciled company ties. *Owusu v. Jackson*⁵² involved a UK-domiciled victim who was injured when on holiday in Jamaica. He sued multiple companies and one of them was a UK-domiciled defendant company with which he had a holiday

⁴⁹ K. Sartin and C. Justesen, 'Employment Compliance Update: Modern Slavery, Gender Pay Equality, and Employee Privacy' (2016) 5 *Compliance and Risk* 2.

⁵⁰ *ibid.*

⁵¹ Above, n. 18.

⁵² *Owusu v. Jackson* [2005] QB. 801.

contract. Whilst in Jamaica, the victim was injured on the grounds owned by the non-UK domiciled co-defendant. The victim sued both defendants in the UK and the Court of Appeals decided that the UK was not the appropriate forum and as a result the proceedings were stayed.⁵³ *Owusu*'s case was later referred to the European Court of Justice where it was confirmed that the Court of Appeals had *forum conveniens*. Citing both the Brussels Convention and a UK legislation, Article 2 of the Brussels Convention precludes the UK from staying proceedings like *Owusu*'s,⁵⁴ and the UK Civil Procedure Rules 6.20 also stipulates that companies residing outside the UK or EEA can be served with litigation procedures if they have ties with a UK-domiciled defendant. These two rules also apply to parent companies and its overseas subsidiaries.

Procedurally, UK-domiciled parents are potentially open to litigation from two kinds of victims: (1) those residing overseas who have been injured by subsidiaries operating overseas, and (2) those who are UK domiciled who have been injured by overseas companies with UK parent ties. With the trinity of case law, legislation and legal procedure, a strong foundation is formed for increasing the parent's onus for the corporate group's activities. A parent would have to prove that it has dutifully discharged its onus through conducting due diligence.

2.3.2 The Importance of Due Diligence

The concept of due diligence is not new. Businesses perform routine risk management exercises through due diligence. Due diligence is also enshrined in the United Nations Guidelines for Business and Human Rights.⁵⁵ The evolving law defines the parent's obligations towards its subsidiaries. In the aforementioned case law and legislation, a rough idea of the parent's due diligence emerges. This idea is centred around the subsidiaries' financial stability, workers' well-being, premises' health and safety, low pollution business activities, and the disassociation with modern slavery.⁵⁶

At first sight, the parent's role in conducting due diligence seems very wide which might infringe upon its corporate personality and its limited liability. The two feminist theories can help reconcile this by providing a tailor-made structure for a parent's corporate duty of care. In refining the corporate duty of care's structure and substance, the parent's management of due diligence will be

⁵³ *ibid*, 806.

⁵⁴ *ibid*, 810.

⁵⁵ Above, n. 38, 206.

⁵⁶ In addition to due diligence already established in areas such as in supply chains, see P. Henty and S. Holdsworth, 'Big Businesses and Modern Slavery: What your Organisation should be Doing' (2015) 4 *Compliance and Risk* 11-13. In Merger & Acquisitions, see D. Boyd and W. Sharpe, 'Trends in Legal Due Diligence in Acquisition Finance' (2007) 11 *Journal of Banking and Financial Law* 658. In project finance, see M. Torrance, 'Equator Principles III: New Sustainability Rules requiring Legal Strategy Rethink' (2013) 8 *Journal of Banking and Financial Law* 503.

well within its legal capacity.

3. Towards A Feminist Direction?

The two feminist theories drawn on in this chapter are Andreas Philippopoulos-Mihalopoulos' spatial justice,⁵⁷ and Eva Kittay's ethic of care.⁵⁸ Both theories challenge the law's purpose and its function in society.⁵⁹ The reason for picking these out of the rich tapestry of feminist theories is their close alignment with the case law, legislation and legal procedure discussed in the previous section.

Philippopoulos-Mihalopoulos' spatial justice urges law to move beyond legal rules.⁶⁰ In this discussion, the examination of corporate behaviour in a corporate group has to move beyond the corporate veil argument. The decisions in *Lubbe* and *Chandler* circumvent the corporate veil argument by imposing direct responsibility on the parent. The courts in the *Hempel* cases imposed a non-fault-based liability on the parent. Spatial justice is manifested when law breaks away from its surrounding rules.⁶¹ Philippopoulos-Mihalopoulos suggests that law is made to recoil into the legal spaces because of the legal boundaries, for example the corporate veil, restricting law within its borders.⁶² With legal boundaries and borders being drawn, spaces are demarcated and divided, and this results in law being fragmented. Fragmented laws take the attention away from the atmosphere,⁶³ which is the interconnectedness of the living species, societies, businesses, resources, and the environment. The corporate group has a corporate atmosphere which includes the subsidiaries' financial stability, workers' well-being, premises' health and safety, low pollution business activities, and the disassociation with modern slavery.⁶⁴ When the corporate atmosphere is disregarded, the corporate pressure on the finite planetary boundaries may similarly be ignored. Therefore, the

⁵⁷ A. Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Landscape, Atmosphere* (London: Routledge, 2015).

⁵⁸ E. Kittay, *Love's Labor* (London: Routledge, 1999).

⁵⁹ A. Hunt, 'The Critique of Law: What is 'Critical' about Critical Legal Theory?' (1987) 14 *Journal of Law and Society* 5-19. See also D. Rhode, 'Feminist Critical Theories' (1990) 42 *Stanford Law Review* 617-638.

⁶⁰ Above, n. 57, 174-175. The present concepts such as distributive justice or social justice cannot be relied upon as they cannot apply to the corporate group. The corporate duty of care requires a structure beyond the current foundations of law.

⁶¹ Above, n. 57, 186. Within the debate around piercing the corporate veil or not, spatial justice withdraws from these types of conflict. Like in the Albanian and UK legislation, law withdraws from the exercise of piercing the veil.

⁶² A. Philippopoulos-Mihalopoulos, 'Spatial Justice: Law and the Geography of Withdrawal' (2010) 6 *International Journal of Law in Context* 207-208.

⁶³ Above, n. 57, 122.

⁶⁴ In addition to due diligence already established in areas such as in supply chains, see P. Henty and S. Holdsworth, 'Big Businesses and Modern Slavery: What your Organisation should be Doing' (2015) 4 *Compliance and Risk* 11-13. In Merger & Acquisitions, see D. Boyd and W. Sharpe, 'Trends in Legal Due Diligence in Acquisition Finance' (2007) 11 *Journal of Banking and Financial Law* 658. In project finance, see M. Torrance, 'Equator Principles III: New Sustainability Rules requiring Legal Strategy Rethink' (2013) 8 *Journal of Banking and Financial Law* 503.

fragmented law serves the interests of those who reside within those legal boundaries. Within a corporate group, the fragmented law promotes the parent's interests.

There are some circumstances where the theory of spatial justice challenges the boundaries of law so that it becomes impossible to recoil into its legal confines. Spatial justice is seen in *Lubbe*,⁶⁵ *Chandler*,⁶⁶ and *Hempel*⁶⁷ where the corporate veil argument cannot triumph over the need to protect the corporate atmosphere. If it can be argued that the finite natural resources and the vulnerable human resources are the main components to the corporate atmosphere, then it must be argued that all corporate group activities must recognise the planetary boundaries. Spatial justice prioritises the planetary boundaries through creating the parent-subsidary relationship. This relationship enables the law to evolve⁶⁸ and adapt to the current need for a more responsible parent.

Where spatial justice provides structure, Kittay's ethic of care adds substance to the parent-subsidary relationship. Because the traditional legal parent-subsidary relationship does not recognise the corporate atmosphere, the parent's awkward duty of care by way of assumed responsibility is highlighted in *Chandler*.⁶⁹ This legal relationship is traditionally known to preserve the autonomy between the incorporator and the incorporated.⁷⁰ Fully autonomous entities like subsidiaries must abide by the principles of equality where each subsidiary is an equal to its parent. Equality leaves no room for an interdependent parent-subsidary relationship.

This traditional legal concept is arguably being ousted by the emerging jurisprudence. The structure and substance of the corporate duty of care shifts the focus away from the fragmented corporate spaces. As a result, the group's atmosphere is acknowledged. The parent's obligation to re-invest into the corporate group may be said to be discernible in the case law, legislation and legal procedure discussed above. The incorporation of theory into law allows the opportunity for better case law, legislation and legal procedure, in turn facilitating future legal principles. These legal principles can then help change the process of achieving business sustainability and eco-profitability. Before each theory is fully explored, it is important to investigate whether or not this emerging parent-subsidary relationship withstands the corporate veil argument. The next section explores the corporate veil's purpose.

⁶⁵ The parent residence can be *forum conveniens*.

⁶⁶ The creation of parent-subsidary relationship.

⁶⁷ The importance of due diligence in the parent's non-fault-based liability. Above n. 38.

⁶⁸ 'Law evolving' meaning law's spatial turn into a new justice. A. Philippopoulos-Mihalopoulos, 'Law's Spatial Turn: Geography, Justice and a Certain Fear of Space' (2010) 7 *Law, Culture and the Humanities* 188-189.

⁶⁹ Per *Adams v. Cape*.

⁷⁰ Per *Salomon v. Salomon*.

4. The Corporate Veil's Purpose

In this chapter, the corporate veil has three purposes: (1) demarcating corporate spaces, (2) preserving corporate autonomy, and (3) establishing equality amongst corporations. In a corporate group, the corporate veil can be useful in benefiting a subsidiary, for example in praising a subsidiary for its good governance. The veil is also useful in holding a subsidiary responsible, for example, finding a subsidiary liable for wilfully defaulting on its creditors. Crucially, the corporate veil is mostly used in shielding the parent from its subsidiaries' liabilities and risks.⁷¹ This chapter suggests that the corporate veil's purpose does not preclude the argument for an interdependent parent-subsidary relationship. Therefore, its purpose does not preclude the parent's role of conducting due diligence on the corporate group and in that regard the possible liability arising from being negligent. The interdependent parent-subsidary and the corporate veil can exist side-by-side.

4.1. Demarcating Corporate Spaces

With incorporation, the demarcation of corporate spaces enables the parent to do two things: (1) gain global presence by operating through subsidiaries across the world,⁷² and (2) gain leverage by forming value chains.⁷³ A subsidiary is an agent which situates the parent higher in the value chain so that the parent can perform a number of tasks. It achieves a lean organisation, levers risks, and externalises liabilities to its subsidiaries.⁷⁴ Law operates within the value chain; however it rarely crosses the legal boundaries between parent and subsidiary.⁷⁵ Within the articles of association, law preserves a strict relationship between the corporation and its incorporators. It is imagined that each corporation is like a silo being filled with a legal space. A corporate group is imagined to be like several silos laying next to one another (A. Ltd., B. Ltd., and C. Ltd.). The walls of each silo (the corporate veil) are in contact with each other, but the legal spaces do not mix. When law encounters the silo's walls, it recoils into its respective corporate spaces.⁷⁶ Nothing flows through the walls or the corporate veil. The atmosphere in the corporate group is fragmented. This legal concept is critiqued for its poor reflection of the interconnectedness within business. Although the parent's profits and markets flow freely within the corporate group; law still recoils within the legal boundaries of each

⁷¹ Above, n. 6.

⁷² Above, n. 7.

⁷³ For value chains, see G. Gereffi, J. Humphrey, T. Sturgeon, 'The Governance of Global Value Chains' (2005) 12 *Review of International Political Economy* 78, 79. Leverage in the apparel supply chain, see G. Gereffi and S. Frederick, 'The Global Apparel Value Chain, Trade and the Crisis' (2010) *The World Bank's Policy Research Working Paper* 11. In agriculture, see J. Clapp, 'ABCD and Beyond from Grain Merchants to Agricultural Value Chain Managers' (2015) 2 *Canadian Food Studies* 126.

⁷⁴ F. Contractor, V. Kumar, S. Kundu and T. Pedersen, 'Global Outsourcing and Offshoring' in F. Contractor, V. Kumar, S. Kundu and T. Pedersen, *Global Outsourcing and Offshoring* (CUP, 2011) 3.

⁷⁵ Above, n. 62.

⁷⁶ Above, n. 62.

respective corporation.

With law recoiling into its legal boundaries, *Chandler's* fault-based liability approach is futile in holding a parent responsible for its subsidiary's negligence or criminal activities. The Dutch case *Akpan v. Royal Dutch Shell*⁷⁷ is a perfect example. The case involved a victim whose land in Nigeria was damaged by a subsidiary operating in the vicinity. The subsidiary extracted oil from the land and transported the oil via pipelines. On two specific occasions, the pipelines were sabotaged by third parties which resulted in crude oil contaminating the victim's land. It transpired that both the Dutch-domiciled parent and its Nigerian subsidiary were aware of the pipelines being prone to sabotage. Measures had been put in place, but those two incidences of sabotage affecting the victim were not prevented. The victim filed a case against the corporate group arguing joint and severable liability of the parent and subsidiary.

The court in The Hague decided that the subsidiary was liable in tort for the victim's harm, and it was ordered to compensate the victim.⁷⁸ The court however was not convinced that the parent should be held jointly or severally liable.⁷⁹ Although the parent was aware of the likelihood of the sabotage, it did not commit the tort against the victim.⁸⁰ The parent-subsidiary legal relationship was found not proximate enough to have the parent assume responsibility.⁸¹ The reasons being; (1) the locations of the companies, in the Netherlands and Nigeria were not proximate, (2) both of their businesses were so different that the parent's superior knowledge could not be shared, and (3) the victim did not fall within a 'limited group of people' identified for compensation.

Owing to the above reasons, the legal spaces between the parent and subsidiary were kept strictly separate. The corporate veil in *Akpan* prevented the subsidiary's responsibility from turning into the parent's responsibility. Law does not flow through the veil in the case of this corporate group. Instead, law found one body corporate responsible and recoils within the space of that body corporate. Here, the corporate group's atmosphere resembles a jigsaw puzzle. On the one hand, the pieces match and mirror the interconnectedness within business. On the other hand, liability detaches the corporate pieces isolating the parent from the rest of its subsidiaries. The legal puzzle which is the corporate veil shields the parent and leaves the tortious subsidiary with the absorption of costs and the victim without any recourse if the subsidiary cannot pay.

In *Akpan*, the demarcation of the corporate spaces was the court's focal point. *Akpan's* decision has bad implications for corporate behaviour within the corporate group. With the artificial

⁷⁷ *Akpan v. Royal Dutch Shell* [2013] HA ZA 09-1580.

⁷⁸ *ibid*, para. 4.45.

⁷⁹ *ibid*, para. 4.34.

⁸⁰ *ibid*,

⁸¹ Above, n. 77, para. 4.29 – 4.32.

legal boundaries, corporations tend to operate in isolation and that dilutes governance within the corporate group. Law being cornered in the parent's corporate spaces only serves its interests. Maximising the parent's profit without taking into consideration the well-being of others contributes to the transgression of planetary boundaries. Furthermore, the parent benefits from accessing the subsidiary's resources. These could be in the form of geographical locality, its infrastructure and security, workforce accessibility, etc. Yet in the same vein, the parent can utilise the veil to sever itself from the interconnected group. A subsidiary might have high risk business operations and it might also lack financial resources. Therefore, holding a subsidiary solely responsible for its obligations exonerates its parent from incurring potential liabilities with great practical importance.⁸²

Chandler's reasoning and its application was noted in *Akpan*, but *Chandler's* spirit was not followed. The fault-based liability approach through assumed responsibility is henceforth ineffective. Holding the parent and subsidiary jointly and severally liable seems ill-focused. The emerging jurisprudence however shifts the focus and places onus on the parent. Thus, the focus is not about the parent absorbing the subsidiary's liability, rather it is about the parent's obligations in preventing the subsidiary's negligence or criminal activity. Fault-based liability in the form of the parent's non-fulfilment of its obligations arguably serves justice better. Law stemming from these kinds of obligations cannot recoil into either the parent's or the subsidiary's corporate spaces. Law in this form belongs to the corporate atmosphere where it governs the interdependence between parent and subsidiaries.

4.2. Preserving Corporate Autonomy

Demarcating corporate spaces is essential for autonomy. A subsidiary is a fully functional legal person and it can undertake most things its parent can. It can purchase or rent premises, enter into contracts, sue and/or be sued, employ and fire its workers, raise debts, takeover or merge, and manage risks. *Lubbe* and *Chandler* did not fall under *Adams'* exceptions and therefore the subsidiary's autonomy was recognised. The parents in *Chandler* and *Hempel* were not asked to indemnify their subsidiary's negligence or criminal activities and therefore *Salomon's* global legacy was not infringed. Rather, the parents were liable for their failure to conduct ample due diligence on the corporate group. The emerging jurisprudence therefore withstands the corporate veil argument. It respects the separate legal spaces and preserves the subsidiary's autonomy.

⁸² Above, n. 6. Utilising corporate groups in this way breeds injustices. H. Collin, 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration' (1990) 53 *Modern Law Review* 731, 738. But, it facilitates limited liability. Also above, n. 7.

4.3. Establishing Equality Amongst Corporations

Subsidiaries function as fully fledged legal persons to give them equal status on par with their parent. They undertake risks, raise debts, and trade on their own. Because their parent cannot indemnify on their behalf, *Salomon* makes sure that the subsidiaries handle their own debts and liabilities.⁸³ Having equality in a corporate group is akin to treating every corporation like a prudent flourishing adult. A flourishing adult exhibits social independence, emotional independence and financial independence. Similarly, an autonomous subsidiary is expected to generate its own income by extrapolating resources from its environment to make a profit. Autonomy and demarcated legal spaces are essential for a subsidiary's existence within the corporate group. Equality makes a subsidiary invulnerable to weaknesses.

Equality in this manner creates inequity within the corporate group.⁸⁴ It is noted that costs, risks, and resources flow freely in the group instead of liabilities. With the diluted governance in the group, subsidiaries like in *Lubbe*, *Chandler* and *Hempel* find themselves operating in unfavourable conditions and environments.⁸⁵ These high-risk conditions expose potential harm to the workers' well-being, their local communities, creditors and the environment. The emerging jurisprudence outlines the interdependence between parent-subsidiary. The parent's duty of care is an acknowledgement that the subsidiary can at times access its support. This underlying concept is based on equity,⁸⁶ as opposed to equality. Equity is sensitive to the power imbalances in the corporate group. In gaining the best leverage, the parent is the most resourceful and the most resilient, it must therefore be the onerous entity in the group. Duties to ensure sustainability of subsidiaries in the group must be vested in the parent.

4.4. Conclusion

It is argued here that the corporate veil argument does not defeat the emerging new parent-subsidiary relationship. This interdependent relationship respects the corporate spaces where subsidiaries are still liable for their own liabilities and debts. So, the parent's limited liability is also respected. This relationship also preserves the subsidiaries' autonomy where they can conduct business independently. Therefore, the corporate veil's sanctity is respected. With the veil's sanctity intact, the interdependent relationship and the corporate veil argument can exist side-by-side. An interdependent spatial layer can also be added to the corporate group's legal sphere. The parent's obligations created by the case law, legislation and legal procedure discussed above add changes to the dynamics of the

⁸³ *Salomon v. Salomon* [1865-99] All ER Rep 33, 36.

⁸⁴ Above, n. 58, p87.

⁸⁵ The parents decide over subsidiaries.

⁸⁶ Above, n. 58, p53. Equity underpinned by an ethic of care.

group. Equality gives way for equity where equity acknowledges each subsidiary's position in the value chain. Equity highlights each subsidiary's vulnerability which is a very important step towards creating the parent's obligations within the parent-subsidary relationship.

The following section explores the corporate duty of care's structure and substance in the interdependent parent-subsidary relationship.

5. The Parent-Subsidiary Relationship

5.1. Structure: Spatial Justice in the Atmosphere

As mentioned above, law disregards the atmosphere by recoiling into the legal boundaries. The parent having the best leverage maximises its interests through utilising the fragmented corporate spaces in the corporate group. Spatial justice disrupts this traditional legal principle.⁸⁷ The breaking away from tradition in case law, legislation and legal procedure (discussed above) shows that the attention has shifted to the corporate atmosphere. The corporate group is recognised as an interconnected web of entities as opposed to an aggregation of autonomous legal persons. A structure is required for this shift. The case law, legislation and legal procedure indicate placing onus on the parent. This can be done in two ways: (1) legislate on the parent's fiduciary duties, (2) make judicial changes in fault-based liability in a corporate group. As mentioned above, both proposals do not infringe upon the two legal doctrines of the corporate veil and the parent's limited liability. Both proposals also prioritise the corporate atmosphere over the parent's interests. Maintenance of the corporate atmosphere requires prioritising the wellbeing of the subsidiaries. In essence, the agendas for profitability and business sustainability are not mutually exclusive.

The expansion of the parent's onus establishes the corporate duty of care in the corporate group and it is also to encourage stewardship over the corporate group. A parent discharges this duty through conducting due diligence. The parent-subsidary relationship can be assessed by accounting the differences in leverage power between all corporations in the group. Vulnerabilities in some corporations can be detected. The standard of care for due diligence is the measurable amount of re-investments placed into the vulnerable corporation. Re-investments can be of any kind of assistance other than money. The main consideration is to nurture resilience in a vulnerable corporation.

The parent's obligation to conduct due diligence on the corporate group in relation to corporate spatial justice is the structure for the parent-subsidary relationship. The substance in this

⁸⁷Above n. 57, p186.

relationship is the method of how the due diligence is exercised.

5.2. Substance: The Ethic of Care

Kittay's ethic of care is a critique of equality, especially in the areas of society's personal development and human flourishing.⁸⁸ According to John Rawls,⁸⁹ society's rules should be created from the original position composing of individuals with equal stature with the disregard of talents and non-talents.⁹⁰ In this way, the rules created neither benefit the talented nor would they disadvantage the non-talented. With an equal amount of resources and opportunities afforded to them, every individual is expected to flourish. That said, Rawls expects the society's flourishing individuals are adults, autonomous, fully independent, and able-bodied.⁹¹ Kittay argues that individuals with leverage (as Rawls considers them, the talented) flourish better than others.⁹² Rawls' difference principle restores an equilibrium between those who are talented and the non-talented.⁹³ Societal institutions are the main agents for the exercise of the difference principle. This principle centres on distributive justice where a fraction of the talented individual's profits are distributed to the less fortunate in the society.⁹⁴

The difference principle's soft-touch version is practiced by some talented individuals. Celebrities and successful business entrepreneurs voluntarily participate in charitable giving. These practices are unfortunately less ingrained in global business practices. Since the 2007-8 financial crisis, the gap between the leveraged individuals (talented) and the non-leveraged ones (non-talented) is widening.⁹⁵ Furthermore, the flourishing in an equal society causes disadvantages to the non-leveraged individuals.⁹⁶ Kittay makes a poignant case for the non-leveraged individuals who are carers. Carers look after dependants, and the clear examples are infants. Dependants do not fit into Rawls' description of the autonomous, fully independent, and able-bodied.⁹⁷ A carer is someone

⁸⁸ Above, n. 57, p87.

⁸⁹ J. Rawls, *A Theory of Justice* (Cambridge: HUP, 1999).

⁹⁰ *ibid*, 119-121. The original position set behind Rawls' 'veil of ignorance'.

⁹¹ *ibid*, 452. Those acting within the boundaries of a good society.

⁹² Above, n. 57, p87.

⁹³ Above, n. 89, p65-70. An egalitarian concept where the talented will be rewarded for being successful, but that does not mean that the non-talented will be worse off as they will also benefit from the rewards.

⁹⁴ *ibid*, 242-251.

⁹⁵ Urban poverty and poor mental health suffered by those without leverage. See C. Tacoli, G. McGranahan and D. Satterthwaite, 'Urbanisation, Rural-Urban Migration and Urban Poverty', IIED Working Paper 27 (2015). For poor housing affecting physical health and mental health, see M. Egan, L. Lawson, A. Kearns, E. Conway and J. Neary, 'Neighbourhood Demolition, Relocation and Health' (2015) *Health and Place* 101, 106-107. Fuel poverty contributes to poor physical health and mental health, see D. Roberts, E. Vera-Toscano and E. Phimister, 'Fuel Poverty in the UK' (2015) 87 *Energy Policy* 216, 221.

⁹⁶ *ibid*.

⁹⁷ Above, n. 57, p.86.

whose day-to-day undertakings must take their dependant's interests into account. For the flourishing of both the carer and the dependant, sacrifices needed to be made.⁹⁸ For example, a single mother bringing up her children without a recourse to extra resources.

Carers are nevertheless autonomous, fully independent, and able-bodied.⁹⁹ However, the dependant's burden results in the quick depletion of the equal resources afforded to the carer. Individuals without caring duties could flourish with that same amount. Flourishing for the carer becomes more cumbersome. Kittay concludes that the carer (without leverage) is the vulnerable individual in society. Kittay notes that equality is inequitable. It breeds hardships for the individuals with no leverage.¹⁰⁰ It also rejects an interdependent society. Kittay's critique resonates with the inequity appearing in a corporate group. Subsidiaries might be starved of resources and they are more prone to bad business practices. They might disregard their workers' well-being, engage in modern slavery, conduct wasteful business decisions, create high risk leverage and/or pollute the environment.

A corporate group based on an ethic of care re-conceptualises autonomy and independence. Like a growing individual, a person gaining autonomy and independence is a process. A subsidiary's incorporation therefore should not guarantee full autonomy or independence. An ethic of care shows that corporations are not completely immune to hardships. The parent's support should to be at hand when hardships strike. Kittay also makes a very important point where she states that every carer is 'some mother's child',¹⁰¹ and because of that obligations should be owed to them. Similar to Rawls, Kitty highlights societal institutions such as the State should provide welfare and support to the carers facing hardship.¹⁰² In a corporate group, each subsidiary can be considered to be 'some mother's child'. A subsidiary has stewardship over its well-being and also the wellbeing of its workers and creditors. With a subsidiary facing hardships, the parent is the appropriate societal institution in the corporate group to provide support.

Due diligence is the measure for the ethic of care. The parent's onus should take into account the corporate group's financial stability, health and safety regulations, environmental protection and the workers' well-being. The parent's leverage in the corporate group justifies having this onus. Due diligence conducted effectively would see both profitability and sustainability agendas embedded into the corporate day-to-day activities. With this level of group governance, the parent would be well-informed in relation to whether or not the incorporation of new subsidiaries is

⁹⁸ Above, n. 57, p99.

⁹⁹ *ibid.*

¹⁰⁰ Furthermore, it is recently reported that UK young carers who fit Rawls' description of able-bodied flourishing individuals are less likely to qualify for government support. P. Butler, 'Four out of Five Young Carers Receive No Council Support' (26 December 2016) *The Guardian*.

¹⁰¹ Above, n. 58, p115.

¹⁰² Above, n. 58, p 54.

necessary, and subsidiaries' operations would be better monitored with their financial capacities and assets well-scrutinised. This could be an essential element in ensuring that the corporate group would become a closely knitted interdependent web of businesses working within planetary boundaries.

6. Conclusion

The experience of headlined corporate scandals seems to drive the evolution of law in very significant ways. At the same time a general awareness of ongoing issues which have proved problematic, such as encouraging corporations to act sustainably, imposing accountability on multinational groups for actions of subsidiaries, corporate crime and human rights abuses, is heightened every time a new scandal breaks. The case law, legislation and legal processes discussed in this chapter are examples of this phenomenon. The chapter connects the evolving law with two feminist theories, the theory of spatial justice and the ethic of care theory. This analysis shows us how law evolves and breaks away from the boundaries encasing it and provides us with a theoretical framework in which to understand the particular evolution of corporate law discussed in this chapter. The chapter demonstrates how there is a limitation in the legal parent-subsidiary relationship within the corporate group. Legal autonomy and equality of each entity in the corporate group promote only the parent's interests. Both feminist theories highlight the importance of due diligence. These theories, together with the examples of 'law in action' illustrate that the parent's role is ever evolving in the corporate group. It must take on proper stewardship by conducting due diligence. The interests surrounding the corporate atmosphere should replace the parent's corporate spaces. The ethic of care addresses the vulnerabilities of subsidiaries in the group. Equity ensures that resources are re-invested into the corporate group. Resilience is an important feature in this economically uncertain climate. Having an interdependent parent-subsidiary relationship reduces legal autonomy and increases equity in the corporate group as a whole providing new possibilities for the control and mitigation of emerging scandals and, perhaps even more importantly, proactive resolution of the concerns which we have discussed here and elsewhere in this collection. The theories discussed provide us with an intellectual map which makes sense of evolving legal principles.