

Tort litigation against multinationals (“MNCs”) for violation of human rights: an overview of the position outside the US

Richard Meeran¹

Context

Alien Tort Statute

Over the past decade, the US Alien Tort Statute (“ATS”) – domestic legislation which gives the US courts jurisdiction in cases alleging international human rights violations – has generally been viewed as the mechanism with the most promising potential for holding MNCs to account for human rights violations in developing countries. In recent years, US public interest lawyers² have been at the forefront of developing ATS cases where MNCs are alleged to have been complicit with states in such violations.

Perhaps the most notable successes have been the settlements in: *Doe v. Unocal*, in which Burmese villagers sued the California-based energy giant for its alleged direct complicity in abuses committed by the Burmese military, Unocal’s partner in a natural gas pipeline joint venture. In 2005, in a confidential settlement, Unocal agreed to compensate the plaintiffs and provide funds for programmes in Burma to improve living conditions and protect the rights of people from the pipeline region (the exact terms of the settlement are confidential); *Wiwa v Royal Dutch Shell*, in which it was alleged that Shell was complicit in supporting military operations against the Ogoni, and actively pursued the convictions and execution of the Ogoni Nine, including by bribing witnesses against them. In June 2009 Shell agreed to settle for \$15.5 million, including \$5 million which the plaintiffs donated to a trust to benefit the Ogoni people³.

However a majority decision of the US Second Circuit Courts of Appeals in September 2010 may have put a “spanner in the works”. The court held that customary international human rights law does not recognise the liability of corporations, and consequently that MNCs cannot be liable under “ATS”⁴. On February 4, 2011, the

¹Partner since 1991 at London human rights law firm, Leigh Day & Co, London (www.leighday.co.uk) apart from a stint as Special Counsel at Slater & Gordon lawyers, Melbourne 2004-2008

²in particular the US Center for Constitutional Rights, EarthRights International and lawyers such as Judith Chomsky, Paul Hoffmann, Jenny Green and Beth Stephens

³<http://www.earthrights.org/legal/wiwa-v-royal-dutchshell>

⁴*Kiobel v Royal Dutch Petroleum Docket Nos 06-4800-cv, 06-4876-cv* (US. Ct. App.2d Cir.)

Second Circuit of the same court denied reconsideration of a September ruling in *Kiobel*, holding that the jurisdiction granted by ATS does not extend to civil actions brought against corporations.⁵ The court voted not to rehear the case. This issue may well be finally resolved by the Supreme Court, since the Eleventh Circuit reached the contrary result in two different cases, deciding that corporations may be held liable under the ATS⁶.

Consequently, at this point in time it would seem timely to consider the state of play with regard to the continued development of more conventional tort law remedies. These too have yielded considerable success over the past decade or so.

Use of conventional tort litigation

Background

In general, apart from using the ATS it is not possible to obtain civil legal redress for human rights violations per se directly against corporations (whether as direct perpetrators or on the grounds of complicity with state perpetrators). Cases against MNCs have been pursued on the basis of tort, specifically the law of “negligence”, the fundamental objectives of which are to (a) provide a level of compensation to a victim of negligence that as much as possible reinstates the victim in the position that he or she would have been in if the negligence had not occurred and (b) act as a deterrent against future wrongdoing by the perpetrator and others generally.⁷ These objectives coincide with those of MNC accountability.

These cases allege harm caused by “negligence” arising from a breach of a “duty of care” (rather than, for example, torture or violation of the right to life etc). Since they involve claims for compensation and are invariably costly, these cases may serve to achieve critical elements of MNC accountability, namely monetary redress for victims and deterrence against future human rights violations. An approach entailing allegations of negligence has been criticised for diminishing the significance of the alleged misconduct and harm (whereas the converse criticism has been levelled in some quarters at the use of allegations of fundamental international human rights violations

⁵ *Kiobel v. Royal Dutch Petroleum Co.*, No. 06-4800-cv, 06-4876-cv, 2011 U.S. App. LEXIS 2200 (2d Cir. Feb. 4, 2011)

⁶ *Sinaltrainal v. Coca-Cola*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008).

⁷ Prior to the use of ATS, US MNC cases had also be pursued on this basis. See for example *Union Carbide Gas Plant Disaster at Bhopal (1986)* 634 F. Supp. 842

in MNC ATS claims). Nevertheless, this approach has the advantage of relatively less complexity and (in the European Union) more favourable law on jurisdiction.

This area has developed over the past fifteen years and has included the following cases:-

*1995-1998: Connelly v RTZ Corporation Plc & Another*⁸ (Namibian uranium mine and throat cancer)

*1995-1997: Ngcobo & Ors v Thor Chemicals Holdings Ltd & Desmond Cowley*⁹ (mercury poisoning of South African workers)

1997: OK Tedi litigation against BHP (claim by 30,000 Papua New Guineans for damages to land in the Supreme Court of Victoria, Australia)¹⁰

*1997-2000: Sithole & Ors v Thor Chemicals Holdings & Desmond Cowley*¹¹(mercury poisoning of South African workers)

*1997-2003: Lubbe & Ors v Cape PLC*¹² (7,500 South African asbestos miners)

2004-present: Hempe, Blom and Ors v Anglo American South Africa Ltd (Johannesburg High Court) (South African gold miners' silicosis test cases)

2007-2008: Musopelo and Ors v Anvil Mining (Supreme Court of Western Australia) (massacre and other human rights violations of Congolese villagers)

2007-present: Ocesa Pipeline litigation: against BP exploration (for 73 Colombian campesinos for damage to land)

2008-present: litigation for alleged oil pollution damage against Shell commenced in the Hague by Nigerian claimants and Dutch NGO, Milieudefensie¹³

⁸*1998 AC 354 (HL)*

⁹*Times Law Report dated November 10th 1995.*

¹⁰*Dagi v BHP* [1997] 1 VR 428 (Aust)

¹¹*2000 WL 1421183*

¹²*2000 1 WLR 1545 (HL)*

2009-present: *Guerrero & Ors v Monterrico Metals plc*¹⁴ (torture/mistreatment of 33 Peruvian environmental protesters).

It can be noted that most of these cases relate primarily to violations of socio-economic rather than civil and political rights.

Details of the above cases, over which the writer has had care and conduct, are contained in Appendix A.

Key considerations in MNC tort cases

Parent company negligence: circumventing the “corporate veil”

Victims’ difficulties in obtaining access to justice locally have led to a search for remedies in the MNC home courts. This depends on securing jurisdiction in the home courts by pursuing the head office parent company rather than the locally operating subsidiary. It also gives rise to the legal complication of the corporate veil obstacle^{15, 16}.

In an attempt to overcome the corporate veil, allegations have centred on the “direct negligence” of the parent company for harm caused by its own wrongdoing (instead of or in addition to its responsibility for the negligence of its subsidiaries). The principal allegation is that the parent company breached a "duty of care" which it owed to individuals affected by its overseas operations e.g. workers employed by subsidiaries and local communities, and that this breach resulted in harm.

The issue of parent company duty of care was formulated by the Court of Appeal in the *Cape PLC* case as follows:-

“Whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to

¹³*Oguru, Efang and Milieudéfensie vs Royal Dutch Shell plc and Shell Petroleum Development Company Nigeria Ltd.* The claimants are represented by Prof Liesbeth Zegveld & Mr Michel Uiterwaal

¹⁴2009 EWHC 2475 & [2010] EWHC 3228 (QB) (15 December 2010)

¹⁵The principle of separation of corporate identity means that simply as a shareholder, a parent company is not liable for the conduct of the businesses (subsidiaries) in which it invests. See *Adams v Cape Industries PLC* 1992 WLR 657

¹⁶Note that the *Trafigura* case for victims of toxic waste dumping in Côte d'Ivoire was atypical in this respect as it involved the UK head office company itself and no subsidiary.

*those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company?*¹⁷

An affirmative answer to the above question is consistent with the moral obligation that many MNCs themselves seem to have acknowledged for literally decades:-

*“The aim of the group is, and will remain, to make profits for our shareholders, but to do it in such a way as to make a lasting contribution to the communities in which we operate.”*¹⁸

Key negligence allegations against the MNC parent in the some of the above and other cases are as follows:-

- (a) *Thor Chemicals Holdings Ltd*: negligent design and transfer of hazardous chemical technology to South Africa and negligent monitoring of the health of South African workers by the parent company (see Appendix A)
- (b) *“It was alleged that R.T.Z. had devised R.U.L.’s [the Namibian subsidiary] policy on health, safety and the environment, or alternatively had advised R.U.L. as to the contents of the policy. It was further alleged that an employee or employees of R.T.Z., referred to as R.T.Z. supervisors, implemented the policy and supervised health, safety and/or environmental protection at the mine.”* (Connelly v RTZ. See Appendix A)¹⁹
- (c) *Cape PLC*: negligent exercise of its “effective control” of health and safety at its South African subsidiaries’ asbestos mining operations (see Appendix A)
- (d) Gold miners’ silicosis litigation against Anglo American: negligent advice given to mining subsidiaries with respect to medical and dust prevention systems pursuant to service contracts between the parent and the mining subsidiaries (see Appendix A)

¹⁷ *Lubbe & ORS v Cape PLC [1998] CLC 1559*

¹⁸ Ernest Oppenheimer (1954 Anglo American Annual Report)

¹⁹ 1998 AC 354 (HL)

- (e) *OK Tedi* litigation: negligent management of subsidiary operations resulting in damage to the land by tailings from a gold/copper mine²⁰
- (f) Shell-Nigeria litigation in the Netherlands: negligence in relation to the control of the Nigerian operations, maintenance of pipelines, and supervision of clean-up of oil spills. The May 2008 subpoena against Shell alleges that the MNC parent is liable essentially because: it owed a duty of care to the Nigerian farmers (the potential harm was foreseeable; it had the power to ensure that adequate steps were taken to avoid the harm) which it breached (by failing to ensure that the appropriate safeguards were taken). The subpoena specifically cites the *Cape PLC* and *Connelly v Rio Tinto* cases as legal authorities supporting the existence of a duty of care
- (g) Peruvian torture victims' litigation against Monterrico Metals: negligent management and control of the response to an environmental protest and the treatment of detained protesters. (Violations of the Peruvian Civil Code are also alleged. See Appendix A).

The issue of parent company liability has not however been subject to a final determination in any of these cases, which have either been settled before trial (e.g. *Thor Chemicals v Cape PLC*) or struck out for other reasons (eg *Connelly v Rio Tinto*). Frustrating though this undoubtedly is for academic lawyers and campaigners, it reflects the financial realities and risks to the MNC, the claimants and the claimants' lawyers of not settling. Unless an MNC is confident of a resounding victory and that no significant evidence damaging to its reputation will emerge at trial, the risk of going to trial usually makes little commercial sense. The primary objective of claimants is usually to obtain the maximum amount of compensation as speedily as possible²¹. Claimants' lawyers, whose resources and cash flow can be stretched to the limit by such cases, may also feel under pressure.

A positive decision (though not a determination) of parent company liability was the dismissal of an attempted strike out application by *Thor Chemicals* in 1996 when the Court held that the evidence went "*well beyond establishing a clear evidential basis*" for liability against the parent company²². However the case against Monterrico Metals is

²⁰*Dagi v BHP* [1997] 1 VR 428 (Aust)

²¹During the course of the seven years' litigation, approximately 1000 of the 7,500 claimants died before receiving any compensation

²²*Ngcobo & Ors v Thor Chemicals Holdings Ltd & Desmond Cowley* (Maurice Kay J 7 November 1996 unreported)

scheduled for trial in the English High Court in October 2011, and the gold miners' silicosis trial in the Johannesburg High Court will probably occur during 2012.

MNC home vs host state law

A major criticism of MNCs has been that they exploit individuals in and the environment of developing countries by engaging in “double standards”, that is by conducting business in a manner that would be regarded as unacceptable in the MNC home state. Whereas the ATS cases are based on international human rights law, conventional tort cases involving a foreign element may be governed by the law of the MNC home or host state. Insofar as the latter may be less stringent (in terms of human rights protection) than the former, application of the latter could be seen as endorsing double standards. However it is usually the lack of enforcement of local laws and regulations, rather than the content of the local laws per se, that is unsatisfactory and encourages double standards.

As indicated above, allegations of “negligence” have formed the basis of claims against the parent company. To base a claim on the law of the MNC home state is consistent with the contention that the alleged harm arose as a result of bad decisions and actions that emanated from the headquarters.²³ Also, in cases brought in the MNC home courts, there has been strategic reason for arguing that the applicable law should be that of the MNC home state, namely to counter the inevitable opposite contention by the MNC that the claim should be governed by the law of the host state, where the claimants reside and the harm was done, and that this is a reason why the MNC home courts should decline jurisdiction in favour of the local courts.²⁴

Private international law requires, in non-contractual cases, the application of the substantive (not procedural) law essentially with which a claim has the closest connection. This will usually be the law of the country where the harm occurred i.e. the law of the host state, (in the European Union) “*unless manifestly more closely connected with another country*”²⁵.

²³In *Ngcobo & Ors v Thor Chemicals Holdings Ltd & Desmond Cowley* (April 2005 Deputy High Court Judge James Stewart QC unreported), held that, by reason of the connections with Thor's Margate factory, English, rather than South African law was likely to apply.

²⁴This issue of “*forum non conveniens*” remains live in common law countries other than the UK, which is subject to the Brussels regime (see further below)

²⁵Article 4 Rome II Regulation (EC) No 864/2007

From a legal perspective, the choice of law may be largely immaterial where, as in the case of South Africa or Namibia, the law of negligence in the host state is based on English law of negligence²⁶. Neither may it be significant where the laws of the MNC host and home states, albeit having a different basis, in essence require proof of the same facts.

The *Monterrico* case is formulated on the basis of both English law of negligence and under the Peruvian Civil Code. It is understood that the Code provides for fault-based liability of individuals who cause harm (Article 1969), liability for someone who incites or aids another in causing harm (Article 1978), vicarious liability for someone in control of another who causes harm (Article 1981), and joint liability of individuals whose conduct causes harm in combination (Article 1983). Thus, on the face of it, the Code provides a mechanism (akin to negligence) for liability for harm caused by the conduct of individual MNC employees, their employers and their employers in conjunction with the state perpetrators. The liability of the parent company, *Monterrico*, for any wrongdoing would seem to turn on a factual analysis of whether or not there was a relationship of “effective control” over aspects relevant to causation of harm that is proved. Consequently, establishing legal responsibility, including overcoming the “corporate veil” obstacle, would on that basis seem to present essentially the same set of challenges under the Peruvian Civil Code as it does under English law.

As an aside, as indicated above, the Peruvian Civil Code (Article 1969) presents the possibility of individual employees, such as directors, being held liable for harm caused by their fault. Civil action against individual MNC directors is rarely utilised. This is no doubt partly because the company is more likely to be in a position to afford to pay damages than an employee/director, but also partly because of the principle (under English law at least) that a director who personally directs and procures a company to commit a tort is himself liable to the victim no less than the company.²⁷ In the *Thor Chemicals* case, the High Court held (in the context of a strike out application) that there was “ample evidence” on which the trial judge might find the Chairman and co-defendant, Cowley, liable on this basis.²⁸ So in this case too, the differences between the laws of the MNC home and host states may be limited.

²⁶ Although note that in the gold miners' silicosis litigation, which is being litigated under South African law, it is alleged that “legal duty” must be determined in *light of provisions of the South African Constitution such as section 24, “the fundamental right to an environment that is not harmful to health and well-being”*

²⁷ *Evans v Spritebrand Ltd* [1985] 1 WLR 317

²⁸ *Ngcobo & Ors v Thor Chemicals Holdings Ltd & Desmond Cowley* (November 1996 unreported)

The choice of applicable law may sometimes however be very significant, for example in relation to:

- (a) Limitation (prescription), which in the UK (by virtue of the Foreign Limitation Periods Act 1984), is treated as a matter of substantive law. In tort cases, the relevant period is 3 years under UK law, 2 years under Peruvian law²⁹, 20 years under the law of the DRC and 10 years under Colombian law. A case brought in England against T&N by an asbestos victim who had worked at T&N's subsidiary factory in Quebec was struck when the Court of Appeal held that the law of Quebec (which had a 1 year limitation period) should apply³⁰ (NB Section 2(2) of the UK Foreign Limitation Periods Act 1984 allows the court to disregard a foreign limitation if its application would constitute "undue hardship" or be "contrary to public policy")
- (b) Claims arising from employment, where local workmen's compensation law bars claims against employers. Such a bar was raised in the *Connelly, Thor Chemicals* and *Cape PLC* litigation, and has been raised by Anglo in the gold miners' silicosis litigation³¹. It also led to the barring of a claim brought in Australia against an Australian parent company by an asbestos victim employed by its New Zealand subsidiary.³² (A decision of the South African Constitutional court on 3 March 2011 however held that this bar did not apply to miners, whose claims were subject to payment of compensation under different legislation under which the amounts of payments were significantly less.³³)
- (c) Claims in which the allegations fit more squarely within the legal provisions of one state rather than another. The allegations against Anvil Mining arose from a massacre and other human rights violations of Congolese villagers by the Congolese military in 2005, in respect of which Anvil provided "logistical assistance" in the form of vehicles and drivers. Anvil contends that its vehicles were requisitioned and that it had no choice in the matter. An action against Anvil Mining (headquartered in Quebec) was filed in the Montreal High Court in

²⁹Sub-section 4 Article 2001 Peruvian Civil Code

³⁰*Durham v T&N plc* 1 May 1996

³¹See Chapter 8 amendments to the Criminal Code Act 1995

³²*James Hardie and Coy Pty Limited v Putt Matter No Ca 40062/98* [1998] NSWSC 434

³³*Thembekile Mankayi v AngloGold Ashanti Limited* Case CCT 40/10 [2011] ZACC 03

November 2010³⁴. This case is based on Congolese law and alleges complicity on the part of Anvil in violations of (a) the Congolese Civil Code, which provides for liability to arise when harm is caused by fault and (b) the Rome Statute of the international Criminal Court (inter alia, *crimes against humanity* (Article 7) and *war crimes* (Article 8)), the provisions of which have been made actionable under the Congolese Civil Code by virtue of Article 215 of the Congolese constitution. According to the complaint, Congolese law is very similar to the law of Quebec. (Had proceedings been commenced in Australia (where Anvil is also based) as had previously been contemplated, it is unclear whether it would have been possible to sue for violations of the Rome Statute (the provisions of which have been incorporated into the Australian criminal but not civil law)³⁵

- (d) A recent detrimental development for claimants suing in the European Union courts is the coming into effect of provisions of European law which will require damages to be assessed in accordance with the law and procedure of the country where the harm occurred³⁶. Previously, the position under English law was that damages would be assessed in accordance with the law and procedure of the country in which the case was proceeding, even if the case was governed by local law.³⁷

Factors affecting access to justice in MNC home courts

A. “*Forum non conveniens*”

Due to the inability to fund lawyers and experts to represent them in their local courts, often the only prospect of obtaining justice in claims against MNCs is to pursue claims in MNC home courts, where they may obtain the services of lawyers in a position to represent them on a contingency fee or *pro bono* basis.³⁸ As indicated above, the MNC home courts will have jurisdiction over a claim against a parent company, but the issue is whether they might decline to exercise it.

³⁴See the complaint at <http://www.haguejusticeportal.net/eCache/DEF/12/287.html>

³⁵See Chapter 8 amendments to the Criminal Code Act 1995

³⁶Articles 4 and 15 Rome II Regulation (EC) No 864/2007

³⁷*Harding v Wealands* [2006] UKHL 32

³⁸ In many instances there are of course other reasons why justice may be inaccessible locally e.g. persecution of Claimants and corruption

The *forum non conveniens* principle serves as a means of restricting the exercise of extra-territorial jurisdiction to cases that have their closest connection with the country in which the proceedings have been instituted. The question is essentially whether there is a “more appropriate forum” for the trial than the MNC home court in which the ends of justice can be served? Answering the question involves the application of a two-stage test: Is there a forum that has a more real and substantial connection with the case? If there is, are there nevertheless reasons why justice requires that the MNC home court should retain jurisdiction?

The test applied by the UK and Canadian courts appears to be the same³⁹. In the case of *Recherches Internationales Quebec v Cambior Inc*⁴⁰, the court dismissed proceedings (on the grounds of *forum non conveniens*) brought by a public interest group against a Canadian mining company following the spill of cyanide-contaminated tailings at a site occupied by its subsidiary in Guyana.

The Australian formulation is more favourable to claimants in that the burden is on the defendant to show that the Australian court is a “clearly inappropriate forum”, rather than to show that the local courts are a “clearly more appropriate forum”⁴¹.

B. *Forum non conveniens* in the UK cases

The *Connelly, Cape* and *Thor Chemicals* litigation became bogged down for years over the *forum non conveniens* issue.

In *Connelly v Rio Tinto*, the House of Lords laid down the principle (in the context of the *forum non conveniens* issue) that a claimant who would be denied substantial justice in his local courts, due to the inability to pay for lawyers and experts to pursue a case, but who was able to obtain such representation in the courts where he had instigated his claim, would be allowed to proceed with his claim, even though the local courts were otherwise the more appropriate venue.

“..the availability of financial assistance in this country coupled with its non-availability in the appropriate forum, may exceptionally be a relevant factor in this context. The question, however, remains whether the Plaintiff can establish that substantial justice

³⁹ *Spiliada Maritime Corp v Cansulex Ltd* (1987) AC 460 and *Amchem Products Inc v British Columbia (Workers Compensation Board)* 1993 1S.C.R 897 Can

⁴⁰ [1998] QJ No 2554, *Quebec Super. Ct*, 14 August 1998

⁴¹ *Voth v Manildra Flour Mills Pty Ltd* (1990) HCA 55

*will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available*⁴²

Application of the Connelly principle finally (after three years of hearings up and down the court system) enabled the *Cape PLC* claimants to overcome *forum non conveniens* and continue with their claim in England three years later⁴³ (see Appendix A).

Neither the Canadian nor the Australian court appear to have yet endorsed the *Connelly* principle referred to above. The upshot is that claimants who are unable, for financial reasons, to secure access to justice in their local courts may still be denied a hearing in Canada and Australia.

MNC claimants suing under the ATS have been cushioned against the effects of *forum non conveniens*, which had previously been applied to harsh effect in claims brought in tort law, the dismissal of the Bhopal claims by the New York District Court perhaps providing the most striking example.⁴⁴ Should claims against MNCs under ATS be barred, claimants in the US courts will again face the same forum hurdle.

C. The position in the European Union

Subject to exceptions that are not relevant for present purposes, European law stipulates that a defendant shall be sued in its domicile, and that the domicile of a company is in the location of its corporate headquarters or its registered office⁴⁵. Apart from the UK, the courts of other EU states have interpreted this rule strictly.

Thus, in the Shell Nigeria litigation in the Netherlands, the Dutch court had mandatory jurisdiction over the claim against the Netherlands-based parent company, Royal Dutch Shell Plc. The Nigerian subsidiary, SPDC, was a co-defendant in the proceedings. Shell challenged jurisdiction *inter alia* on the grounds that the Dutch court only had jurisdiction over SPDC by virtue of the claim against Royal Dutch Shell; and that the claim against the latter was tenuous and had only been pursued to enable the claim against SPDC to proceed. In its judgment on 30 December 2009, the Court of the Hague

⁴²*Connelly v RTZ Corporation Plc & Another* 1998 AC 354 (HL)

⁴³*Lubbe & ORS v Cape PLC* 2000 1 WLR 1545 (HL)

⁴⁴*Union Carbide Corporation Gas Plant Disaster at Bhopal (1986)* 634 F. Supp. 842

⁴⁵In the European Union, the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) provides that a defendant "shall" be sued in its domicile (Article 2) which, in the case of a company is where it has its "principal place of business" or "statutory seat" (Article 60)

dismissed Shell's challenge, concluding that the claim against the parent was not "unsound or certain to fail", that "the same complex facts in Nigeria must be assessed in respect of the claims against both defendants, and that accordingly that the court had "international jurisdiction" over SPDC.⁴⁶

However until 2005, the English courts had interpreted Article 2 of the Brussels Regulations as allowing dismissal of a case against a UK-domiciled defendant in circumstances where there was a more appropriate forum located in a non-European Union state⁴⁷. It was on this basis that the English courts entertained *forum non conveniens* applications in the *Connelly, Thor* and *Cape PLC* cases (which involved UK-domiciled dependants).⁴⁸

A decision of the European Court of Justice (the highest court across the EU, the decisions of which are binding on the courts of all EU states) in 2005 clarified that the national courts of the EU (including those of the UK) do not have the power to halt proceedings on the grounds of *forum non conveniens* in cases brought against EU domiciled defendants, where the alternative venue is outside the EU.⁴⁹ Consequently *forum non conveniens* is no longer an issue in the UK in these MNC cases. Hence why the *Trafigura* and *Monterrico* litigation was not plagued by this obstacle.

Costs and Resources

In considering the potential for legal action in MNC home courts, the relevance of financial resources, constraints and incentives for claimants' lawyers cannot be overstated. The fact of the matter is that, apart from a few exceptions, claimants' lawyers in MNC home states have shown a distinct lack of enthusiasm for undertaking such cases. The reasons are clear: these cases are complex, risky, hard fought by the MNCs and resource-intensive. Therefore they are expensive to fund, are of uncertain duration and outcome and have significant cash flow implications for the claimants' lawyers. (The MNC lawyers, by contrast, are funded on an ongoing basis irrespective of outcome). Furthermore, the magnitude of the financial risk is such that only lawyers

⁴⁶There is a similar procedural principle in the UK which enables the joinder of a foreign subsidiary to a claim against a UK parent if the subsidiary is a "necessary and proper party" CPR Practice Direction 6B 3.1(3)(b)

⁴⁷In *re Harrods (Buenos Aires) Ltd* [1992] Ch 72

⁴⁸It was however contended, on behalf of the Cape PLC Claimants, that the UK courts had no power to apply the *forum non conveniens* principle to a case involving a UK defendant. In its ruling, the House of Lords concluded that the position was not "acte clair" and that had they found in Cape's favour they would have referred the issue to the European Court of Justice for resolution.

⁴⁹*Owusu v Jackson and Ors* Case C-281/02 [2005] QB 801

who are experienced in this field are likely to feel sufficiently confident to take the risk (or put another way, the perceived risk for lawyers who are new to this field is even greater). That said, if these cases succeed they may potentially be very profitable, thereby increasing the financial incentive for claimants' lawyers with experience and sufficient resources to take on such cases.⁵⁰

The *Connelly*, *Cape PLC* and *Thor Chemicals* cases were publicly funded by the UK Legal Services Commission. This meant that the claimants' lawyers received a regular stream of funding for expenses and legal fees, albeit it not at very high rates.⁵¹ Cases are now run on a no-win no fee basis, a system authorised by legislation in the UK⁵², Australia⁵³ and South Africa⁵⁴, which provides that lawyers are paid only if they win, but if they do win they may charge an uplift fee on their costs. US-style contingency fee agreements, by which lawyers are entitled to a share of a claimant's damages, are expressly prohibited. However it is understood that such damages-sharing agreements are permissible in Canada (at least in Ontario)⁵⁵. A further benefit to claimants suing in the UK has been that the costs uplift (or "success fee") is payable by the unsuccessful defendant, rather than from the claimant's compensation⁵⁶.

The UK government however has recently announced an intention to fundamentally reform the civil costs system, including abolishing the right of successful claimants to recover success fees from the defendant⁵⁷. Success fees, if they were to be paid, would then need to be deducted from claimants' damages (as is the case, for example, in Australia and South Africa). This combined with the introduction of Article 4 and 15 of the Rome II Regulation – which is likely to produce a significant reduction in damages

⁵⁰In Europe, Australia and South Africa, claimants lawyers' tend to form the less wealthy end of the legal profession. Commercial law firms, which undertake a variety of impressive pro bono work in the UK, Australia and South Africa, would be ideally placed, in terms of resources and expertise, to undertake these MNC cases but as they represent MNCs they would invariably be reluctant to act or even conflicted out of acting.

⁵¹Obtaining such public funding in the UK is no longer realistic

⁵²Sections 58 and 58A Courts and Legal Services Act 1990

⁵³See eg s3.4.27 and 3.4.28 Legal Profession Act 2004 (Victoria)

⁵⁴Contingency Fees Act 1997 of South Africa

⁵⁵*McIntyre Estate v Ontario (Attorney General)* [2001] OJ 713 (SCJ)

⁵⁶Section 9.1 Practice Direction to Part 44 of the Civil Procedure Rules 1998

⁵⁷"UK Government response to the consultation on reforming civil litigation funding in England & Wales March 2011"
<http://www.justice.gov.uk/consultations/docs/jackson-report-government-response.pdf>

awards for developing country claimants (see footnote 36) – would effectively rule out recovery of success fees in MNC litigation and consequently reduce the incentive for UK lawyers to take cases on.

Perhaps even more significantly for these MNC cases, the UK government costs proposals include a stricter application of the “proportionality principle”⁵⁸. Due to the complex and protracted nature of this litigation, legal costs are often substantially higher than compensation. If a successful claimant’s legal costs can only be recovered from the MNC to the extent that they correspond to the level of compensation, and further, the level of compensation is reduced (by the Rome II Regulation) in line with compensation in the MNC host state, then this will serve as a powerful deterrent against claimants’ lawyers undertaking these cases.⁵⁹

Class/group actions

For claimants and claimants’ lawyers, the Australian and Canadian legal systems have a potential advantage of providing for class actions, by which a representative claimant may sue for the benefit of a group of individuals falling within the class definition. Once instituted, a class action suspends the limitation period for all class members. Such a mechanism is potentially speedier and far less costly and thus presents less of a financial disincentive for claimants’ lawyers. In Australia, class action legislation has been passed in Victoria⁶⁰ (although the main *OK Tedi* litigation was not brought as a class action). The introduction of class action legislation in the near future in NSW has also recently been announced. Australia also has class action legislation at a federal level⁶¹ but MNC litigation based primarily on common law negligence is generally unlikely to have a federal element and would therefore need to be brought in state courts. Having said that, the recent Australian class action relating to anti-arthritic drug Vioxx was pursued against US manufacturer Merck & Co Inc in the Federal Court alleging breaches of consumer product safety law under the Trades Practices Act.⁶²

⁵⁸Under Civil Procedure Rules Part 1.1 the overriding objective includes “dealing with the case in ways which are proportionate (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party”;

⁵⁹See Section 5 of the Leigh Day response to the Ministry of Justice costs proposals (www.leighday.co.uk)

⁶⁰*Part 4A of the Supreme Court Act 1986 (Vic).*

⁶¹*Part IVA of the Federal Court of Australia Act 1976 (Cth)*

⁶²*Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd & Merck & Co Inc [2010] FCA 180*, a case which the writer initiated in Victoria

In Canada it is understood that class actions are permissible in nine out of ten provinces. Both the Australian and Canadian class action systems are of the “opt out” variety, meaning that members of the class are included in (and bound by) the outcome of the action unless they opt out. This also enables key legal issues to be resolved without instructions having to be taken from large numbers of individual claimants, thereby reducing the level of legal resources required (and their financial disincentive for claimants’ lawyers).

The UK does not have class actions as such, but the procedural rules do provide special procedures for the cost-effective case management of group actions.⁶³ UK group actions are however essentially of the “opt in” variety, which means that commencement of legal action on behalf of a small number of individuals does not stop the limitation clock from running for the remainder of the group. This in turn means that instructions must be taken from all members of the group, thereby increasing the costs and decreasing the financial viability (in comparison with proper class actions).

Procedural and commercial factors over substance

Experience of MNC litigation indicates that procedural issues and factors that may only be peripherally related to the merits of the cases often dominated the litigation:

- (a) The *Cape PLC* case was litigated up and down the UK court system for four years on the issue of *forum non conveniens*, including two hearings in the House of Lords rulings and three in the Court of Appeal. Reasons given by *Cape* as to why the case should be heard in South Africa rather than England included the need to re-create the environmental conditions of an asbestos mine. Yet within a year of losing the hugely costly jurisdiction battle, *Cape* announced that it had run out of money and wanted to settle for a paltry sum.⁶⁴ The *Cape PLC*, *Connelly v Rio Tinto* and *Thor Chemicals* cases would all have ended if the *forum non conveniens* applications had been upheld
- (b) The second *Thor Chemicals* case was settled following a Court of Appeal ruling relating to the Claimants’ application for a declaration under s423 Insolvency Act that a transfer of assets, which had left the *Thor Chemicals* defendant with

⁶³Part 19 Civil Procedure Rules

⁶⁴“*Cape pays the price as justice prevails*” (Richard Meeran, The Times 15 Jan 2002)

virtually no money, was unlawful on the grounds that the “predominant purpose” of the transfer was to defraud the Claimants⁶⁵

- (c) In 2002, injunction proceedings were brought in the Johannesburg High Court against mining parent company Gencor, under legislation which precludes a company from making payments to shareholders when by doing so it would render the company unable to meet its debts⁶⁶. Gencor, whose subsidiaries had operated asbestos mines, had announced an intention to unbundle its assets and distribute the proceeds as a dividend to its shareholders without making any provision for compensation for asbestos victims. The *Cape PLC* claimants – many of whom had also worked at Gencor operations – intervened in the injunction proceedings⁶⁷. Within a matter of months Gencor agreed to establish a substantial settlement scheme⁶⁸ and also to pay a significant sum to the *Cape PLC* claimants

- (d) In October 2009, the *Monterrico* claimants succeeded in obtaining a worldwide freezing injunction over £5 million of the company’s assets ⁶⁹ An ancillary freezing injunction in aid of the UK injunction was obtained in the Hong Kong High Court, *Monterrico* having relocated its corporate headquarters to Hong Kong and announced an intention to de-list from the UK AIM Stock Exchange. Obtaining the injunction was crucial for the claimants, who might otherwise have later found themselves in a position of winning at trial without any assets over which to enforce judgment. The granting of such injunctions could well result in an early settlement (though as it turns in this case, the litigation has continued and is scheduled for a ten week trial from October 2011)

- (e) The key factual issue in determining whether Anvil Mining should bear any liability for the human rights violations perpetrated against Congolese villagers by the military was the circumstances in which the company provided "logistical support" to the military in its operation. Anvil stated that its trucks and chartered planes were requisitioned on the orders of the Congolese government. In 2008 pre-action proceedings for discovery (meant to provide a speedy and cost-

⁶⁵ *Sithole & Ors v Thor Chemicals Holdings & Desmond Cowley* 2000 WL 1421183

⁶⁶ S90 Companies Act 61 of 1973 of South Africa

⁶⁷ “UK law firm adds a new twist in South Africa asbestos case” *Financial Times* 29 September 2002

⁶⁸ The Asbestos Relief Trust www.asbestostrust.co.za

⁶⁹ *Guerrero & Ors v Monterrico Metals plc* 2009 EWHC 2475

effective method for a prospective claimant to evaluate whether or not he/she has a claim worth pursuing) of documents that could shed light on this issue were commenced by sixty-one victims in the Supreme Court of Western Australia.⁷⁰ The company responded with a subpoena for production of claimant documents, which Anvil said was required in order to assess whether the claimants' lawyers should provide security for costs. Anvil's contention, with which the court agreed, was that subject to legal privilege the documents needed to be disclosed and the issue of security for costs determined before the merits of the claimants' pre-action discovery application (which Anvil said it would contest) could be considered. These preliminary issues had the potential to develop into major litigation in their own right. However the application came to an abrupt end when agents of the claimants' lawyers were prevented by the Congolese authorities from travelling to obtain instructions from the claimants and Congolese lawyers assisting the claimants received anonymous death threats.

- (f) A barrage of procedural hearings in the *OK Tedi* litigation, designed to knock the case out, also illustrates the point. These included unsuccessful applications: for security for costs against the plaintiffs; to have the plaintiffs' solicitors punished for contempt of court after speaking out about the case; and to question the validity of the retainer agreement between the plaintiffs and their solicitors. BHP also attempted to halt the case on the basis of the "Mozambique rule"⁷¹ on the grounds that the Victorian Supreme Court could not determine issues relating to land situated in another jurisdiction.

Global collaboration on behalf of victims

A positive development over the past decade has been the increasing global collaboration between public interest lawyers and human rights campaigners in MNC litigation. This has undoubtedly been facilitated by internet communication methods. For example, with regard to the *Monterrico* case:

- (a) the case was referred by US-based Environmental Defender Law Center⁷²

⁷⁰Rules of the Supreme Court of Western Australia 1971 - Order 26A Rule 4 Discovery from a potential party. The writer acted for the Anvil victims for part of these pre-action proceedings.

⁷¹*British South Africa Co. v Companhia de Mocambique* [1893] AC 602

⁷²www.edlc.org

- (b) It has involved Peruvian human rights organisations, Fedepaz,⁷³ and its umbrella organisation, Coordinadora Nacional de Derechos Humanos⁷⁴
- (c) Hong Kong commercial lawyers⁷⁵ acted for the claimants to secure, from the Hong Kong High Court, an ancillary freezing injunction in aid of the English freezing injunction
- d) Swedish lawyers⁷⁶ acted for the claimants in securing the implementation, by the Stockholms Tingsträtt Court, of a request made by the English High Court for the obtaining of evidence from Sweden-based MNC Securitas, the parent company of Forza (Peru), which provided security personnel at the Rio Blanco mine at the time of the alleged human rights violations.⁷⁷

This global cooperation between lawyers involved in MNC litigation has been taken a stage further in the gold miners' silicosis litigation against Anglo American South Africa Ltd in the South African High Court (see Appendix A). Leigh Day is working in conjunction with the South African Legal Resources Centre (which represents the claimants) and eminent South African counsel. South African lawyers and experts are receiving funding from Legal Aid South Africa. This collaborative arrangement may provide a model for similar action in South Africa or the courts of other developing countries.⁷⁸

Conclusion

Tort litigation provides a practically valuable route to achieving the key objectives of MNC accountability for human rights violations in developing countries. Cases can now proceed against home-domiciled MNC parent companies across the European Union, without the obstruction of expensive and protracted *forum non conveniens* disputes.

⁷³ www.fedepaz.org

⁷⁴ <http://derechoshumanos.pe>

⁷⁵ www.gall-lane.com

⁷⁶ Eversheds Södermark Advokatbyrå AB

⁷⁷ The request was made pursuant to the European regulation on cooperation between courts of Member States in the taking of evidence of evidence in civil or commercial matters Article 4 of Council Regulation (EC) No 1206/2001

⁷⁸ Open Letter to the Special Representative of the UN Secretary-General on Business and Human Rights: "The genesis and development of MNC litigation in South Africa and a possible model for the future." 16 Jan 2009 and Statements of SRS in reply dated 19 January 2009 <http://www.businesshumanrights.org/Search/SearchResults?SearchableText=meeran&x=7&y=16>

Class and group action procedures assist in enabling claims to be run by victims' lawyers in a fairly cost-effective manner.

Increasing global cooperation by victims' lawyers - facilitated by the internet - give rise to the possibility of such cases being brought in the victims' local courts, using the combined resources and skill of local and international lawyers.

However, the financial disincentives of these cases to claimants' lawyers are so great that very few lawyers have shown an inclination to run them. Proposed legal reforms in Europe will, if implemented, intensify this disincentive still further.

This approach involves allegations of negligence rather than human rights violations, which may be regarded as diminishing the significance of the harm, but on the other hand has the advantages of (a) simplicity and (b) being potentially applicable to fundamental human rights violations as well as violations of socio-economic rights (whereas ATS appears applicable only to the former⁷⁹).

The commercial reality of costly, high profile litigation (ATS, common law negligence or otherwise) where there is so much at stake for corporations and victims, is that these cases are unlikely to involve a trial on the merits or a finding of liability against MNCs. Indeed, these cases are frequently terminated by procedural applications that are only peripherally related to the merits of the cases. Nevertheless, the financial and reputational implications of these civil actions, and their wider implications for business generally, constitutes a powerful deterrent against corporate wrongdoing.

⁷⁹ *Sosa v. Alvarez-Machain* (03-339) 542 U.S. 692 (2004)

Appendix A: examples of MNC human rights tort cases

The writer has had care and conduct of the following cases:-

The Thor Chemicals Case

This was the first recorded success in England in a case of this type.

During the 1980s, Thor manufactured mercury-based chemicals in Margate, South East England. Health and safety at the Margate factory came under considerable criticism over a prolonged period from the Health and Safety Executive due to elevated levels of mercury in the blood and urine of the workers. In 1986, the company terminated mercury based processes in Margate and shifted its Margate mercury operations, “lock, stock and barrel” – including key personnel and plant – to Cato Ridge, Natal, South Africa. Thor also imported to South Africa 3,500 tonnes of mercury-containing waste for “re-cycling”.

Witnesses alleged that in South Africa, rather than taking effective measures to reduce mercury levels in the working environment, Thor recruited individuals who queued at the factory gate for work each day, allowed them to work until their mercury levels reached the limit and then replaced them with new recruits.

In February 1992, mercury poisoning of South African workers came to light. Three workers (one following a three year coma⁸⁰) died and many others were poisoned to varying degrees. Thor admitted that the three most seriously affected workers had been poisoned by mercury, but contended that this was due to an act of sabotage (a contention that was despatched by a leading mercury toxicologist⁸¹). Thor however denied that any other workers had been poisoned.

The following is an extract from the July 1992 Department of Manpower Inquiry (SA) into Thor, in which Production Manager, Bill Smith, who was also in charge of health and safety in the South Africa factory (and who had been a truck driver in England with no health and safety training) explained his understanding of and approach to mercury burns to the skin (a recognised route of mercury into the body):-

Chairman: "What advice did you give to Mr Hittler [one of the workers] when he complained about his burn?"

⁸⁰"S African workers sue British firm over poisoning" (The Guardian 29 September 1994)

⁸¹"Three cases of methylmercury intoxication which eluded correct diagnosis" L.Magos Arch Toxicol (1998) 72: 701-705

Mr Smith: "I tried to say I couldn't see any burn"

Chairman: "No, that's not the question. The question is, he complained about a burn. He said that he was affected. What advice did you give to him? You may not have seen anything there, but what advice did you give him?"

Mr Smith: "Possibly, I cannot remember really, but possibly let's see what its like in the morning, because it would have - if he was burned, which he ended up as being burnt, he would have come - it would have come out in the night blistered."

Chairman: "Sorry. Have you ever been burnt with mercury?"

Mr Smith: "Yes"

Chairman: "And what treatment was given to you when you were burnt?"

Mr Smith: "Well, I've had quite a bit of experience, and I treat myself"

Chairman: "What treatment, Mr Smith?"

Mr Smith: "No treatment"

Chairman: "So the treatment you give yourself is basically no treatment at all?"

Mr Smith: "No treatment. I just kept it clean."

Chairman: "Wash it, clean it and leave it?"

Mr Smith: "Well I don't particularly wash it. I just keep a loose bandage and lint"

Chairman: "Is that the recognised treatment for a mercury burn?"

Mr Smith: "I don't know. That's my treatment."

The Inquiry led to a criminal prosecution against Thor in the local (Pietermaritzburg) Magistrates' Court, for manslaughter and breaches of health and safety regulations. The case ended in a plea bargain by which Thor pleaded guilty to breaches of health and safety regulations and was fined the equivalent (at the time) of approximately £3,000.

Compensation claims against the parent company (Thor Chemical Holdings Ltd) and its Chairman (Cowley) were commenced in the English High Court on behalf of 20 workers. The claims alleged that the English parent company was liable because of its negligent design, transfer, set-up, operation, supervision, and monitoring of an intrinsically hazardous process. Following a three day hearing in April 2005, Thor unsuccessfully applied to stay the action on *forum non conveniens* grounds, the judge concluding (primarily due to the Margate factory connection and evidence) that South Africa was not a “clearly more appropriate forum”. In October 2005, Thor’s appeal was struck out by the Court of Appeal, Thor having been found to have acceded to the jurisdiction by filing a defence.⁸² In 1997, following a series of hearings concerning the acceptability of Thor’s disclosure of documents and an unsuccessful strike-out application by Thor, the claim was settled for £1.3 million in April 1997.⁸³

A further 21 claims were commenced by workers from the same factory. In July 1998, Thor’s application to stay this second set of proceedings on *forum non conveniens* grounds was dismissed. In January 1999, the Court of Appeal granted Thor permission to continue with its defence of the proceedings⁸⁴.

It then emerged from company documents filed in December 1999 that Thor’s parent company, Thor Chemicals Holdings Ltd (the defendant), had undertaken a demerger which involved transfer of subsidiaries valued at £19.55 million to a newly formed company, Tato Holdings Limited (Tato). At the same time Thor Chemicals Holdings Ltd had been re-named “Guernica Holdings Ltd”⁸⁵ Two weeks before the start of the three-month trial, an application to the court was then made, on behalf of the claimants, for a declaration under section 423 Companies Act 1986 that the “dominant purpose” of the demerger was to defraud creditors, such as the claimants, and it was thus void. Thor and its chairman disputed that this was the purpose, but the Court of Appeal held that in the absence of information to the contrary, the inference that the demerger of Thor was connected with the present claims was ‘irresistible’⁸⁶. The court ordered Thor to pay £400,000 into court within seven days and to disclose documents concerning the demerger. The case was settled on the first day of trial in October 2000.

⁸² *Ngcobo & Ors v Thor Chemicals Holdings Ltd & Desmond Cowley* Times Law Report dated November 10th 1995

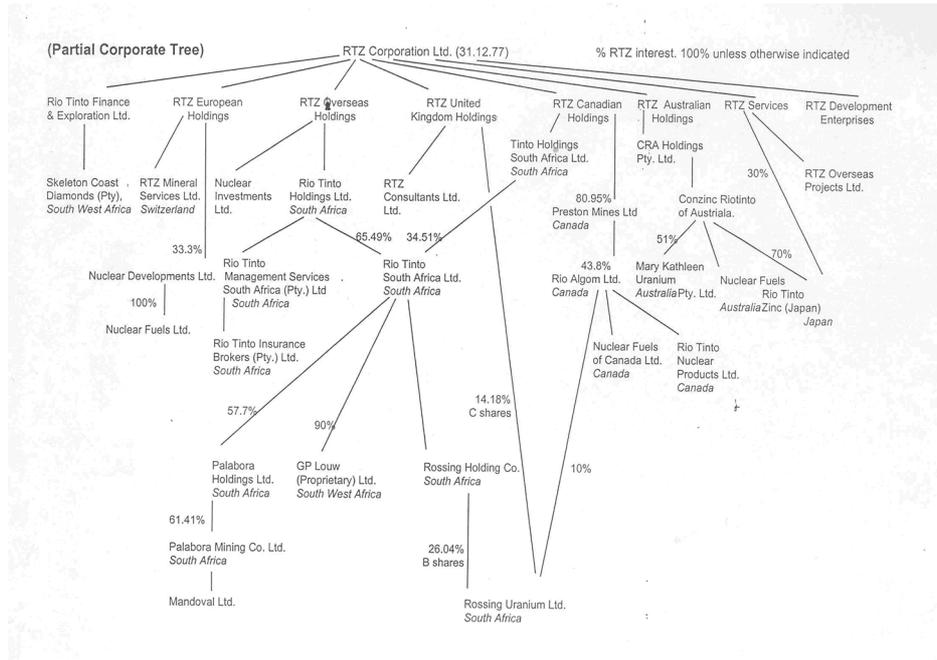
⁸³ “Mercury poisoning victims win £1.3 million in landmark case” UK Independent 12 April 1997

⁸⁴ *Sithole & ors v. Thor Chemicals Holdings Ltd & anr* (CA) 1999

⁸⁵ According to Cowley, this was to symbolise the “fascist attacks” made against the company! “Thor point”: Private Eye (October 2000)

⁸⁶ *Sithole v Thor Chemicals Holdings Ltd* 2000 WL 1421183

Connelly v Rio Tinto



In September 1994, a claim for compensation was brought in England by Edward Connelly, a Scottish laryngeal cancer victim who had been employed at Rio Tinto's Rossing uranium mine in Namibia. His case had been referred by the Legal Assistance Centre in Windhoek, Namibia.

Despite the corporate distance (see above tree) between the UK head office company and the Namibian subsidiary operating the mine, it was alleged that key strategic technical and policy decisions relating to Rossing were taken by the English-based RTZ companies. It was alleged that Rio Tinto had devised the mine's policy on health, safety and the environment and/or had advised the mine as to the contents of the policy. It was also alleged that an employee or employees of Rio Tinto had implemented the policy and supervised health, safety and/or environmental protection at the mine.

In March 1995, Rio Tinto succeeded, initially, in persuading the Court that Namibia was the 'clearly and distinctly more appropriate forum' for the case. Thereafter, the argument focused on whether Mr Connelly's inability to obtain funding to bring a claim in Namibia, when in the UK such funding was available (in the form of legal aid or lawyers willing to act on a 'no win, no fee' basis) meant that the stay of proceedings

should be refused as otherwise justice would be denied. The case went to the Court of Appeal twice before reaching the House of Lords.

On the first occasion, in August 1995, the Court of Appeal held that, in determining whether Namibia was an 'available forum,' section 31 of the 1988 Legal Aid Act precluded the court from having regard to the fact that the plaintiff was unable to obtain funding to litigate in Namibia, but had legal aid to litigate in England. Accordingly, Mr Connelly's appeal was dismissed.

Mr Connelly then applied to lift the stay on the grounds that the funding of his English action had switched to 'no win, no fee' conditional fee agreements – the UK variant of contingency fees – which were made lawful in August 1995. His application was rejected at first instance in October 1995. However, in May 1996 the Court of Appeal, referring specifically to Article 6 of the European Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights, allowed the appeal. Bingham MR stated that:

*"[F]aced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate, in which there never could, in my judgment, and interests of justice tend to weigh, and weigh strongly in favour of that forum in which the plaintiff could assert his rights."*⁸⁷

The House of Lords held, by a 4-1 majority, that Mr Connelly's inability, in practice, to litigate in Namibia meant that the case should be allowed to proceed in England. In the lead judgment, Lord Goff stated that:

*"The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available."*⁸⁸

The decision was greeted with dismay by the business community.⁸⁹ Subsequently the Lord Chancellor (UK Minister of Justice) proposed legislation to reverse the effect of the

⁸⁷ *Connelly -v- RTZ Corporation Plc* [1996] 2 WLR 251

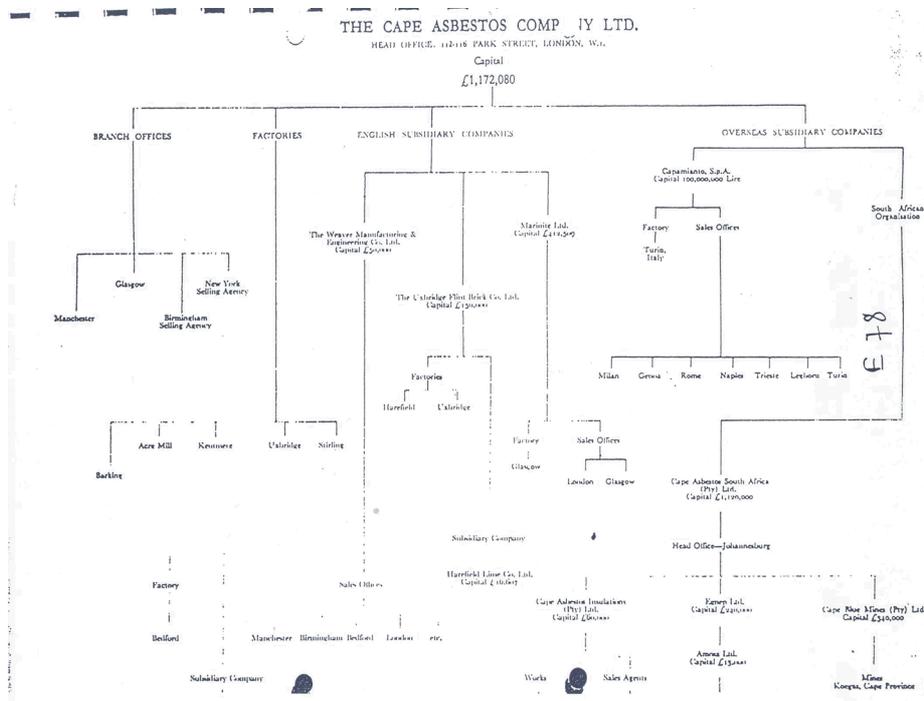
⁸⁸ *Connelly v. RTZ* (CA) (HL) 1998

⁸⁹ "RTZ ruling threatens other multinationals" *Financial Times* 25 July 1997

House of Lords' ruling⁹⁰ but does not appear to have found favour as it was not implemented.

Unfortunately, in December 1998 the High Court struck out Mr Connelly's claim on limitation grounds, concluding essentially that the prejudice to Rio Tinto of allowing the claim to proceed (in terms of tracing witnesses and significant (irrecoverable) legal costs) outweighed the prejudice to Mr Connelly in being prevented from pursuing a claim that would be extremely difficult to prove (in particular the causative link between laryngeal cancer and uranium dust exposure)⁹¹.

The Cape PLC case



This case was referred by the National Union of Mineworkers (UK & SA).

Cape PLC (Cape), an English registered company, was formed in 1893 to acquire asbestos deposits in South Africa and a factory in Italy to produce asbestos-related

⁹⁰ "Mining firm tries to change law to block £100m claims" *The Guardian*, Friday 19 March 1999

⁹¹ Unreported decision of Wright J on 4 December 1998

products from the asbestos mine in South Africa. By 1913, Cape was undertaking crocidolite (blue asbestos) mining in the Northern Cape and had a manufacturing plant at Barking in London. The Northern Cape operations were conducted directly by Cape until 1948, and thereafter through Cape's wholly owned subsidiaries until 1979. In 1925, Cape acquired amosite (brown asbestos) mining operations in Limpopo (formerly Transvaal) province, which were operated through wholly-owned subsidiaries until 1979. Cape also operated manufacturing plants in Turin, Italy, from about 1911 to 1968, and in Benoni, Johannesburg, from about 1940 until about 1986.

Associated with the mines were mills involved in the crushing of the asbestos rock to expose and extract the asbestos fibres. A mill was situated in Prieska (Northern Cape), in the middle of the town next to the old Prieska School. The mill ceased operating in about 1964, but the environmental hazard it had created in the form of general contamination and asbestos dumps persisted. Cape sold its South African mining operations in 1979. In 1981, Gefco, a subsidiary of Gencor, a major South African mining company that was also involved in gold mining, purchased these operations. Up to 1979, Cape and Gefco were by far the largest asbestos producers in South Africa.

Asbestos that was mined and milled in South Africa was converted into asbestos products at the factories in South Africa, Italy and England, and then sold around the world, particularly in the United States. Throughout this chain of production, asbestos-related diseases occurred on a significant scale among numerous groups associated with its miners and millers viz: workers involved in the transportation of asbestos to ports in South Africa; stevedores loading and unloading ships in South Africa and in the United Kingdom; workers utilizing the products; and people living near mining, milling, and manufacturing operations.

Asbestos production in South Africa was driven by demand generated in Europe and the United States; Cape's technical department at the Barking factory designed asbestos products which it marketed worldwide, for example, through Cape's American subsidiary, North American Asbestos Company. When the demand for asbestos grew, the mining increased. When the demand waned, primarily due to pressure from US litigation and US consumers concerned for their own well-being, rather than for the health of South African miners, the South African mining operations ceased. Therefore, far from being a discrete independent business, the Cape South African mining operations were part of an integrated worldwide business.

Asbestos regulations were introduced in the United Kingdom in 1931, and the fact that serious lung diseases could be caused by asbestos exposure was well known to the industry before 1930. Despite this, Cape actively and intensively lobbied to conceal the

nature and extent of the health risks associated with asbestos exposure, in particular the risks associated with exposure to blue asbestos. This helped to ensure the continuation of demand for asbestos from its South African operations. As a direct result, implementation of measures necessary to protect those working with asbestos, including the cessation of the defendant's South African operations, were delayed for many years. Cape closed down its UK factory in Barking in 1968 due to the level of asbestosis in the workforce but continued to operate in South Africa until the 1980s.

Conditions in the South Africa mines were bad and made widespread use of child labour. According to government doctor, Schepers, when he inspected the Penge mine (Limpopo province) in 1949:

*“Exposures were crude and unchecked. I saw young children completely included within large shipping bags, trampling down fluffy amosite asbestos which all day long came cascading down over their heads. They were kept stepping lively by a burly supervisor with a hefty whip. I believe these children to have had the ultimate asbestos exposure. X-ray revealed several to have radiologic asbestosis with cor pulmonale before the age of 12”.*⁹²

In the litigation that ensued in England in the 1990s, a category of claimants emerged, who had been employed as ‘chissa boys’. These unfortunate workers had the task of lighting the fuses after the engineers had planted the explosives. They had to run as fast as they could in order to avoid being blown apart.

A wealth of documentary evidence from government departments reveals high dust levels in the working and surrounding environments, with poor methods of exhaust ventilation and filtration systems in the absence of respiratory equipment. For instance, in Prieska, with the encouragement of Cape, asbestos tailings were used to gravel roads, to construct golf greens and sport fields, and to make bricks and roofing materials used to build houses. According to Cape's Chief Medical Officer, Dr W J Smither in his report in 1962:

“At Prieska, the conditions around and about the mill are not good. The crusher is out of doors. Fibre comes in on the windward side of the mill and is crushed in the open. We saw this opening on several occasions and it was obvious that quite a cloud of dust was being produced and being blown away by a fairly

⁹² Felix M, Leger J-P, Ehrlich R. *“Three minerals, three epidemics: asbestos mining and disease in South Africa.”* MA Mehlman, A Upton, editors. *Advances in modern environmental toxicology*. Vol 22, part 1: The identification and control of environmental and occupational diseases. Princeton Scientific Publishing Co, Inc: USA, 1994, pp 265-286.

strong wind towards the town...the mixer was raised from the floor of the general warehouse area and had a very dusty platform. Men were working below in a rain of dust."

Given the circumstances of Cape's South African operations, any attempt to contest an allegation of negligence is likely to have been untenable.

Due to the insolvency of Cape's South African subsidiaries, the only realistic target for legal action was the parent company, Cape. In February 1997, compensation claims were commenced in the English High Court on behalf of three workers at the Penge mine and two Prieska claimants who had lived in the vicinity of Cape's mill in that town. One of the claimants was the widow of a Prieska resident who had lived near the mill. He and his mother and brother had all died of mesothelioma. None of them had ever worked with asbestos. Multiple family deaths from mesothelioma were not uncommon in Prieska.

Claims were also lodged on behalf of four Italian workers employed at Cape's Turin manufacturing operation. Like the South African operations, the Turin factory was operated by a wholly owned subsidiary of Cape PLC, Capamianto. It too shared directors in common with the UK Company. Predictably also, a number of the Italian workers had developed ARD, including mesothelioma. A criminal prosecution for manslaughter was initiated by the Turin State Prosecutor in 1993 against Capamianto and its managing director. The prosecution was, however, suspended when he was diagnosed with Alzheimer's disease.

Cape applied to stay the South African claims on *forum non conveniens* grounds, contending that the cases ought to be tried in South Africa. In January 1998, following an eight-day hearing spread over six months, Cape's application was granted but on appeal in July 1998, the Court of Appeal reversed this decision.⁹³

In January 1999, two further actions comprising almost 2,000 claims were commenced in England against Cape PLC by South African claimants exposed to asbestos in the same geographic regions of South Africa. Cape re-applied to stay the 2,000 claims on *forum non conveniens* grounds, contending that the emergence of the group was a sufficiently material change to warrant a different conclusion from that of the Court of Appeal in the first five cases. Cape also sought a stay of the first five cases on the grounds that the Court of Appeal had been misled as to the true nature of the case. The court granted a

⁹³ *Lubbe & ORS v Cape PLC* [1998] CLC 1559

stay of all the actions, including the initial five claims. The court concluded that South African legal aid was likely to be available to the claimants to litigate in South Africa.

Subsequently, legal aid was withdrawn in South Africa for all damages claims. Nevertheless, in November 1999, the Court of Appeal dismissed the claimants' appeal, deciding that South African lawyers would undertake the case on a 'no win, no fee' basis. It also decided – on the basis of principles developed in US cases, in particular the *Bhopal* case – that the 'public interest' of South Africans in hearing the case was greater than that of England. Although the vast majority of the claimants did not speak English and many could not read or write, the court found that they would be able to gain access to the scientific, technical, and medical evidence necessary to pursue their case in South Africa.

The claimants appealed to the House of Lords, and the South African Government was given permission to intervene on their behalf in relation to the issue of public interest. Among other things, its representations stated that:

“The South African legal system, as with all South African public services, is under very great financial and administrative pressure, in seeking to right the wrongs of the apartheid regime, to pay its debts, to build the new South Africa. Under the old regime, the majority of South African people did not (in financial or geographical terms) have access to law or lawyers. The new South African Government has embarked on a proactive programme to establish courts in the countryside, particularly in the former black homelands where justice has been seriously neglected, and where people may have to travel over 1000km to the nearest High Court. These services are regarded as high priority, but many have had to be on hold for lack of funds. The current budget of R2,117 billion (£202 million) which is allocated to the Department of Justice is not sufficient to meet the Republic's goals and programs for access to justice. The South African legal aid scheme for claims sounding in damages was abolished in 1999.

The allegations against Cape did not take place in a legitimate legal system, and the new South African Government cannot afford to determine every wrong of the old regime through its judicial system. The discriminatory health and safety laws, which left South African workers unprotected, or significantly underrepresented against known risks as a matter of South African law, were against the common law of humanity. They should have no part to play in determining the cope of the negligence liability of a foreign multinational which operated under those laws.”

In July 2000, in a landmark decision in favour of the claimants, all five Law Lords held that the case should be allowed to continue in the English High Court.⁹⁴ Applying the principle it had developed exactly three years earlier in *Connelly v Rio Tinto*⁹⁵, the court held that a case of such magnitude required expert legal representation and experts on technical and medical issues, none of which could be funded in South Africa.

Further claimants joined the case, so that by August 2001 about 7,500 were registered in the group. Notably, six per cent of this group had worked on the asbestos mines when they were under the age of seven years.

It had been anticipated that Cape, having failed in its bid to halt the claims in the English courts, would wish to negotiate a settlement. However, the litigation continued with a series of hearings in which the argument revolved not around where the case should be heard, but how and in what form it should be heard.

From the claimants' side, it was contended that the only real issue to be resolved was the question of the legal liability of Cape as the parent company. Cape, however, claimed that it wished to contest all issues, including negligence and the medical condition of the claimants. The subsequent developments in the case were largely unconnected with the merits.

In March 1999, it emerged that Cape had instructed political lobbyists on the case and that these lobbyists had advised on a media campaign to discredit the UK Lord Chancellor over the granting of UK legal aid to black South African workers and to label the claimants' lawyers, Leigh Day & Co as "*ambulance chasers*".⁹⁶

⁹⁴ *Lubbe & Ors v Cape PLC 2000 1 WLR 1545 (HL)*

⁹⁵ *1998 AC 354 (HL)*

⁹⁶ [Early Day Motion](#)

EDM 449

CAPE PLC

18.03.1999

Livingstone, Ken

"That this House condemns the activities of Cape plc, a UK-based multinational company which engaged lobbyists, GJW Government Relations Ltd and Media Strategy Ltd, to derail claims brought against Cape plc in England on behalf of hundreds of fatally and seriously injured South African asbestos miners; notes that the lobbyists' written media political and communication audit reports for Cape plc in January 1999 recommended action on behalf of Cape plc, to launch a campaign targeted at the ambulance chasing activities of Leigh Day, the claimants' lawyers, and to encourage the Daily Mail to embarrass the Lord Chancellor by making him have to 'choose between black workers and multinationals (such that) the detail of the claims are likely to be of secondary interest'; and further notes that to achieve these objectives the lobbyists communicated with a variety of senior government sources including the Lord Chancellor's advisers, Gary Hart and Victor

However Cape announced in October 2001 that it was in financial difficulty and that the claimants were in a 'lose-lose' situation. If they continued with the case to trial and lost, Cape would be 'in the clear' but if they fought the case to trial, Cape would exhaust its remaining assets on defending the case to trial.

Negotiations occurred between the claimants and one of Cape's shareholders, Montpellier Limited, and in December 2001, terms of settlement were reached which provided for payment of a total of £21 million through a trust to be established in South Africa. The settlement terms represented a pragmatic solution to the financial reality of Cape's position, rather than reflecting any relation to the true value of the case. The tariffs were to vary for different categories of disease, with mesothelioma/asbestos-related lung attracting the highest awards of £5,250.

Although the evidence justified the claimants' confidence of winning the trial that had been set for April 2001, Cape's financial position was such that it would probably have gone into liquidation if it lost. During the litigation its share value plummeted from £1.50 to £0.11. Had Cape suffered this fate, the only achievement of a court victory might have been to set a precedent for claims against multinationals. Victims would receive only what was available on break-up of the company. Hundreds of claimants had also died during the litigation.

So there was a serious risk that a court judgment would not have translated into real money. The challenge was thus to negotiate the best possible settlement based on what Cape could afford. The claimants' position was that they would rather have taken the case to trial and run the risk of recovering nothing, than accept a derisory amount and see Cape carry on in business. There was to be no repetition of the *Union Carbide* debacle, which left thousands of Indian victims of the Bhopal chemical explosion uncompensated while the American multinational continued to flourish.

How much Cape could afford (or rather was prepared to borrow) was a nebulous concept, being a function of the company's contrasting perspective: a successful defence was the ideal outcome, whereas defeat would mean the end of business. Commercially, settlement was the sensible course, provided that it reflected Cape's assessment of the merits of its defence and enabled it to continue to do business and recover its value. The latter was dependent on whether finality could be achieved, otherwise the settlement would simply be followed by waves of further claims, which

Benjamin, advisers to the Minister of State, officials at the Foreign and Commonwealth Office, Department of Trade and Industry, HM Treasury and Lord Falconer of the Cabinet Office on the grounds that he has 'a very close relationship with both the Prime Minister and the Lord Chancellor.'

would force Cape out of business. This was why Cape stipulated that the settlement encompass all potential claimants in the form of a settlement trust. However, a balance had to be struck: by applying to the trust for compensation, a sufferer would forfeit the right to take court action. If sufferers were to be encouraged to use the trust rather than litigate, payments would need to be sufficiently high.

⁹⁷The December 2001 settlement was generally hailed as a victory⁹⁸ but certain of its terms were unpalatable. For example the condition that the South African government should waive any future claims against Cape PLC in respect of environmental liabilities⁹⁹ (although ultimately, since this settlement collapsed, the waiver was ineffective).

Substantial work was done (on a *pro bono* basis) to establish the trust machinery and to process the claims of the 7,500 victims in accordance with the settlement. Eminent trustees were appointed. Until August 2002, all the indications from Cape were that it fully expected to honour the settlement. It emerged in August, however, that Cape had encountered financial problems and that their bankers were not agreeable to the release of the set amount of money.

Consequently, in September 2002 the litigation recommenced – a blow to claimants who at that point had expected to begin recovering their compensation payments. Due to Cape’s precarious financial position, permission was also sought and obtained to join

⁹⁷“Cape pays the price as justice prevails” (Richard Meeran, *The Times* 15 Jan 2002

⁹⁸“Victory” “The Sowetan” December 2001

Early Day Motion (UK)
EDM 661
15.01.2002

VICTORY FOR SOUTH AFRICAN ASBESTOS CLAIMANTS

McNamara, Kevin

That this House welcomes the agreement, by Cape plc, a British company who mined asbestos in South Africa for several decades, to pay £21 million in compensation to South African asbestos victims; congratulates the 7,500 claimants, the communities of Northern Cape and Northern Province and the National Union of Mineworkers in South Africa, as well as national and regional political leaders in South Africa for the perseverance and dignity of their long struggle for justice; commends the actions of those in the United Kingdom who have worked tirelessly to support the claimants, including the lawyers of Leigh, Day and Co and John Pickering and Partners, and the staff and activists of pressure group Action for Southern Africa, as well as many trade union members in the United Kingdom; believes that this settlement represents a contribution to the ongoing process of truth and reconciliation in South Africa, particularly through the recognition of the role of United Kingdom based businesses in the injustices of the past; notes with concern that many multinational companies continue to neglect the health and safety of their workers; and welcomes the signals given by this case that the British public now demands concrete action to back up the warm words of corporate social responsibility.

⁹⁹“Government should not accept the Cape Plc settlement deal” NUM (South Africa) press statement 13 February 2002

Gencor as a co-defendant to the English proceedings. Gencor's subsidiary, Gefco, had been a major asbestos producer in South Africa from about the same time as Cape and had bought the Cape subsidiaries in 1981. Many of the Cape PLC claimants had also worked at Gencor-owned operations.

In 2002, shortly before the collapse of the December 2001 Cape settlement, another group of South African asbestos victims instigated injunction proceedings in the Johannesburg High Court against Gencor under legislation precluding a company from making payments to shareholders when by doing so it would render the company unable to meet its debts¹⁰⁰. Gencor, whose subsidiaries had operated asbestos mines, had announced an intention to unbundle its assets and distribute the proceeds as a dividend to its shareholders without making any provision for compensation for asbestos victims. The *Cape PLC* claimants – many of whom had also worked at Gencor operations – intervened in the injunction proceedings.

On March 2003, two settlement agreements were signed on behalf of the *Cape PLC* Claimants:

1. A new settlement with Cape PLC for the 7,500 claimants with a one off payment of £7.5 million by Cape PLC
2. A settlement between the 7,500 claimants and Gencor for approximately £3 million. All settlements were contingent on Gencor's completing its unbundling, the deadline for which was set at 30 June 2003. In fact, Gencor did unbundle on 18 June, 2003.

Whilst the *Cape* settlement undoubtedly constituted a powerful deterrent against MNC human rights violations, subsequent research indicated that the litigation experience, at least for one of the more isolated communities involved in the case, had not been empowering.¹⁰¹ No doubt this sentiment was partly due to the amounts of money paid to each claimant, which reflected the overall value of the settlement and Cape's parlous financial position.

¹⁰⁰ S90 Companies Act 61 of 1973 of South Africa

¹⁰¹ "When Social Movements Bypass the Poor: Asbestos Pollution, International Litigation and Griqua Cultural Identity" By Linda Waldman - 2005 ISBN 1 85864 8750

Silicosis test cases by South African gold miners against Anglo American¹⁰²

This case was referred by a South African victims' support group following the Cape PLC settlement.

A number of test cases against Anglo American South Africa Ltd for former Free State gold miners and their families, who contracted silicosis and silico-tuberculosis, have been ongoing in the Johannesburg High Court since August 2004.

Although Anglo American is now headquartered in London, the defendant is the Anglo American Corporation of South Africa, the former parent company of the Anglo group. This parent company was the technical adviser and consulting engineer to the whole group. It is alleged that it negligently failed in its duty to advise its operating companies on matters concerning occupational health and safety.

A series of published scientific studies over the past decade have shown black South African former gold miners to be suffering from consistently high rates of silicosis and TB.¹⁰³ In an industry which employs hundreds of thousands of miners, experts estimate that there are tens of thousands of victims of these diseases. Those worst affected are miners in the former "bantustans" and neighbouring states from where migrant labour for the mines was drawn during apartheid. The cause of this epidemic is excessive dust to which miners were subjected, unprotected. Black miners undertook the dustiest jobs and were at greatest risk.

That excessive dust exposure on gold mines caused silicosis and TB in gold miners was well understood by the mining industry for well over a century, as were the methods required to protect miners from dust. It would appear (at least during the apartheid era) that the industry's hunger for profit combined with totally incompetent oversight of dust control by the Department of Minerals & Energy (SA) meant that miners' health was sacrificed. Also important here was the absence of any realistic mechanism by which impoverished miners could obtain legal redress and hold the industry to account legally.

¹⁰² The writer is coordinating the legal action, in which the plaintiffs are represented by the South African Legal Resources Centre.

¹⁰³ "The burden of silicosis, pulmonary tuberculosis and COPD among former Basotho goldminers." Girdler-Brown BV, White NW, Ehrlich RI, Churchyard GJ. *Am J Ind Med.* 2008 Sep; 51(9): 640-7.

"Prevalence of occupational lung disease among Botswana men formerly employed in the South African mining industry." Steen TW, Gyi KM, White NW, Gabosianelwe T, Ludick S, Mazonde GN, et al. 1997. *Occup Environ Med* 54(8): 19-26.

"Prevalence of occupational lung disease in a random sample of former mineworkers, Libode District, Eastern Cape Province, South Africa." Trapido AS, Mqoqi NP, Williams BG, White NW, Solomon A, Goode RH, et al. 1998. *Am J Ind Med* 34(4): 305-313

Miners' risk of contracting silicosis and TB as a result of their dust inhalation does not end when they leave employment on the mines, but continues for the remainder of their lives. For those living in rural areas where TB is endemic and where medical facilities have been rudimentary or non-existent, TB has frequently not been diagnosed or treated until serious permanent lung damage has occurred (or worse). Miners returning from the mines with TB, and susceptible miners who contract TB, may then infect members of their families and communities. Eminent occupational medicine specialist Professor Tony Davies has publicly described the situation as a "*river of disease flowing out of South African mines*".¹⁰⁴

The extent of the disregard for miners' health was graphically illuminated in the evidence given to, and the report of, the Leon Commission in 1994. This led to more stringent health and safety legislation. In 2002, government and the mining industry also signed up to a "Silicosis Elimination Program", the goal of which is said to be the elimination of further cases of silicosis by 2013.

Regarding former miners' ongoing risk of silicosis and TB, the mining industry has been well aware of the problem for decades but still appears to be taking the view that once miners have left employment, they are no longer the responsibility of the industry (even though these ongoing health risks are directly attributable to excessive dust exposure on the mines). The statutory compensation system (administered by the Compensation Commissioner), on which sick miners, unable to work, depend, is seriously flawed and inaccessible to many miners, for example those in the Eastern Cape, and totally inaccessible to miners living in Lesotho. The result is that a substantial proportion of the victims are left uncompensated.

¹⁰⁴ "*Dust in goldmines gave thousands lung disease says lawyer*" The Guardian 18 November 2009

Monterrico Metals PLC

45% Zijin Mining Group Co. Ltd	35% Tongling Nonferrous Metals Group Holdings Co., Ltd	20% Xiamen C&D Inc.
↘	↓	↙
<i>Xiamen Zijin Tongguan Investment Development Co. Ltd. ("Zijin")</i> Owns ↓ 100% <i>Monterrico Metals plc</i> Owns ↓ 100% <i>Copper Corp Ltd (Caymans Islands company)</i> Owns ↓ 100% <i>Rio Blanco Copper Ltd (Cayman Islands company)</i> Owns ↓ 99.98% <i>Rio Blanco S.A. (Peruvian company)</i> Owns the Rio Blanco mining interests		

In June 2009, proceedings were commenced against Monterrico Metals PLC in the English High Court on behalf of 33 indigenous Peruvians allegedly tortured and mistreated at Monterrico's Rio Blanco mine in August 2005 following an environmental protest. The claimants allege essentially that Monterrico was complicit in the torture and mistreatment by the Peruvian police (an allegation that is strongly contested by Monterrico).

Monterrico was incorporated in England and purchased in 2007 by the Xiamen Zijin Tongguan Investment Co Ltd (a Chinese consortium), when it shifted its corporate headquarters from London to Hong Kong. Monterrico's principal asset is the Rio Blanco mine. Monterrico owns all the shares in Copper Corp Limited (Cayman Islands); Copper Corp Limited owns all the shares in Rio Blanco Copper Limited (Cayman Islands); Rio Blanco Copper Limited owns 99.98% shares in Rio Blanco Copper SA (Peru). Rio Blanco Copper SA owns the Mine.

In May 2009, Monterrico had announced an intention to de-list from the AIM UK stock exchange on 3 June 2009. It is accepted that this was for genuine commercial reasons and that there was no intention to dispose of assets in relation to these claims, but there were concerns that the transfer of assets out of the UK might make the claimants' legal action here futile.

On 2 June 2009, a worldwide freezing injunction was granted to the Claimants by the High Court. This prohibited Monterrico from disposing of assets to an extent that would leave Monterrico with less than £7.2 million. The injunction application was made in the absence of Monterrico. A further hearing occurred on 8/9 July, with both parties present when Monterrico argued there was no justification for freezing its assets as the claimants did not have an arguable case against Monterrico. Monterrico said it could not be held responsible for the conduct of the police and vigorously denies that its officers or employees had any involvement with the alleged abuses.

Hong Kong solicitors, Gall & Lane, were then instructed on behalf of the claimants. On 5 September a freezing injunction was granted by the Hong Kong High Court over Monterrico's assets in Hong Kong.

On 16 October 2009, Mrs Justice Gloster ruled that the Claimants had a 'good arguable case' against Monterrico and that company assets of £5 million should remain frozen.¹⁰⁵

The proceedings have occurred at quite a pace and the case is scheduled for a ten week trial commencing in October 2011.

¹⁰⁵ 2009 EWHC 2475 & [2010]