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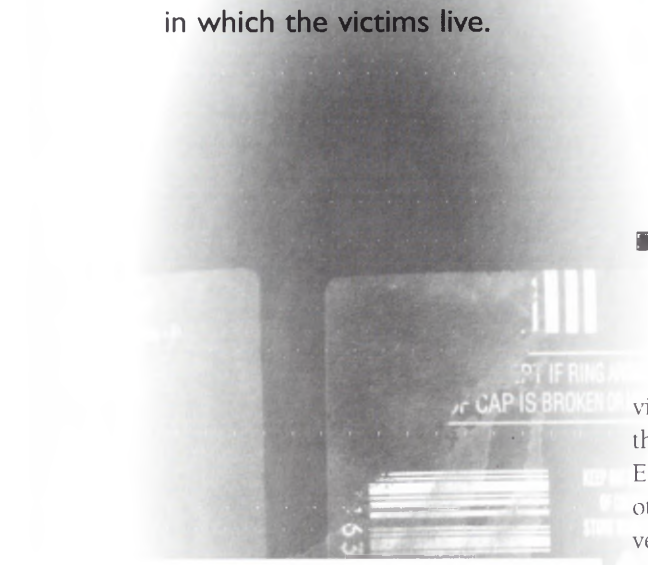
Multi-nationals may pay a price but THERE ARE OTHER ISSUES

Last month's House of Lords decision that 3000 South African asbestos disease victims will be allowed to sue the English multi-national company Cape PLC in London, has wide-reaching implications. It means that other multi-national companies based in England may be held accountable in English Courts for injury and disease suffered by South Africans and others in the developing world, if there is no funding to bring court actions in the countries in which the victims live.



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The only reason that the House of Lords, in a humane and unanimous decision, allowed the South African asbestos disease victims to litigate in England, is that there is still legal aid for the case in England, whereas there is no legal aid or other funding in South Africa. It was a very simple point, extracted from a mass of documentation, including over 160 legal authorities.

Cape unwittingly demonstrated the lack of funding for the case in South Africa by offering a Johannesburg academic lawyer a sum of money to fund the action in South Africa against itself. Understandably, he questioned the ethics of such an unusual arrangement.

This is how Lord Bingham put it in the House of Lords decision:

"If these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and the expert evidence which would be essential if these claims were to be justly decided. This would amount to a denial of justice. In the special and unusual circumstances of these proceedings, lack of the means in South Africa to prosecute these claims to a conclusion provides a compelling ground...for refusing to stay the proceedings here."

This conclusion overruled last year's Court of Appeal decision, which referred to the tradition of public service in the legal profession in South Africa, and stated that legal representation would be available for claims in the South African Courts.

Pill LJ, in the Court of Appeal, stated:

"Moreover, given the accessibility to the wealth of scientific, technical and medical evidence available in this context, I am confident that it could be made available in a South African court to the extent required to achieve a proper consideration of the plaintiffs' cases. The action would by no means be novel or speculative."

No one knows how long legal aid will remain available in England for such cases. At the moment, multi-party or mass tort actions with a public interest factor come within the scope of the recently curtailed civil legal aid system and there are no plans to change this. It is not difficult to imagine that, with or without a change of government, there will be intensive lobbying from industry that it should be protected from this colonial legacy by the removal of legal aid in this type of case.

A detailed investigation of internal corporate arrangements will be the first stage in any case brought by South African workers against a British multi-national. There is an emerging pattern of such cases - RTZ, Thor, and Cape have already been sued in the English courts on behalf of African workers. Every case will be different.

Very few companies have the bottomless pockets to pay compensation to an open-ended and growing group of victims. Obscure and complex insurance and re-insurance arrangements they had 25 or 30 years ago may become vital to both sides. These arrangements can be clouded in secrecy. There are conflicts of interest between companies, insurers and re-insurers, when each of them is potentially exposed on such a large scale.

In order to win such a court action against an English company, South African or other workers must prove control was exercised from England by the parent multi-national.

The issue was put this way in the Cape PLC case:

"Whether a parent company which is proved to have exercised de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risk 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 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."

The key word is "control".

Industrial diseases, particularly asbestos-related diseases, take a long time to develop. Mesothelioma, a cancer which attacks the lining of the lungs or abdomen, takes at least 10 years to develop after exposure to asbestos, but it can often take 40 or 50 years. What matters, if such cases are to be won, is the control exercised from Britain 25 or 30 years ago.

The arrangements between British parent companies and their South African and probably other subsidiary companies were different in nearly every case. Some subsidiaries were very tightly controlled from Britain, others operated almost independently.

In 1973 there was a British Government Report called "Wages and Conditions of African Workers employed by British Firms in South Africa." 141 British companies with business interests in South Africa gave evidence for this report. They included British Leyland, Unilever, Metal Box, GEC, Slater Walker, Barclays Bank, Cadbury Schweppes, British Oxygen, Dunlop Holdings, Great Universal Stores, Consolidated Gold Fields and many others. In 1973, British companies employed over a third of a million workers in South Africa. About a half of the companies were in manufacturing, a fifth in services, and a tenth in mining. This report analyses the variations in control and responsibility exercised from Britain: "The presence of one or more of its directors on the board of the South African affiliate should assist the parent company to exercise control or influence. In many British companies, a particular director or directors - normally appointed to the South African Board - were given responsibility for monitoring, influencing or liaising with the South African affiliate. Many had a Main Board director on the board of a wholly-owned or partly-owned subsidiary...In a number of cases - for example B.L.M.C., Slater Walker, Chubb & Son, the George Cohen 600 Group, and Glynwed – the parent company was represented by its chairperson. In the case of Palabora Mining Company, in which Rio Tinto-Zinc (RTZ) had a controlling interest, four of the 15 members of the Palabora board were directors of RTZ."

The largest investor in South Africa covered by this enquiry was Charter Consolidated, which had book value investments in South Africa in 1973 of nearly £150 million. Its investment was spread over many areas, most of it in companies in which it held about 10% of shares. This included the Anglo-American Corporation of South Africa which, together with its closely associated companies, accounted for 70% of Charter Consolidated's total investments in South Africa. The Chair of Charter Consolidated denied that it could exercise any form of control over its investments, but said that it *could exercise some influence*. British Steel Corporation (BSC) on the other hand, stated that it "is concerned as to the employment policies of all the companies in which it directly or indirectly owns even minority interests in South Africa and elsewhere throughout the world, and has consistently used such influence as it possesses in those companies to further the improvement

of working conditions and to ensure that they at least keep pace with the best current practices of good industrial employers in the country concerned." That begs the question of whether a British multi-national should be judged by standards of working conditions in Britain or by standards prevailing in the country in which it has invested.

Almost all the British companies which expressed a view for this report "acknowledged a responsibility in relation to the wages and conditions of African employees in their affiliated companies in South Africa. Among them can be mentioned RTZ, Associated Portland Cement, Imperial Chemical Industries (ICI), British Oxygen, Jessel Securities and Armitage Shanks. Virtually no company disclaimed responsibility in evidence."

The authors of the report make the comment: "However it is one thing to accept responsibility and another to act upon it."

The Report states that British companies with scores or even hundreds of branches abroad had little possibility of control of any but the most important policy issues, "but the wages and conditions of African workers in their South African affiliates are of such importance to the reputations of parent companies that they must necessarily have a responsibility in formulating broad policies."

It concludes with a statement that "it is right for British companies to accept a responsibility in relation to the wages and conditions of South African employees in their business interests in South Africa, insofar as the companies have the power to control or influence those wages and conditions. The wages and conditions of African employees are an important issue, on which the parent company is advised to formulate certain broad policies."

The new accountability of multinationals in the country in which they are registered and based, and what tests the Courts will apply to the meaning of "control" exercised by parent companies over foreign subsidiaries, are exciting and important issues. As of now, nobody knows where this will ultimately lead.