Holding multinationals to account: recent developments in English litigation and the Company Law Review I

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INTRODUCTION

This paper considers a specific question that has been highlighted in recent years by the growing concern over the operations of multinational enterprises (MNEs). How and to what extent should MNEs be subject to specialised regulation through laws and rules relating to their activities as cross-border corporate groups? In particular, should parent companies be directly responsible for the acts of their overseas subsidiaries by reason of specific rules of liability for those acts? Furthermore, should MNE groups be more accountable for their operations by reason of disclosure and governance systems that are adapted to the transnational nature of those operations? Such questions would appear to be exactly of the kind that a comprehensive review of company law should be addressing, if it is to be rooted in the realities of increased international economic integration encouraged by the transnational business practices of MNEs.

In the event, and rather surprisingly, the Company Law Review Steering Group had little to say on these very important questions. Indeed, the issue of corporate groups was introduced only at a later stage in the Review process and consisted of a single chapter in the November 2000 Consultation Document *Modern Company Law for a Competitive Economy – Completing the Structure* (DTI, London, November 2000, Chap. 10) – hereafter *Completing the Structure*. In that chapter, there is little said by the Steering Group on the specific question of group liability for tortious acts of affiliates, let alone on the specific problems surrounding MNE accountability. More strikingly, the Final Report of the Steering Group, published on 26 July 2001, contains nothing on corporate groups. Neither the Foreword, nor the opening chapter on 'Guiding Principles, Methods and Output', offers any explanation for this omission (see The Company Law Steering Group, *Modern Company Law for a competitive Economy Final Report,* (DTI, London, 2001), Vol.1 – hereafter *Final Report*). In the meantime, litigation involving the liability of UK-based parent companies for the acts of their overseas subsidiaries has been instituted, and is continuing, before the English courts, raising precisely the kinds of issues outlined above. The principal cases, which involve Cape Plc and Thor Chemicals as defendants, arose out of the operations of the subsidiaries of these English-based parent companies in South Africa. In the *Cape case*, the litigation has arisen out of the exposure of large numbers of employees and local residents to asbestos mining and milling operations undertaken by the subsidiaries of Cape, with attendant consequences to the health of the claimants (see further Peter Muchlinski, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Case' (2001) 50 *International and Comparative Law Quarterly* 1). In the *Thor case*, the parent company has been pursued for the exposure of employees in its South African subsidiaries to highly toxic chemical processes that are in fact unlawful in the United Kingdom, but which were moved out of the English jurisdiction to South Africa (see Richard Meeran, 'Liability of Multinational Corporations: A Critical Stage in the UK' in *Liability of Multinational Corporations Under International Law* (Menno Kamminga and Sam Zia-Zarifi ed., Kluwer Law International, The Hague, 2000), p. 251).

The question of holding MNEs to legal account for the consequences of their unlawful actions has been a recurring theme in litigation over the past two decades. MNEs, in common with all advanced enterprises, whether national or multinational, have the potential to harm very large numbers of people through the use of hazardous technologies. However, unlike national enterprises, MNEs apply such technologies in their worldwide operations. Where such a technology injures people in the overseas location in which it is used, this may lead to transnational mass tort litigation, as was the case in relation to the Bhopal accident in India in1984. Indeed, the consequences of this litigation have yet to be finally resolved some 17 years on (for regular updates on the current legal situation in the continuing litigation visit http://www.bhopal.net/legal.html).

It is the aim of this paper to analyse the principal legal and policy issues raised by such cases, as seen in the context of the business and industrial organisation of MNEs (see further Muchlinsk, *Multinational Enterprises and the Law* (Blackwell Publishers, Oxford, revised paperback edition, 1999) at Chapters 3, 9 and 10). It is in the context of this analysis that the work of the Company Law Review Steering Group will be considered. Though, as already noted, the wider discussion of corporate governance and accountability in relation to groups was rather limited, the Steering Group did offer a view on the question of group liability in tort and also considered the question of accountability, in particular, by suggesting some new methods of group governance based on the concept of an 'elective' regime for groups. These matters will be examined more closely in the third section of the paper, as will the likely reasons for the Steering Group's reticence on these important issues.

Before that is done, the paper will begin with an overview of the conceptual issue of MNE parent company liability for the tortious acts of its affiliates, with a view to the development of possible arguments concerning the existence of a duty of care on the part of parent companies of a MNE for the infliction of personal injuries upon claimants at the hands of their overseas subsidiaries. This demands an excursus into the literature on the organisation of MNEs. That literature is vast. Furthermore, there is no single definitive theory of the growth and operation of MNEs, whether in economics, business studies or economic and business history. However, certain general themes can be identified and these can be used to structure an argument for the existence of the above-mentioned duty of care.

Attention will then turn to the issues raised by the recent United Kingdom litigation. Thus far judicial decisions have dealt with only one of the two principal issue areas around which MNE group liability is determined, namely, jurisdiction over the parent to answer for the acts of its overseas subsidiary in the host country where the alleged harm is suffered. The second question, that of the existence of a duty of care and of group liability for harm caused by overseas subsidiaries to overseas claimants, has yet to be decided, at least under English law. A decision on this issue of substance is unlikely in the near future. The Cape litigation will not be heard until April 2002 (see 'Date set for South African miner's battle with UK firm', *The Observer*, 27 May 2001, p. 6). Indeed, such cases rarely come to a final decision on the merits as, once jurisdiction is accepted, the case will often go to settlement. This occurred in the Bhopal litigation and in Thor Chemicals. Accordingly there is a dearth of judicial pronouncement on this matter and much remains in the realm of speculation based on the existing state of the law, and on what that law should be, but see for an exceptional decision finding MNE parent liable for the acts of its overseas subsidiaries *The Amoco Cadiz* [1984] 2 Lloyd's Rep 304, and for a decision holding that the parent cannot be liable due to its separate corporate existence from the subsidiary *Briggs v James Hardie & Co Pty* (1989) 16 NSWLR 549. Thus, in the third part of this paper, the wider questions of MNE accountability will be examined in the light of the general question posed above and, as mentioned, in the light of the views of the Steering Group.

THE CONCEPTUAL FRAMEWORK: THE BUSINESS ORGANISATION OF MNES

In order to determine whether a parent company should be liable for the tortious acts of its subsidiary, it is necessary to prove that, on the basis of the relationship between them, the parent can *justifiably* be held so liable. In legal terms that requires proof, either, that the parent has acted as a joint tortfeasor with its subsidiary, as in *The Amoco Cadiz*, or, that the subsidiary acted as the agent or *alter ego* of the parent when committing the alleged tort. In either case the evidential basis for such a finding will emerge from the actual business organisation of the MNE. Thus, in order to develop a clear theory of parent company responsibility, it is, first, necessary to understand something of that organisation.

A good starting point is to review certain common definitions of MNEs (see further Muchlinski, *Multinational Enterprises and the Law*, mentioned above, pp. 12-15). These have moved from a simple definition of MNEs as 'corporations.... which have their home in one country but which operate and live under the laws and customs of other countries as well' (definition by David Lillienthal, quoted by D K Fieldhouse in 'The Multinational: a critique of a concept', *Multinational Enterprise in Historical Perspective* (Teichova *et al.* ed., Cambridge University Press, Cambridge, 1986), p. 10), to a more economic conception as any enterprise which, 'owns (in whole or in part), controls and manages income generating assets in more than one country' (see N Hood and S Young, *The Economics of the Multinational Enterprise* (Longmans, London,

1979), p. 3. See also J H Dunning, *Multinational Enterprises and the Global Economy* (Addison-Wesley, Wokingham, 1993), pp. 3-4 and Richard Caves, *Multinational Enterprise and Economic Analysis* (2nd ed., Cambridge University Press, Cambridge, 1996), p. 1). This last definition distinguishes an enterprise that engages in *direct investment* – that is investment which gives the enterprise not only a financial stake in the foreign venture but also managerial control – from one that engages in *portfolio investment*, which gives the investing enterprise only a financial stake in the foreign venture without any managerial control. Thus the MNE is a firm that engages in *direct investment outside its home country*. The term 'enterprise' is favoured over 'corporation' as it avoids restricting the object of study to incorporated business entities and to corporate groups based on parent/subsidiary relations alone. International production can take numerous legal forms. From an economic perspective the legal form is not crucial to the classification of an enterprise as 'multinational' (see Muchlinski, mentioned above, p. 12).

The most recent general definition of MNEs can be found in the *OECD Guidelines for Multinational Enterprises*, revised in June 2000. According to this definition such enterprises:

'... usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.'

(The above definition can be found in OECD Guidelines for Multinational Enterprises, I Concepts and Principles, 27 June 200, para. 3: see *http://www.oecd.org/daf/investment/guidelines/mnetext.htm* at p. 3. For the old version of this paragraph see OECD Guidelines 1991 Review (OECD, Paris, 1994, 1997) and Muchlinski, *Multinational Enterprises and the Law*, mentioned above, p. 13. The old version of this definition, which stressed control even more strongly by way of reference to the ability of one company to control the activities of another company located in another country, had been substantially adopted in the final version of the proposed text of the now shelved United Nations Draft Code of Conduct on Transnational Enterprises, UN Doc. No. E/1990/94 (12 June 1990), para. 1 at p. 5.)

The crucial characteristic of a MNE is, according to the above definition, the ability to co-ordinate activities between enterprises in more than one country. Other factors are not decisive. The definition is therefore, broad enough to encompass both equity and non-equity -based direct investment, regardless of the legal form, or ownership structure, of the undertakings. It also reflects the more recent trend in academic literature to move away from a simple, classical model of the MNE as a hierarchical 'pyramid' with the parent as the directing 'brain' of the company and the subsidiaries as its subordinate organs, with emphasis on line management though divisionalised corporate structures, towards a more flexible organisational form where subsidiaries are given more initiative over major decisions and to which significant strategic functions may be devolved. In addition, these more recent models stress the trend in more modern industries, that are not so dependent on economies of scale in manufacturing, to develop more open 'hierarchical' management structures and more readily to establish strategic alliances with other firms as and where necessary. For a general overview of the early and more recent thinking on MNE business organisation see: Muchlinski, mentioned above, pp.57-61, Dunning, *Multinational Enterprises and the Global Economy*, Chaps 8 and 9, and Caves, *Multinational Enterprise and Economic Analysis*, Chap. 3. As an example of the early approach see further D Channon & M Jalland, *Multinational Strategic Planning* (MacMillan Press, London, 1979), Chap. 2. A leading statement of the more recent 'hierarchical' approach is C Bartlett and S Ghoshal, *Managing Across Borders: The Transnational Solution* (Century Business, 1989), Part I, pp.1-71. Also useful is Hedlund, 'The Hypermodern MNC: a hierarchy?' (1986) 25 *Human Resource Management*, pp.9-36, which some see as the first paper to use this term. Julian Birkinshaw stresses a new 'Internal Market' perspective on MNE management in his new work *Entrepreneurship in the Global Form* (London, Sage Publications, 2000) especially at Chapters 1 and 8.

This trend towards more open types of business organisation has given rise to two further developments in thinking on the business organisation of MNEs. First, the earlier theories of MNE growth have tended to explain the growth of the hierarchically integrated MNE. (General overviews of the various early theories of MNE growth can be found in: Muchlinsky, *Multinational Enterprises and the Law*, mentioned above, Chaps 2 and 3; Dunning, *Multinational Enterprises and the Global Economy,* Chaps 3 and 4; Hood and Young, *The Economics of the Multinational Enterprise,* Chaps 1 and 2; Caves, *Multinational Enterprise and Economic Analysis,* Chaps 1-3. For a very useful discussion of the major trends in economic theory concerning the growth of MNEs that is accessible to non-economists see: C Pitelis and R Sugden, *The Nature of the Transnational Firm* (Routledge, London, 1991) especially John Cantwell: 'A Survey of Theories of International Production', p. 17. Also useful is Geoffrey Jones, *The Evolution of International Business* (Routledge, London, 1996), Chap. 1). They emphasise the ownership of specific competitive advantages by firms, the locational advantages of investment destinations and the 'internalisation' of markets into the corporate group of the MNE on the basis of the lower transaction costs that such a strategy offers. (Professor John Dunning has brought these approaches

together into the so-called 'eclectic paradigm' of MNE growth. Professor Dunning explains the 'eclectic paradigm' in his textbook mentioned above. For further readings see: J Dunning, *International Production and the Multinational Enterprise* (Allen and Unwin, London, 1981), Chaps 1 and 2; J Dunning, *Explaining International Production* (Unwin Hyman, London, 1988) especially at Introduction and Chaps 2 and 12).

Such theories are being modified so that they can be made more useful in explaining the emergence of co-operative relationships between firms. Thus, for example, according to Professor Dunning, strategic alliances arise so that the competitive advantages of the participating firms can be combined through the new co-operative form of the enterprise, which then behaves much like a single integrated business, taking advantage of its collectively internalised advantages in global markets. (Professor Dunning has adapted the 'eclectic paradigm' in relation to strategic alliances in *Alliance Capitalism and Global Business* (Routledge, 1997) of which Chapter 3 provides a useful summary). Secondly, both among economists and business management experts, there is now a shift in emphasis away from theories of why MNEs develop in the first place, and how they tackle the problems of managing an evolving multinational business, to questions of how already established MNEs further develop and manage their operations. (Thus Mark Casson emphasises the need for a new research agenda that looks at the flexibility of MNEs in relation to global economic stimuli of his new edited book *Economics of International Business: A New Research Agenda* (Edward Elgar, Cheltenham, 2000). See also Birkinshaw mentioned above, at Chap. 7).

How is this knowledge to be used when constructing arguments for and against the creation of duties of care incumbent on parent companies for the acts if their subsidiaries? From the perspective of the United Kingdom litigation in Cape, the business organisation of this firm at the time relevant for the contested claims would have been that of a hierarchical parent-subsidiary group, typical of early MNEs operating in high risk, capital-intensive extraction industries where economies of scale are important (see further Jones, mentioned above, at Chap. 3. The corporate organisation of Union Carbide Corporation in the Bhopal case displayed similar characteristics. See further Muchlinski, 'The Bhopal Case: Controlling Ultra hazardous Industrial Activities Undertaken by Foreign Investors' (1987) 50 *Modern Law Review* 545). Cape thus appears to fit into the theoretical model of the closely controlled, managerially centralised, MNE. On the other hand, the defendants have maintained that their operations were devolved to their South African affiliates in 1948. Thus, they may wish to argue that their corporate structure fitted more into the 'hierarchical' model of more recent literature, with considerable autonomy being granted to local managers. (See further Birkinshaw, mentioned above). Although such an argument may not be historically accurate, it may impress a court.

Against this background, caution needs to be exercised on how contemporary ideas on the business organisation of MNEs should be used when constructing legal duties of care. First, much of the more recent literature on open and flexible forms of corporate organisation relates primarily to newer high technology industries such as information technology or advanced product manufacture. It does not relate to older forms of MNE organisation, which might still appear before the court. Thus, when reviewing evidence of the business organisation of the defendant MNE, sweeping generalisations, based on a literal reading of the academic literature, about the 'general' organisation of MNEs should be avoided. At most such literature can offer models of business organisation against which the defendant enterprise's actual organisation may be compared. Secondly, none of the more recent literature predicts the imminent end of the hierarchical multinational corporate group, just that this form of enterprise has a specific application to specific industries. (See Birkinshaw and Muchlinski, mentioned above, p. 60). Thirdly, even if it can be shown that the defendant MNE operates a devolved management system, or is part of a wider alliance of co-operating companies, this does not, of itself, deny the existence of a duty of care on the part of the MNE parent towards employees of its subsidiaries (or of co-operating firms in an alliance), or to members of the local community in the host country adversely affected by the operations of the enterprise. A direct duty of care may exist on the part of the parent (or the controlling enterprise[s] in an alliance) on the basis of general principles of tort, regardless of the precise business organisation of the enterprise, where, as a matter of policy, it is thought important for the duty to exist. Equally, liability for certain ultra-hazardous activities may be strict and the need for proving the existence of a duty of care may be unnecessary (as in the Indian doctrine of absolute enterprise liability for ultra-hazardous activities; see Muchlinski above in The Bhopal Case).

Thus it is not possible to offer wide and absolute concepts of MNE organisation. On the other hand, the law may develop through the use of presumptions as to the nature of corporate organisation, which may be rebutted on the provision of evidence to the contrary. For example, it may be presumed that a parent company, which owns 100 per cent of the stock in its subsidiary controls that subsidiary and may therefore be further presumed to direct its activities unless there is evidence to the contrary. Equally, the law could presume strict liability on the part of the parent for the acts of its subsidiary unless it can be shown that the chain of causation has been broken in some way. Such approaches are not unproblematic. In particular, they challenge the advantage of limited liability implicit in the corporate separation between parent and subsidiary

(see further Muchlinski, *Multinational Enterprises and the Law*, pp. 331-2). However, as will be shown below, when the existence of a duty of care is considered further, such an argument may, in fact, misapprehend the true meaning, and legitimate boundaries of, limited liability in a group enterprise context.

THE CONTEXT: THE CAPE AND THOR CHEMICALS LITIGATION

Two main issues arise in relation to litigation involving alleged breaches of a duty of care on the part of a parent company for the acts of its overseas subsidiaries: first, does the forum before which the case has been brought have jurisdiction to hear the case, and, second, is the parent company liable for the alleged breach of the duty of care? As noted in the introduction, the current English litigation has been concerned mainly with the first question, while the second question awaits a judicial pronouncement. Each issue will now be considered in turn.

Jurisdiction

The first issue to be dealt with in all the recent cases involving English-based parent companies has been that of jurisdiction: were the English courts the proper place for the litigation on the merits of the case to be heard? In all of these cases jurisdiction before the English courts was available 'as of right' because all the defendant companies are domiciled in England. That is: Cape, Thor Chemicals and Rio Tinto Zinc. See also *Connelly v RTZ Plc* [1998] AC 854, which has had a significant bearing on the Cape litigation. In the Thor Chemicals litigation, the English courts prior to the settlement of the case accepted jurisdiction for £1.3million in 1997 (see *Ngcobo et al. v Thor Chemicals Holdings* [1995] TLR 579. A further 21 claims are now in progress against Thor. Again jurisdiction was accepted; see *Sithole et al. v Thor Chemicals Holdings* [1999] TLR 110). However, in the Cape litigation, the matter proved to be more problematic. Cape argued that, as South Africa was the place where the alleged harm had occurred it was the correct forum for the case to be heard. Thus, the main issue was whether England or South Africa was the more appropriate forum under the doctrine in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460. The *Spiliada* doctrine has two limbs: First, taking account of all the circumstances and, especially, the nature of the subject matter and the convenience of the parties, which forum is the more appropriate for the action to be heard? Secondly, notwithstanding that a forum other than the English forum may be the more appropriate, will substantive justice be achieved by the hearing of the case in that other forum?

Different courts involved in these claims arrived at different conclusions. In the first set of claims, that were brought in 1997 by Rachel Lubbe and five others, South Africa was held to be the proper forum at first instance, though this was overturned on appeal to the Court of Appeal in *Lubbe v Cape Plc (No.1)* [1999] IL Pr 113. Then in January 1999, Hendrik Afrika and 1538 others commenced their claims. In July 1999 Buckley J reopened the jurisdiction issues in Lubbe *et al.* while hearing the Afrika class action cases. He found for a South African forum in *Lubbe v Cape Plc* [2000] 1 Lloyd's Rep 139, p. 141, QBD. In November 1999 a second Court of Appeal upheld Buckley J on South African forum and on his approval of US public-interest criteria in US case law on forum issues in *Lubbe v Cape Plc (No.1)* [2000] 1 Lloyd's Rep 139, CA. On 20 July 2000 the House of Lords overturned the second Court of Appeal decision and upheld the first Court of Appeal decision under the second limb of the *Spiliada* doctrine: substantial justice could not be done in South Africa, even though there were factors that could point to the South African forum in *Lubbe v Cape Plc (No.2)* [2000] 1 WLR 1545, HL.

In arriving at its decision the House of Lords was asked to consider three sets of questions: first, what was the scope of the *Spiliada* doctrine in the context of MNE operations; secondly, should the *Brussels Convention on Civil Jurisdiction and Judgments* with its emphasis on the principle of jurisdiction over corporations based on domicile, be mandatory in all cases, including cases brought by claimants from Non-Convention countries, as in the present case; and, thirdly, should the English courts take into account public policy considerations when determining whether jurisdiction should be exercised over English based parent companies for the alleged torts committed by their subsidiaries in another country (see now *Council Regulation (EC) 44/2001 of 22 December2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* OJ [2001] L 12/1. The Regulation supersedes the Convention for Member States. It enters force on 1 March 2002).

As to the first question, the House of Lords did not go so far as to accept enterprise analysis under the first limb of *Spiliada,* and conclude that, as an integrated MNE, Cape Plc was a proper party to the proceedings as a result of its actual or potential control over the health and safety activities of its overseas subsidiaries. Instead, the House of Lords came to its conclusion by relying on the second limb of *Spiliada* and finding that, in the light of the evidence submitted by the claimants, and by the Government of South Africa in its special submission to the House of Lords, the claimants' case was very unlikely ever to be heard in South Africa due to, in particular, the absence of legal aid and of lawyers expert enough and willing to take on such a complex mass tort action. That would, in effect, take away the claimants' right to a hearing. In this their Lordships were following the approach taken in the earlier case of *Connelly v RTZ Plc* [1998] AC 854, where the absence of legal aid in the foreign forum (Namibia) was held to have been a significant factor pointing to the conclusion that substantial justice could not have been

achieved there, notwithstanding that the foreign forum may have been more appropriate on the basis of the first limb test. Therefore, it would appear that the House of Lords are developing a 'due process' approach to the second limb of the *Spiliada* doctrine. As to the second question, the House of Lords did not feel it necessary to deal with this point, in view of its finding under the *Spiliada* doctrine. As to the third question, the House of Lords expressly rejected the US approach, evident in cases such as *Bhopal,* of weighing the public interests of the home and foreign forums in conducting the litigation. For a more detailed and extensive discussion of this issue see Muchlinski, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Case' (2001) 50 *International and Comparative Law Quarterly* 1.

The Existence of a Duty of Care

As noted in the introduction to this essay, none of the recent English cases involving MNE parent companies has yet determined the substantive question of liability for the acts of their overseas subsidiaries. Unless it settles, or is abandoned, before the trial date, the Cape litigation will be the first instance of this question to reach an English court for decision. It follows that the question of MNE group liability remains a speculative one (see further M Kamminga and S Zia-Zarifi (ed.), *Liability of Multinational Corporations under International Law*, Part III on US, English and Dutch approaches to such litigation. See also *The Amoco Cadiz* [1984] 2 Lloyd's Rep 304).

In Part I of this paper it was argued that a presumption of parent company liability for the acts of its owned and controlled overseas subsidiaries could be established in principle, subject to rebuttal by evidence negating control. It was further said that the main objection to this presumption is that it effectively undermines the vital principle of limited liability. In reply, it is arguable that too much is made of the need for limited liability between parent and subsidiary when they form part of an integrated economic entity, as has been pointed out by Professor Philip Blumberg, in his seminal work *The Multinational Challenge to Corporation Law*, (Oxford University Press, Oxford, 1993):

> *'Under entity law and limited liability, each higher-tier company of the multitiered corporate group is insulated from liability for the unsatisfied debts of the lower tier companies of which it is a shareholder. In the multitiered group, there are, thus, as many layers of limited liability as there are tiers in corporate structure. Limited liability for corporate groups thus opens the door to multiple layers of insulation, a consequence unforeseen when limited liability was adopted long before the emergence of corporate groups'.* (p. 139)

When applied to involuntary creditors of the group, such as the victims of an alleged tort committed by the enterprise in the course of its operations, this extension of limited liability does little more than shift the risk of liability onto them and away from the group. Can this be a justifiable result when the victims are uninsured, as was the case with the Cape claimants? Even where the claimants are insured, can such a transfer of risk from corporation to involuntary creditor be justifiable, given the risk of moral hazard implicit in such a policy? In relation to the Cape case, it is not immediately obvious why the cost of dealing with asbestos-related injuries should be borne by the local subsidiary alone, especially where it does not have the assets from which to compensate the claimants, given that Cape closed down its asbestos operations in South Africa in 1979. On the other hand Cape has enjoyed the profit stream from those overseas investments, and it would seem proper to make those proceeds available to compensate involuntary creditors where they can show that the parent controlled the operations in South Africa, and so could be held responsible for them. In any case direct liability might be possible on the ground that as Cape was aware of the dangers of asbestos mining and milling, given the state of knowledge at the time these activities were being carried on, and so any failure on its part to follow established safe practices, and, in particular, to require its South African subsidiaries to do so, would amount to a breach of a duty of care by omission (see further *Lubbe et al. v Cape Plc* House of Lords Claimants Final Served Case, at 43-50).

Therefore, the issues relating to the existence of a duty of care, and of its breach, could be kept separate from the wider issue relating to the extent to which the parent company could benefit from the principle of limited liability as a means of insulating itself against tort claims arising out of the actions of its subsidiaries. However, that is a position entirely dependent on the particular facts of the case, and on whether there is sufficient proof of parental complicity in the alleged tort. It does not remove the broader question of whether the economic entity of the group as a whole should act as a source of funds for the compensation of involuntary creditors, and of whether there should be such a thing as 'multinational enterprise liability' based on the integrated nature of the transnational system of economic activities carried on by the MNE (see for example *The Amoco Cadiz* [1984] 2 Lloyd's Rep 304, p. 338, paras. 43-46. See further Muchlinski, *Multinational Enterprises and the* Law, pp.328-333. See also Halina Ward 'Governing Multinationals: The Role of Foreign Direct Liability', Royal Institute of International Affairs *Briefing Paper* New Series No.18, February 2001). This matter will now be considered further in the light of the views of the Company Law Review Steering Group.

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