

# Cape Plc: South African Mineworkers' Quest for Justice

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Communities in South Africa, especially those in Limpopo and Northern Cape, have been decimated by the mining operations of Cape Plc. South African victims of asbestos-related disease have only recently begun to be awarded (modest) compensation settlements through litigation, as a result of collective efforts on their behalf. The tortuous case of Cape, which knowingly exposed thousands of innocent people, especially black workers, to damaging environmental concentrations of asbestos, is detailed. After fierce and prolonged skirmishing in the courts, a decision in favor of the claimants allowed the case to be tried in the English High Court. Cape reached a settlement agreement with the claimants in 2001, but was unable to meet its terms. Renewed litigation in 2002 resulted in the signing of three new settlement agreements in 2003. These have yet to be put into effect, but it is hoped that the recent developments represent a turning point in the fortunes of South African asbestos victims. *Key words:* asbestos; litigation; South Africa; Cape Plc.

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The asbestos emanating from South Africa has caused widespread asbestos-related disease (ARD) worldwide among workers involved in the mining, transport, and production of asbestos and in the handling of asbestos, as well as people living near these operations. Its legacy in the form of further disease will continue for many years to come.

The financial consequences for the companies concerned have also been dramatic. In the United States

and the United Kingdom, a massive amount of compensation has been paid to victims of ARD over the last 25 years.

South African mine workers at the source of the world asbestos business arguably have borne the brunt of the ARD epidemic. Certainly the devastation caused to communities in South Africa and their environments is unparalleled. Yet it has not been until very recently that compensation settlements on behalf of South African victims have been achieved against Cape Plc and Gencor. Although these settlements provide only modest compensation to individuals in comparison with Western awards, the feedback from the communities is that these amounts are worth having. Furthermore, the settlements do represent some measure of justice at last being delivered to South African victims and a deterrent against the practicing of double standards.

From a practical perspective, unlike their Western counterparts, an integral component of the South African litigation has been the involvement of community structures, trade unions, governmental and non-governmental organizations, politicians, and the media. In that sense the outcome of the litigation to some extent reflects a collective rather than exclusively individual-based approach.

Nevertheless, from an international perspective the fairness and effectiveness of legal systems in compensating victims in different countries leaves much to be desired.

## CAPE PLC

The corporate structure of Cape is shown in Appendix A.

Cape Plc ("Cape"), an English registered company, was incorporated in 1893 as The Cape Asbestos Company Limited. According to its own 1953 "Diamond Jubilee" report, Cape was formed to acquire asbestos deposits in South Africa and a factory in Italy to produce asbestos-related products from the asbestos mine in South Africa.

By 1913, Cape was undertaking crocidolite 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 mining operations in Limpopo (formerly the Transvaal), which were oper-

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ated through wholly owned subsidiaries until 1979. One of these was "Egnep" (Penge spelled backwards).

Cape also operated manufacturing plants in Turin, Italy, from about 1911 to 1968, and in Benoni, Johannesburg, from about 1940 until about 1986.

## CAPE PLC IN SOUTH AFRICA

### *Location, Scale, and Nature of Operations*

Cape was involved in mining crocidolite and amosite in the Northern Cape and Limpopo (formerly "Northern") Provinces, respectively, from 1890 until 1979. Koegas was the largest crocidolite mine in the world. Penge was the largest amosite mine in the world. Penge was named after Penge in Kent, England (apparently one of the U.K. directors considered that the two areas were similar in appearance). Cape also operated a large crocidolite mine at Pomfret in North Western Province.

Associated with the mines were mills involved in the crushing of the asbestos rock to expose and extract the asbestos fibers. The most infamous 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.

In addition to the major mines, Cape owned many smaller mines in the same region.

Cape sold its South African mining operations in 1979. In 1981 Gefco, a subsidiary of Gencor, a wealthy South African mining company that was also involved in gold mining, purchased these operations. The Penge mine continued operating until about 1990 and the Pomfret mine continued until about 1986, under Gefco/Gencor.

Up to 1979 Cape and Gefco were by far the largest asbestos producers in South Africa.

### *Chain of Production/Death*

Cape sought to give the impression that its South African operations were a discrete business run independently by Cape's local South African subsidiaries. Examination of the facts, however, casts a contrary impression in a variety of respects, two of which are relevant here.

First, the asbestos that was mined 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 (or "death" as it is known by many campaigners) ARD occurred on a significant scale among miners and millers; 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; shipworkers; factory workers in South Africa and the United Kingdom; workers utilizing the products; and people living near mining, milling, and manufacturing operations.

Second, 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 (NAAC). The Technical Director in the 1960s and 1970s was a scientist, Dr. Richard Gaze, who was also the Health and Safety Director of the group.

When the demand for asbestos grew, the mining increased. When the demand waned (primarily due to pressure from U.S. litigation and U.S. consumers out of concern for their own well-being, rather than concern for the health of South African miners), the South African mining operations ceased.

Far from being a discrete independent business, the Cape South African mining operations were part of an integrated worldwide business.

### *Concealment of Health Risks*

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.

Cape Asbestos South Africa (CASAP), a subsidiary of Cape, was a member of the South African Asbestos Producers' Advisory Committee (SAAPAC), and the Northern Cape Asbestos Producers' Advisory Committee, (NCAPAC), bodies comprising and representing the interests of the asbestos industry in respect of South African asbestos operations. Mr. Mackeurtan, a director of Cape and its South African subsidiaries, played a key role in the activities of the SAAPAC and NCAPAC.

Following the International Pneumoconiosis Conference held in early 1959, which had discussed the association between mesothelioma and asbestos dust arising from blue asbestos mining operations in the Northern Cape, it was decided that the Pneumoconiosis Research Unit (PRU) should conduct further investigations, in particular a mesothelioma survey.

Representatives of the SAAPAC, including CASAP, agreed to and did provide the funding for the research into mesothelioma by the PRU. Years later, a letter from the honorary secretary of the NCAPAC to the Director of the PRU in November 1975 stated:

Following on this morning's discussions at the offices of Cape Asbestos (Pty.) Ltd., I am directed by my committee to confirm with you that an arrangement dating back to the days of the Asbestos Research Project still stands, viz that no studies dealing with asbestos exposed mining and milling personnel are to

be published without prior consultation with the writer or, in case he is not available, with the offices of . . . Cape Asbestos SA (Pty.) Ltd.

In October 1961 Mr. MacKeurtan met Dr. W. J. Smither, Cape's Chief Medical Officer, and Dr. Gaze in Barking to discuss the mesothelioma survey. In a letter dated April 1962, accompanying the results of the survey, the PRU stated:

I do, however, suggest that the use of the term "mesothelioma survey" now be discontinued and that the projects which will be carried out in phase II be regarded as individual projects each with its own name. For example it was originally intended to include in the general "mesothelioma survey" an "air pollution" project in the Prieska area . . . this project will be started in the very near future but it will now be called "an investigation into possible air pollution by asbestos dust," with no direct reference to any possible relationship to the term "mesothelioma." The unfortunate publicity that was given to the survey in its early days has resulted in certain mining groups feeling that reference to a form of cancer has attached a stigma to the area, in which they operate, and that such stigma could adversely affect, not only the future recruitment of personnel for their mines, but even the economy of the industry as a whole. While emphasising that this Unit realises its obligation to humanity it is desired to point out that it will endeavour to continue what is regarded by us as necessary research as discreetly as possible and with due consideration of all policies which may be involved.

The final version of the mesothelioma survey report, dated 4 May 1962, had concluded:

- (i) That even after the most critical reassessment of the findings it has been shown that people who live or have lived in the areas of Prieska, Koegas, Kuruman and Penge are in danger of contracting asbestosis even though they have no industrial exposure to asbestos dust inhalation. . . ;
- (ii) That an alarmingly high number of cases with mesothelioma of the pleura has been discovered among people who live or have lived in the North Western Cape area and that there is evidence to suggest that this condition is associated with an exposure to asbestos dust inhalation which again need not be industrial.

In June 1962, Dr. Smither went to Johannesburg and met with Mr. MacKeurtan. In his report of his visit, Dr. Smither stated,

at this stage Mr MacKeurtan's critique of the [mesothelioma] survey report has my full agreement.

On the same visit in June 1962, Dr. Smither met with Dr. Walters, then the director of the PRU. A letter from Dr. Walters, dated 23 June 1964, referred to the

mesothelioma survey and to discussions with the asbestos industry, as a result of which it was agreed that the survey should not be extended pending the outcome of the industry's representations to the South African Government and that the survey itself "would not be published or made available outside the PRU, other than to sponsors and the various members of the working committees that had been concerned with the conduct of the "survey." (The mesothelioma survey report was not published more widely until the 1980s).

In 1965 Mr. MacKeurtan nominated pathologist Dr. Gluckman as a member of the PRU panel. Dr. Gluckman thereafter used his influence to criticize adverse comment as to the risks of asbestos, for example, mounting a detailed written challenge to concerns that had been expressed in the South African Parliament by Dr. Audrey Radford, MP.

Thereafter the SAAPAC and the NCAPAC, including Mr. MacKeurtan, frequently criticized and undermined statements by the PRU and others concerned about the health risks associated with asbestos, with a view to minimizing adverse comment on this issue and to protecting the industry. For example, in September 1971 the Honorary Secretary of SAAPAC referred to the "anti-crocidolite campaign in Holland," and his view that the "harsh and biased British restrictions had spread to Scandinavia as well." He expressed concern that "the British specifications for the use of blue asbestos would ultimately be adopted all over Europe and may even spread further." He further stated that,

Mr. J. G. MacKeurtan indicated that the South African asbestos mining industry was due to embark on some very substantial expansion projects and needed some moral encouragement for its customers outside of Britain, who while keen to continue or even increase the use of blue asbestos, feared the spreading of the British restrictions.

In July 1973 Dr. Gaze, Mr. MacKeurtan, and Mr. Cross, another Cape director, engaged in detailed communications with the South African ambassador in London over questions that had been posed by *The Times* concerning the safety of the South African asbestos mining operations. These communications included, in particular, formulating and attempting to modify answers to the questions.

In 1975 Mr. Cross, a member of the International Asbestos Information Centre (IAIC), engaged in detailed communication with the South African Ambassador to London, informing him that the IAIC was working for sensible precautions and to combat panic measures, in Italy. The Ambassador wrote to the South African Consul in Milan, Italy, to comment on the letter written by the latter based on information that he said emanated, "to a large extent, from Mr. A. Cross, a member of the International Asbestos Information Conference (IAIC)." He stated, inter alia,

The IAIC is active in this field to counter incorrect information;

...

Should the Counsellor (Commercial) in Rome find that banning is indeed being considered it will be wise to bring it to my attention. I can then inform the local representative of the [IAIC];

...

Mr Cross' message is that he would appreciate it if you would keep your ear to the ground and inform him of developments; that they are working in Italy for sensible precautions and to combat panic measures. If the use of asbestos or any kind of asbestos is prohibited, his committee will work towards easier regulations.

In March 1976 the South African Consul in Milan wrote to the Secretary for Commerce in South Africa referring to the need for *"coordinated and concerted efforts to combat rumours which could loose [sic] South Africa this export market for blue asbestos"* and stating that Mr. Cross would be contacted in London to discuss matters.

In July 1976 Mr. Cross had a detailed meeting with the Consul or representatives of the Consul, in which he undertook to "awaken" asbestos producers to the need for action in Italy.

A document dated August 1971 obtained from U.S. archives reveals that Cape's U.S. subsidiary NAAC was also concerned to protect the image of asbestos. It held discussions with public relations consultants over the promotion of the "Asbestos Family Idea." The "Asbestos Family Hero Album" was produced and other possibilities included a children's book featuring "Asbestos-man" with helper "Smokey the Bear" to emphasise the fire-prevention qualities of asbestos.

Back in the United Kingdom Dr. Smither advised in December 1968 that;

a carefully worded warning label on sacks of asbestos should have the effect of indicating the service to community safety which asbestos performs, for example it was recently established that 1,000 people die every year from burns suffered at home. The label might read something like this: "In the interests of fire prevention, this board contains 20% asbestos. Handle with care."

These actions of Cape 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, such as the Claimant, including the cessation of the Defendant's South African operations, were delayed for many years.

### *Treatment of Black Workers in South Africa*

That serious lung diseases could be caused by asbestos exposure was well known to the industry before 1930.<sup>2</sup>

Asbestos regulations were introduced in the United Kingdom in 1931.

Cape closed down its U.K. factory in Barking, due to the level of asbestosis in the workforce, in 1968 but continued to operate in South Africa until the 1980s.

Cape accepted the apartheid system in order to increase the profitability of its business, the profits of which were channelled back to England:

Cape knew that black women and children were a cheap source of labor. Despite the risks to their health and safety, Cape continued to allow and condone their use.

As at 6 September 1940, at Penge 372 children under 16 years of age and a further 75 under 18 years of age were employed in asbestos processing, out of a total workforce of 1625. In a letter dated 6 September 1940, the manager of Egnep Limited wrote,

We would point out that ever since 1917 when these mines were first opened up, juveniles have regularly been employed on light work in the surface.

At Koegas in June 1941, 191 women and children out of a native and "colored" workforce totalling 548 were employed at the mines and mills, as described in a report dated 11 May 1971 prepared by a health officer from the Department of Public Health at the Medical School, Johannesburg. The position regarding the employment of women and children was further explained in the report, as follows:

After obtaining the raw material this is "cobbed," i.e. hammered to separate the asbestos from the rock, and this work is carried out by women and children. "Cobbing" is done either for the native contractor, usually by his family, or for the company in the case of asbestos mined by the daily paid labourer. There are a large number of women employed in this way.

In April 1951 the mine secretary requested permission to employ boys to sort asbestos fiber on the grounds that it was "uneconomical" for adults to do such work.

In October 1953, Cape's subsidiary Cape Blue Mines Ltd. made an application to the Native Commissioner to employ 70 juveniles between the ages of 13 and 16 years in its asbestos mines in the Northwest Cape. In its letter of application, it stated that,

These under age natives are employed on very light work, such as sorting fibre, and the majority do their work sitting down. It would be most uneconomical for us to employ fully grown men to the work done by these minors.

Attempts were still made as late as 1954 to employ youths under 16 at Prieska and Koegas despite the Department of Mines' view that such youths would be exposed to harmful concentrations of dust.

In May 1958 the Government Minister with responsibility for authorizing women and children to work in dusty atmospheres at asbestos mines informed the inspectors of mines at Pretoria, Bloemfontein, and Witbank that the employment of women in cobbing was to cease because such work would involve their working in a dusty atmosphere.

A memorandum dated 25 May 1959 from the director of the Pneumoconiosis Bureau to the Secretary for Mines concerning the incidence of asbestosis in women employed on hand-cobbing in the NW Cape commented that,

It is obvious that 'female cobbers' on asbestos mines work in a dusty atmosphere as defined in the Act . . . The above survey proves conclusively that 'cobbing' is a dangerous occupation. . . .

Despite all the above, Cape still allowed women and children to be exposed to dust until at least 1962. Dr. Smither's report arising from his visit to the mines and mills owned, operated, or controlled by Cape and/or its subsidiaries in South Africa in 1962 states,

Women are still employed on hand cobbing, sometimes accompanied by their children who are also exposed to dust.

He was further driven to have to make a recommendation that,

Above all children should be excluded from working areas.

Cape relied on the system of racial discrimination within South Africa and extensively employed black workers, thereby allowing Cape's business to reduce wage costs, spend less on accommodation and safety precautions for its workers, and expend less on medical and other facilities.

In 1947 Cape limited the building of a school to one for white children only. Perhaps the most significant example of mistreatment of South African workers was recorded by government doctor Schefers when he inspected the Penge mine 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.

Throughout, Cape paid no bonuses to its black workers, whereas it approved bonuses to its limited number of white workers.

In the 1950s Cape decided to provide retirement benefits for its white staff, whereas none were provided for black workers until, on a very limited basis, in the 1970s.

In 1951 it was decided to compensate white only workers who had silicosis.

Cape provided some, but not all, black workers with flannelette masks, less effective than those provided to white workers. African workers were allowed only micro-x-rays, whereas white workers had full x-rays.

Cape failed to take any proper steps to ensure there were adequately designed masks/respirators for black workers until at least 1977.

It was conceded by Mr. Dent, Cape's chairman, before the 1973 U.K. House of Commons Select Committee, that Cape approved:

1. African workers being excluded from carrying out the same jobs as white workers, and
2. "colored" workers being paid less for the same job than white workers,

and that Cape was not inclined to do anything effective to change the system.

In the litigation that ensued in England in the 1990s, a certain category of claimant emerged, those who had been employed as "chissa boys." These unfortunate workers had 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.

## **CAPE'S AWARENESS OF AND APPROACH TAKEN TO SOUTH AFRICAN BUSINESS**

### *Conditions at the South African Operations*

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 happening on several occasions and it was obvious that quite a cloud of dust was being produced and being blown away by a fairly 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.

Dr. Smither's 1962 assessment of the Penge mill stated;

There is a great deal of dust and a great deal of danger...the control of dust at the drying plants, with fibre lying in the sun out of doors, is quite impossible.

Lashing or loading of dry ore into the bins, the cobbing by hand, the handling of large masses of fibre by forks and shovels, is all very dusty . . . there are many uncovered conveyer belts. There are some belts in which the conditions are good but there are many in which the dust must be thrown off to atmosphere.

## LITIGATION AGAINST CAPE PLC

### *Background*

Given the circumstances of Cape's South African operations, any attempt to contest an allegation of negligence would 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. But, the general legal principle is that the liability of a limited company does not attach to its shareholders save in exceptional circumstances, for instance fraud or where the company in question could be shown to be a "sham" or the agent of a shareholder. Notwithstanding obvious negligence, multinationals such as Cape were able to depend on this principle to protect the parent company from liabilities arising from operations ostensibly conducted by subsidiaries.

One of the landmark decisions on the point arose in the case of *Adams v. Cape*, in which U.S. asbestos victims unsuccessfully sought to enforce a Texas judgment against Cape's U.K. assets. The English Court of Appeal refused to "pierce" the veil of incorporation and allow enforcement against the parent company even though it was found that "Cape ran a single integrated mining division with little regard to the corporate formalities as between the members of the group."<sup>3</sup>

In that context it is perhaps hardly surprising that South African asbestos victims have not previously been compensated by Cape.

The Cape case itself must be seen in the context of two earlier cases we had run which paved the way for a case of this type against the parent company in the English Courts against Rio Tinto and Thor Chemicals (see Appendices B and C).

In February 1997, compensation claims for ARD were commenced in the English High Court on behalf of three workers at the Penge mine in the Northern Province who had also lived near the 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, purportedly run by another wholly-owned subsidiary, Capamianto. 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, a Mr. Savoie. The prosecution was, however, suspended when Mr. Savoie was apparently diagnosed as having Alzheimer's disease.

Cape applied to stay the South African claims on forum grounds, contending that the cases ought to be tried in South Africa. In January 1998, following an eight-day hearing spread over six months, their application was granted, but on appeal in July 1998, the Court of Appeal reversed this decision and noted in particular that the alleged negligence of the English parent company was central to the case.

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 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 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, such as the Bhopal case) that the *public interest* of South Africans in hearing the case was greater than that of England.

Despite the fact that the vast majority of the claimants do not speak English and many could not read or write, the Court suggested 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 put on hold for lack of funds. The current budget of R 2,117 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 under-represented, 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 scope of the negligence liability of a foreign multinational which operated under those laws.

In July 2000, in a landmark decision in favor of the claimants, all five Law Lords held that the case should be allowed to continue in the English High Court. Applying the principle it had developed exactly three years earlier in *Connelly v. RTZ* (see Appendix B), 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. Prior to the November 1999 Court of Appeal ruling, Cape's lawyers had approached Professor David Unterhalter, director of a public interests law center in Johannesburg, with an offer of £1 million to represent the claimants against Cape. Apart from being perplexed as to the ethical issues arising from this proposal, Professor Unterhalter informed then that the money was insufficient. Although the Court of Appeal had not seen fit to refer to this evidence, the House of Lords relied on it as independent evidence, commissioned by Cape, which supported their ruling. The media expressed surprise that on a question of *fact* not *law*, three Court of Appeal judges and five House of Lords judges had reached opposite conclusions based on precisely the same evidence.<sup>4</sup>

### *Post House of Lords (July 2000–December 2001)*

Further claimants joined the case, so that by August 2001 about 7,500 were registered in the group. The geographic composition of the group was about 75%:25% Limpopo to Northern Cape.

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 existence of a workmen's compensation scheme meant that the Medical Bureau of Diseases (MBOD) held files for all workers who had passed through the scheme, including x-rays. But Cape would not accept the findings of the MBOD and insisted instead on further medical evaluation of these files by a team of experts.

A review of a sample of 650 files by the team of experts indicated that the MBOD diagnosis had been correct in around 85% of cases. Rather than reviewing each and every file, it was contended on behalf of the claimants that this success rate was likely to be the same for all 7,500 cases. But Cape would not agree and suggested that the 650 cases had been selected. As a result the claimants were forced to participate in a very expensive and time-consuming exercise of reviewing 5,000 cases. The end result, as predicted, was a success rate of around 85%.

In terms of disease breakdown, about 30% were pleural plaque cases; 30% were asbestosis cases, and about 30% were pleural thickening/pleural effusion cases. There were about 400 mesothelioma cases.

Literally hundreds of victims died between the commencement and settlement of the Cape case due to the indulgence by the courts of company litigation strategies that were designed to frustrate justice. Having insisted from the outset, in the words of Cape's senior Counsel, that it would "never surrender," Cape announced in October 2001 that it was in financial difficulty and could not afford to pay substantial compensation. The claimants were informed that they were in a "lose-lose" situation: if they continued with the case to trial and lost, Cape would be "in the clear." At that stage, in October 2001, the case seemed to be headed on a downward spiral.

Negotiations occurred between the claimants and one of Cape's shareholders, however, with a view to producing a more respectable settlement, in the region of £20 million. On the basis of these negotiations, the shareholder, Montpellier Limited, took control of Cape and in December 2001 a settlement agreement was signed.

At the same time, hoping simultaneously to end all its international liabilities, Cape settled the four Italian claims.

### *December 2001 Settlement*

The December 2001 settlement agreement provided for payment of a total of £21 million through a trust which was to be established in South Africa (the Hendrik Afrika Trust, named after one of the Prieska asbestosis victims). 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 types of ARD, with mesothelioma/asbestos-related lung cancer 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. (In October 2001, T&N, another U.K. asbestos multinational, filed for bankruptcy, leaving thousands of victims worldwide without redress.)

If Cape had suffered a similar 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. The claimants could also have lost what was, after all, a cutting-edge case. Furthermore, judgment was at least seven months away and the process could be drawn out by appeals. About 300 claimants have died since 1999.

So there was a serious risk that an award would not have translated into real money. The challenge was thus to negotiate the best possible settlement based on what Cape could afford. It was made clear, however, that without a meaningful offer the claimants would take the case to trial and run the risk of recovering nothing rather than accepting a derisory amount and seeing 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 would force Cape out of business.

This was why Cape stipulated that the settlement encompass all potential claimants. However, a balance had to be struck: by applying to the trust for compensation, a sufferer will forfeit the right to take court action. If sufferers are to be encouraged to use the trust, rather than litigate, payments must be high enough.

The December 2001 settlement was hailed as a triumph in most quarters. 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 honor the settlement. However, it emerged in August 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 devastating blow to claimants who at that point in time had expected to begin receiving their compensation payments. Due to Cape's precarious financial position, permission was also sought and obtained to join Gencor as a co-defendant to the English proceedings.\*

### *Gencor*

Shortly before the collapse of the December 2001 Cape settlement, a claim against Gencor on behalf of ARD victims from its South African operations had also begun in South Africa. (Those claimants were represented by South African attorney Richard Spoor.) In the wake of the Cape litigation this claim against Gencor had become more viable. Furthermore, it had two substantial advantages over the Cape claim: first, there was no issue of jurisdiction; second, it was concluded on the claimants' side that it was now possible, under the new South African Constitution, to pursue U.S.-style "class actions" in South Africa. The disadvantage was the absence of legal aid, but this was less than an obstacle following the Cape litigation.

In terms of strategy, the greatest advantage was Gencor's desire to "unbundle," i.e., to sell its assets and distribute the proceeds of sale as a dividend to its shareholders.† This enabled the Gencor claimants to instigate a challenge in the Johannesburg High Court to the legality of the unbundling on the grounds that no provision had been made for asbestos victims. The Cape Plc claimants intervened in this challenge on the basis of their claim in England against Gencor.

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\*Many of the 7,500 Cape claimants had also been exposed to asbestos from Gencor-owned operations as a result of having worked at different Gencor-owned mines and also from continuing to work at operations that were owned by Cape until 1979 and purchased by Gencor's subsidiary, Gefco, in 1981.

†The unbundling should be compared with the Thor chemicals "demerger." See Appendix C.

In order to receive the unbundling and to avoid the risk of the Court ruling that the proposal was unlawful, Gencor was prepared to settle the asbestos litigation.

## NEW SETTLEMENTS

On 13 March 2003, three settlement agreements were signed: 1) a main settlement with Gencor for about £35 million. Of this sum about £3 million has been earmarked for environmental rehabilitation expenses. This settlement is to be administered by a Gencor Trust along the same lines as the previously doomed December 2001 Cape Plc Hendrik Afrika Trust; 2) a new settlement with Cape plc for the 7,500 claimants with a one off payment of £7.5 million by Cape Plc; 3) 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.

## ROLES OF COMMUNITIES, UNIONS, DOCTORS, NGOS, AND POLITICIANS

In a group action of this magnitude involving impoverished communities with rudimentary means of communication, the importance of community structures is paramount.

In the Cape case, community organizations and the National Union of Mineworkers provided an efficient means of communication about the progress of the case. It was also vital to maintain unity within the group. The politicization of communities during the apartheid era meant that group meetings were constructive to an extent which, based on experience, is not achievable in the United Kingdom. Committed doctors were instrumental in the assessment of the health impact on the communities and the identification and diagnosis of cases. Professor Tony Davies, Dr. Sophia Kisting, Dr. Marianne Felix, and Dr. Deon Smith deserve special mention.

The inspirational support given to the claimants by the South African Government has been discussed above. The intervention occurred at a critical time and must have had a significant psychological impact on the House of Lords, even though this was not reflected in the legal reasoning of their decision.

Nongovernmental organizations, in particular Action for Southern Africa (ACTSA), the successor to the anti-apartheid movement, played a vital role in raising the public profile of the case and providing moral support to the victims. Claimants' morale was "rock bottom" in November 1999 following the second Court of Appeal defeat. The sight of ACTSA campaigners and others demonstrating outside Court in the pouring rain was televised in South Africa and uplifted the com-

munities. Lobbying by U.K. Members of Parliament who wrote letters to Cape's shareholders and Cape's bankers and filed early day motions (EDMs) in Parliament was also invaluable.

Cape instructed political lobbyists, GJW, who advised Cape on a campaign to target the claimants' lawyers, Leigh, Day & Co., as "ambulance chasers" and to embarrass the U.K. law Chancellor into having to choose "between black workers and multinationals . . . so that the details of the claims are likely to be of secondary interest."<sup>5</sup>

An early day motion was subsequently filed in Parliament criticizing this approach.<sup>6</sup>

A photographic exhibition<sup>‡</sup> compiled by Bloemfontein photographer Hein Du Plessis, whom I first met when he was displaying his photographs from another exhibition on the floor of a bar in Kimberley, was also vital in raising the public profile of the case. The exhibition was displayed at a variety of venues internationally.

## PERSPECTIVES

Communities in Limpopo and Northern Cape have been decimated by Cape's mining operations. Now that the mines have closed, the level of impoverishment and despair in these regions is striking. As young people move away in search of work, the communities become progressively older. Some of the smaller communities are unlikely to exist at all in another 20 years. Regrettably, the only logical inference that can be drawn about the mentality of the Cape directors is that they did not regard black South African workers as equal human beings. They were prepared to sacrifice even small children in order to satisfy their greed.

The industry was able to continue unimpeded in South Africa due to a combination of the apartheid regime, concealment of risks by the industry, and the legal effect of the corporate veil.

Access to justice was even more problematic in a case such as this because of the complexities and legal resources that would have been required to deal with the corporate veil issue. In addition, the law relating to jurisdiction would have made it difficult for victims to have obtained access to justice in the English courts.

Developments between 2001 and 2003 have hopefully initiated a turning point in the fortunes of South African asbestos victims. Compensation settlements with former mining companies Cape Plc and Gencor mean that these mine workers, who were at the heart of the asbestos industry, should at long last secure some measure of justice.

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<sup>‡</sup>Some of the photographs are shown elsewhere in this journal. The exhibition was displayed at the Quaker Gallery, Barbican Centre, Royal Festival Hall, and Stephen Lawrence Gallery, United Kingdom; The International Asbestos Conferences in Sao Paolo, Brazil, 2000, and Buenos Aires, Argentina, 2001.

Their path to success has, however, been achieved through a series of cases that have literally been bounced up and down the legal systems of England and South Africa.

In a variety of respects, the cases have provided an insight into and a model for future cases, in the area of asbestos and occupational diseases generally.

The manner in which, in a case law—precedent-based—legal system, a ruling arising in one case can have a dramatic impact on another case of unconnected subject matter has been demonstrated: Had it not been for the Connelly and Thor Chemicals cases (Appendices B and C), the Cape case would not have been viable. Indeed the NUM raised the possibility of an action against Cape because of the implications of the rulings in these earlier cases. The sequence and an incremental approach to developing the law were crucial. There was an acute awareness that litigating the wrong case could have produced a detrimental effect across the board in a variety of areas.

Also highlighted starkly is how, in the field of asbestos where the industry has no “leg to stand on” in terms of the legal merits of the case, the outcome is invariably determined by a combination of legal procedural issues and extraneous commercial considerations. The legal process provides the impetus for settlement (or collapse of the case), but not a forum for the resolution of the merits. The real legal issues—whether

there was negligence that caused the injury—are relegated to the status of a sideshow. Procedural and technical questions—such as the venue of the case and whether the victims might be legally barred altogether from suing—provide the focus of the legal battle.

The sheer scale and value of the cases means that markets and shareholders become nervous. The dive in share value that is likely to accompany a mass claim, and the prospect of this being sustained until the conclusion of the case (or rather of any appeals), assuming the company can survive the ordeal, creates a powerful incentive to settle.

For poverty-stricken victims, speedy payment is as important as the amount of compensation. This factor together with the risk of losing at trial—on a technical point such as whether a parent company owed a legal duty of care—makes settlement the preferred option. Setting legal precedents is usually the goal of campaigners and politicians, not victims.

The success of asbestos-related claims in the United States has meant that just at the point where ARD victims in developing countries could see some prospect of being compensated as well, the companies and their insurers are filing for bankruptcy (though U.S. lawyers and accountants appear to have done rather well for themselves).§ Thus just at the point when the 400 or so Swaziland ARD victims from T&N’s Havelock mine had overcome the jurisdiction hurdle, the cases were suspended by bankruptcy. Fairness dictates that there should be a more even distribution of money to victims worldwide. Moreover, the existence of a system that encourages vast disparities in the levels of compensation payable to workers in different countries will in turn perpetuate the practice of double standards.

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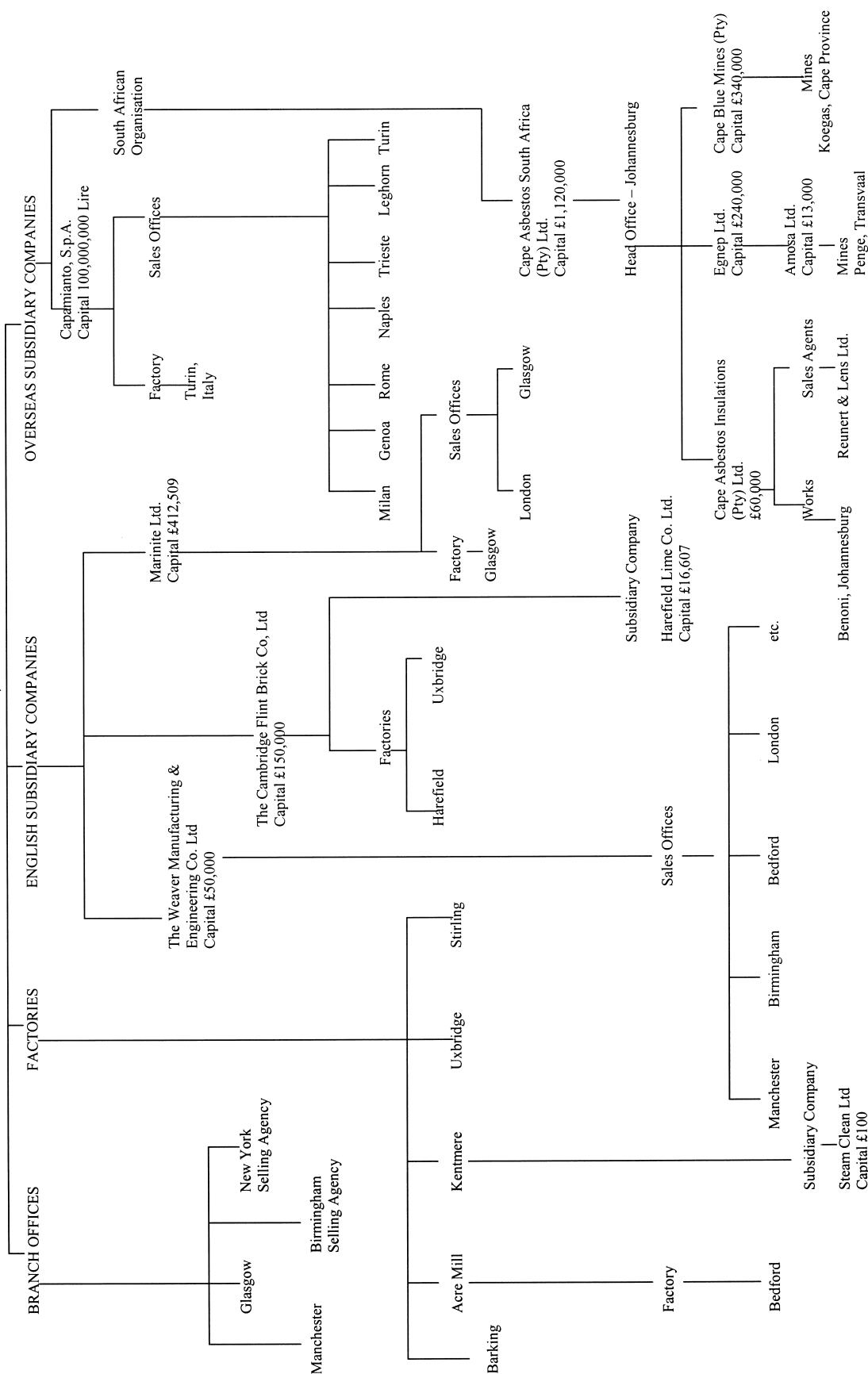
§Between 2002 and the first quarter of 2003, the administration and reorganization expenses relating to the bankruptcy of Federal Mogul amounted to an excess of US\$50 million, <<http://news.morningstar.com/news/DJ/M04/D22/1051021262480.htm>>.

# APPENDIX A

## The Cape Asbestos Company Ltd. Structure

**THE CAPE ASBESTOS COMPANY LTD.**  
Head Office: 112-116 PARK STREET LONDON W1

Capital  
£1,172,080



*The RTZ Case*

A claim for compensation was brought in England by Edward Connelly, a laryngeal cancer victim employed at RTZ's Rossing uranium mine in Namibia. It was alleged that key strategic technical and policy decisions relating to Rossing were taken by the English-based RTZ companies. For example, directors of their English companies were directly responsible on the ground, for substantially increasing the output of uranium—and the consequent dust levels—without ensuring that effective precautions were taken to protect workers against the hazards of uranium dust exposure.

In March 1995, RTZ succeeded, initially, in persuading the Court that Namibia was the “natural forum” for the case. Thereafter, the argument was limited to the relevance of Mr. Connelly's inability to obtain funding to bring a claim in Namibia, whereas in the United Kingdom funding was available, in the form of legal aid or lawyers willing to act on a “no win, no fee” basis.

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,” s.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. Mr. Connelly 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 U.K. variant of contingency fees) having been 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 European Convention on Human Rights and Article 14 International Covenant on Civil and Political Rights, allowed the appeal. Bingham MR stated:

But faced 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.

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,

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.

Unfortunately, in December 1998 the High Court struck out Mr. Connelly's claim on limitation grounds. Therefore, while his legal action would prove to be of value to others in the future, he personally has not benefited from it.

*The Thor Case*

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. About 1986, the company terminated mercury-based processes in Margate and shifted its Margate mercury operations (including key personnel and plant) to Cato Ridge, Natal, South Africa.

In February 1992, mercury poisoning of South African workers came to light. Three workers died and many others were poisoned to varying degrees. An inquiry by the Department of Manpower followed by a criminal prosecution in the local (Pietermaritzburg) Magistrates' Court led to the equivalent of a £3,000 fine. Compensation claims against the parent company and its chairman 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.

Thor unsuccessfully applied to stay the action on *forum non conveniens* grounds and its appeal was struck out by the Court of Appeal. This was the first recorded case of this type. 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.

A further 21 claims were commenced by workers from the same factory. In July 1998, Thor's application to stay 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 proceedings.

It then emerged from company documents filed in December 1999 that Thor's parent company, TCL, had undertaken a demerger which involved transfer of subsidiaries valued at £19.55 million to a newly formed company, Tato Holdings Limited (Tato). 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 S 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.” 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.

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