Implications of the Jackson Civil Costs Reforms for Human Rights Cases against Multinational Corporations

The UK government has recently proposed wide-ranging reforms to the costs regime for civil litigation following a review by Lord Jackson. The so-called Jackson reforms will significantly restrict the ability of claimants and their lawyers to recover legal costs from defendants. They will have particularly devastating consequences for human rights claims against multinational corporations (MNCs), as they threaten to make such claims economically unviable. This briefing note explains why.

Human rights litigation against MNCs:

The past decade has seen increasing litigation in the UK by communities harmed by the actions of UK-based MNCs in the developing world. The cases have included, among others, claims by 7,500 South African miners exposed to asbestos dust,[1] by 30,000 Ivorian residents affected by toxic waste dumping[2] and by Colombian farmers for loss of livelihood resulting from an oil pipeline development.[3] These cases have not only delivered redress and justice for the affected communities but have also exerted significant pressure on MNCs to change their practices.

Litigating these types of cases, however, is both risky and expensive. Each case usually involves a team of lawyers working for several years, reviewing thousands of internal company documents to assess liability and investigating evidence in remote locations. MNCs devote enormous resources to defending the claims and will often deluge the claimants' lawyers with procedural disputes before the cases come anywhere near trial.

This means that the cost of bringing these cases often significantly exceeds the compensation awarded. Since 2009, this disparity has been widened further by the introduction of the 'Rome II Regulation',[4] which has meant that victims' compensation, rather than being assessed by reference to UK legal standards, is assessed according to the law of the country where the harm occurred. Victims in developing countries thus now typically receive significantly less by way of compensation.

How cases against MNCs have been funded to date:

As legal aid is no longer available for these types of cases, most are currently funded through 'no win/no fee' cost agreements, under which the claimants' lawyers agree to fund all of their legal costs and expenses throughout the case on the basis that they can then claim those costs back from the MNC if the case is successful.

[1] Lubbe & Ors v Cape Plc
[2] Motto & Ors v Trafigura
[3] Ocensa Pipeline v BP
[4] Rome II Regulation (EC) No 864/2007

The ‘no win/no fee’ model enables a more level playing field between claimants and MNCs. It also means, however, that claimants’ lawyers shoulder a significant financial burden throughout the duration of each case and the risk of losing all the costs incurred if the case is unsuccessful. In recognition of this risk, claimants’ lawyers have to date been allowed to charge what is known as a ‘success fee’ when a case is successful: an uplift of up to 100% of their standard fees that is recoverable from the MNC. Success fees enable firms to spread their risk by using costs recovered in successful cases help to fund the costs and expenses of those that are not.

The Jackson reforms and their implications for MNC litigation:

The proposed Jackson reforms will tip the costs balance in favour of MNCs in three key respects:

- Abolition of ‘success fees’: MNCs will no longer have to pay a success fee in the event that a case against them is successful.

- ‘Proportionality’: MNCs will only have to pay claimants’ basic legal costs insofar as they are ‘proportionate’ to the compensation received. While at first glance this may seem reasonable, in reality it will mean that wherever the costs of a claim exceed the compensation awarded (which, as explained, is almost inevitable in cases against MNCs), MNCs will have strong grounds for resisting payment of the additional costs, even where they were essential to the success of the case. In a context where compensation levels have already been reduced by the ‘Rome II’ changes, the effect of the ‘proportionality’ principle is to potentially reduce recoverable costs to a meaningless level in comparison to the resources that are expended on a case.

- Introduction of contingency fees: Instead of MNCs paying the full costs, the reforms propose that a proportion of the costs are instead taken out of claimants’ compensation.

Conclusion: barriers to justice

The combined effect of these changes will severely reduce the ability of claimant law firms to take on human rights litigation against MNCs in the future. Claimants’ lawyers will face the prospect of investing enormous amounts of time and money not knowing whether, even if the case is successful, they will recover anything more than a fraction of the costs incurred. Only the very strongest claims will justify the risk and, even then, MNCs will be able to exert unfair pressure on claimants to settle for less, rather than running up costs that may not be recoverable at the end of the day. Those in the developing world, where levels of compensation are typically lower, will lose out most, as the proportionality principle means that their cases will be the least economically viable. The Jackson reforms will thus create a significant barrier to justice, especially for the victims of corporate harm in the developing world.

Types of Cases affected by the Jackson Reforms:

The following are just a few examples of human rights cases against MNCs brought by Leigh Day & Co (LDC) over the past fifteen years that may no longer be possible if the Jackson reforms to the civil costs regime go ahead:

Lubbe & Ors v Cape Plc

In 1996, LDC brought what was then the UK's largest ever group action on behalf of 7,500 South African asbestos miners who had developed a range of asbestos-related diseases included mesothelioma and asbestosis following prolonged exposure to asbestos dust in the workplace. Cape Plc had been involved in asbestos mining in South Africa for many decades. Evidence that came to light during the case revealed that the company had actively lobbied to conceal the nature and extent of the health risks associated with asbestos exposure and had knowingly exposed thousands of workers to the deadly dust. Black workers including young children were exposed to even higher risks than their white colleagues, as the company took even fewer precautions in terms of their safety. After prolonged skirmishing in the Courts, a decision in the claimants' favour allowed the case to be tried in England, rather than South Africa. The company reached a £21 million settlement with the claimants in 2001, but was unable to meet its terms, resulting in further litigation. Eventually, a new settlement was reached in 2003 , in the amount of £10.5 million.

Ocensa Pipeline

In 2004, LDC brought proceedings against the BP Exploration Company (BPXC) on behalf of a group of 52 Colombian farmers in relation to alleged environmental damage caused by the construction of the OCENSA oil pipeline, constructed in the 1990s across the north of Colombia to carry oil from the Department of Casanare to the Carribean coast. The farmers claimed erosion created by the pipeline's construction had caused extensive damage to their properties and contamination of nearby water supplies, resulting in loss of livestock and making farming of the land unsustainable. The case was successfully settled out of court in June 2006 with BP agreeing to the establishment of an Environmental and Social Improvement Trust Fund for the farmers' benefit. Subsequent to this first case, LDC has brought claims on behalf of a further 72 farmers whose land has been allegedly been similarly affected. This second case is ongoing and is being vigorously contested by BPXC and, at this stage, is expected to go to trial in 2013.

Motto & Ors v Trafigura

In 2006, Leigh Day brought proceedings against multi-million dollar oil trader Trafigura Ltd on behalf of 30,000 Ivorian residents affected by the dumping of toxic waste in the commercial capital, Abidjan in August 2006. The waste was the chemical by-product of an oil 'de-sulphuring' process carried out by Trafigura aboard one of its ships, the Probo Koala. Having unsuccessfully tried to offload the waste as regular tank-washings in Amsterdam, Trafigura paid a small, ill-equipped company in Abidjan to dispose of the product. It was subsequently dumped the waste in numerous sites around Abidjan, creating a plume of foul-smelling chemicals that enveloped the city for several weeks. In the immediate aftermath of the dumping, almost 100,000 residents of the city reported to local hospitals and clinics complaining of skin, eye, throat and breathing problems. The case is thought to be the largest group action brought to date in the UK. After three years of hard-fought litigation, the company finally settled the claim out of court in September 2009, resulting in significant compensation for the Claimants. Trafigura has faced subsequent criminal proceedings in the Netherlands as a result of the incident.

Tabra & Ors v Monterrico Metals

In 2009, LDC commenced ongoing proceedings on behalf of 32 indigenous Peruvian anti-mining protesters against British mining company Monterrico Metals. The claimants allege that the company was complicit in their torture and mistreatment by the Peruvian police following a protest at the Rio Blanco mining site in August 2005. When the protesters arrived at the mine site, armed police were waiting for them. After firing tear gas into the crowd, the police detained, bound and hooded the protesters and proceeded to beat them. Two women allege they were sexually assaulted. It is also alleged that a further three protesters were shot and one was left to bleed to death on the site of the mine. While the company denies involvement in the police operation, LDC has taken statements from witnesses who report that the mine's management were coordinating the police operation. In 2009, to protect the interests of the Claimants, the English and Hong Kong High Courts granted orders freezing £5 million of the company's assets. The case is scheduled for a 10-week trial commencing in October 2011.