



Please reply to:

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Jonathan Djanogly MP
Justice Minister
The Ministry of Justice
102 Petty France
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11th February 2011

Dear Minister,

Re: Proposals for Reform of Civil Litigation Funding and Costs in England and Wales

We are writing to you in relation to the current consultation on Sir Rupert Jackson’s proposals for reform of civil litigation funding and costs. We believe that these proposals could have far-reaching implications for access to justice in certain categories of cases and would like to outline some ideas as to how such risks could be effectively mitigated.¹

Our concern is that the ‘Review of Civil Litigation Costs: Final Report’ and the Ministry of Justice’s current proposals arising from this, do not take account of the implications these proposals would have on victims of harm committed by UK multinational corporations’ abroad. At present, victims are able under certain circumstances to pursue litigation in the UK and a number of high profile cases have resulted in compensation for victims of corporate abuse, who would not otherwise have had access to a remedy.²

¹ For example, the proposals also have implications for Freedom of Expression which are not addressed here.

² Including *Ngcobo & ORS v Thor Chemicals*: claims by 20 South African workers poisoned by mercury (1995-1997), *Connelly v Rio Tinto*: Namibian uranium miner’s claim for throat cancer (1995-1998), *Sithole & ORS v Thor Chemicals*: claims by 21 South African workers

These cases are important for a several reasons. They not only provide justice for individuals who have been harmed by the activities of corporations, but they also give a powerful incentive to multinational corporations to respect human rights and the environment in the future. In general, the extent to which victims are able to pursue avenues of redress for abuses committed by multinational corporations is low. This has been recognised by the UN Special Representative for Business & Human Rights in his recent draft guidelines, which have received strong support from the UK Government in January this year.³

The Joint Committee on Human Rights has also recently reviewed this issue in its inquiry on Human Rights & the UK private sector.⁴ The Government assured the Committee in its response to this Inquiry that the Jackson proposals would take account of their consequences on legal cases brought against UK companies for committing human rights abuses and environmental violations.⁵

Apart from John Pickering & Partners in the Cape PLC case, Leigh Day & Co has been the only UK law firm to undertake such cases over the past 15 years. This reflects the risks associated with such cases, in terms of their prospects of success, uncertain duration, level of resources and investment required, and cash flow implications of carrying the financial burden until the conclusion of the litigation. We are concerned that without a specific exception for this type of litigation, the proposed changes to the “no-win-no-fee” arrangements mean that lawyers will find it prohibitively risky to take such cases in future, which would lead to no such cases being taken in the UK for lack of legal representation.⁶

While the current cost rules impose prohibitive limitations on such cases for most law firms, they nonetheless allow law firms such as Leigh Day & Co to pursue such cases and take the financial risks involved. We therefore recommend that the following proposals are amended to clarify that they do not apply in respect of litigation against multinational corporations, in cases where the ability of victims of corporate harm to obtain a remedy would be undermined because of

- (a) The proposed non recoverability of success fees; and
- (b) The proposed non-recoverability of basic costs, to the extent that they fail the “proportionality” test.

The Government gave a commitment to operationalise the work of Professor John Ruggie, UN Special Representative on Business & Human Rights, including draft Guiding Principle 24, that:

poisoned by mercury (1997-2000), *Lubbe & ORS v Cape PLC*: claims by 7,500 South African asbestos miners (1996-2003), *Bembe & ORS v T&N* : claims by 400 Swaziland asbestos miners, *Ocesa Pipeline claim* against BP exploration for Colombian campesinos for damage to land (2004-2006), *Motto & ORS v Trafigura*: claims by 30,000 Ivory Coast citizens arising from toxic waste dumping (2007-2010), Litigation against multinational corporations (MNCs) currently ongoing in the UK courts for human rights violations: *Ocesa Pipeline litigation*: against BP exploration for 73 Colombian campesinos for damage to land (2007 -), *Tabra & ORS v Monterrico Metals*: torture claims by 32 indigenous Peruvian anti-mine protesters (2009-)

³ UK Government Comments on the Draft UN Guiding Principles for the Implementation of the ‘Protect, Respect and Remedy’ Framework, January 2011

<http://www.business-humanrights.org/media/documents/uk-comments-guiding-principles-2011.pdf>

⁴ The Joint Committee on Human Rights enquiry on Human Rights & The UK Private Sector took place over 2009. More information available here <http://www.publications.parliament.uk/pa/jt/jtrights.htm>

⁵ Paragraph 68 of The Government Response to The Joint Committee on Human Rights enquiry on Business and Human Rights, 16th December 2009 <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf>

⁶ See Leigh Day submission to The Ministry of Justice Consultation on “Proposals for reform of civil litigation funding and costs in England and Wales” <http://www.justice.gov.uk/consultations/jackson-review-151110.htm>

“States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing human rights-related claims against business, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”⁷”

We trust, therefore, that the Government will keep its commitment and amend these proposals to reflect these concerns.

Yours sincerely,

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⁷ Draft Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie “Guiding Principles For The Implementation Of The United Nations ‘Protect, Respect And Remedy’ Framework” <http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>

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