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HUMAN RIGHTS AND BUSINESS

Deighton Pierce Glynn Submission to the Joint Select Committee on Human Rights

Executive Summary

Accountability for corporate human rights abuses is still in its infancy and legal successes are the exception rather than the rule. No single jurisdiction can be held up as an exemplar. Accountability mechanisms have not kept pace with the trends of globalization and privatisation, which have found large corporations exercising quasi-governmental roles and capable of severely impacting on victims' lives.

The UK government's rhetoric has not been matched by meaningful action, and all to often human rights considerations are subordinated to commercial interests of 'UK plc'.

As a law firm litigating on behalf of victims in the area of business and human rights, we principally focus on access to remedy below. Many of these submissions have already been made as part of the Action Plan review process by CORE, Traidcraft and others, and it is disappointing that they have not been taken forward by government as part of that process.

About Deighton Pierce Glynn

Deighton Pierce Glynn is a firm of solicitors specialising in civil liberties, human rights and public law, based in London and Bristol in the UK. It has particular specialisms in community care and mental capacity; actions against the police; detention and prison claims; equality and discrimination matters; environmental and planning law; healthcare; housing, destitution and migrant rights; international human rights; inquests; public sector cuts; and assisting victims of crime. The firm acts for very vulnerable individuals such as victims of torture, human trafficking/sexual exploitation and arbitrary detention; unaccompanied child immigrants; disabled people and those with serious mental health needs. The firm is acting in and investigating several claims for victims of corporate human rights abuses at present, in respect of, inter alia, complicity in torture in Latin America; arms exports to human rights abusing states; corporate support to rights abusing states through sporting events; and killing by private security contractors overseas, with a focus on Africa, Asia and the middle east. The firm and its lawyers have received awards for their work. For further details see www.dpglaw.co.uk and @dpg_law on twitter.

Detailed Submissions

Government engagement with business and human rights

Although our insight into this issue is limited to our work and the experiences of our NGO clients, we have seen little evidence of effective engagement with the business and human rights agenda by Government departments. To the contrary, the increasing involvement of business in performing roles traditionally reserved to public authorities appears to be partly driven by a perception that they are not bound by human rights and other accountability mechanisms. The preference for marketing 'UK plc' over and above stressing human rights

concerns has been a recurrent theme. Indeed, a recent trend has seen government departments mimicking private sector activity by marketing their own services for profit overseas (e.g. Just Solutions International, the now abandoned profit arm within the Ministry of Justice; and the marketing of policing services by the College of Policing).

The National Contact Point for the OECD Guidelines was criticised in Amnesty International's recent 'Obstacle Course' report, the findings of which we support[1].

A major cultural change is required to place human rights considerations on an equal footing to trade within government and the civil service.

The government's anti-human rights rhetoric and the absence of any positive affirmations of human rights in a domestic context have no doubt contributed to this stagnation.

It appears to us that procurement rules are not consistently applied, nor are they sufficiently clear as to the extent to which human rights impacts can be taken into account. The government's recent intervention in this area: issuing the Procurement Policy Note 01/16[2] on wider international obligations, was a backwards step, as it purported to restrict those authorities proactively pursuing a business and human rights agenda (at [7]):

> "Public procurement should never be used as a tool to boycott tenders from suppliers based in other countries, except where formal legal sanctions, embargoes and restrictions have been put in place by the UK Government."

It appears to be an intentionally ambiguous document, and whilst of doubtful lawfulness to the extent that it purported to change the law around procurement, it is likely to have a chilling effect on public authorities proactively including human rights concerns in their procurement decisions.

Access to remedy

- Access to remedy is a global problem. No single jurisdiction can be held up as an exemplar. International instruments such as the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises are non-binding in nature and inconsistently applied. The UK lacks some of the remedy mechanisms available in other jurisdictions such as the US. See further *Michael Goldhaber, Corporate Human Rights Litigation in Non-US Courts: A Comparative Scorecard*[3]. The picture has deteriorated over recent years with successive cuts to legal aid. The Supreme Court recently quashed the Ministry of Justice's introduction of a residence test for legal aid, which would have significantly further hampered legal accountability. However, there have been successes in the UK due to the availability of common law causes of action; the work of committed activists; and a relatively small group of lawyers.

- Access to remedy would be further enhanced by a provision to allow damage caused by an EU domiciled company to be sued in any EU member state, not only the state of domicile.

[1] https://www.amnesty.org.uk/sites/default/files/uk_ncp_complaints_handling_full_report_lores_0.pdf

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/500811/PPN_on_wider_international_obligations.pdf

[3] http://www.law.uci.edu/lawreview/vol3/no1/goldhaber.pdf

- Domestic courts in the UK are increasingly familiar with extra-territorial matters, in the public law sphere (see e.g. *Al-Skeini v United Kingdom*) and in commercial disputes involving foreign law and subject matter[4]. The Brussels I Regulation certainly aids legal certainty in establishing jurisdiction for claims against UK-domiciled corporations. However, the courts' approach to jurisdiction against non-UK domiciled corporations is still difficult territory. It would assist victims if the UK Courts also adopted a more flexible approach in relation to non-UK domiciled corporations where vindication of victims' rights is not possible or uncertain in other foreign courts. For an example of an exercise of this discretion, see the recent judgment in *Pike & Doyle v The Indian Hotels Company Limited* 2013 EWHC 4096 (QB)[5].

- The preference for the law of the country in which the damage occurs under the Rome II Regulation does lead to further complication, expense and a sometimes unsatisfying 'battle of experts', when using UK law in some cases would avoid unnecessary complication and enhance legal certainty. A treaty-based solution could usefully introduce flexibility in this area. A victim should be able to choose between the law of the country of damage or the law of the country of the corporate human rights abuser in enforcing human rights obligations against such corporations.

- Proving parent company liability and establishing corporate knowledge of the actions of officers and/or subsidiaries is difficult, in the absence of an 'aggregated' or 'organizational' approach to liability. Claimants are forced to rely on scarce public documents regarding the relationships between parents and subsidiaries. Unless they make an Application for Specific Disclosure or Pre-Action Disclosure, discovery of documents only occurs after proceedings have been issued, pleadings exchanged and substantial costs have been incurred. All too often, genuine attempts to narrow the issues in a proposed claim pre-action are dismissed as 'fishing expeditions', a phrase which itself is indicative of a lack of public accountability. Pre-action disclosure requests generally carry an assumption that the requester is responsible for the Defendant's costs. Earlier disclosure from Defendants should be facilitated by changes to the Civil Procedure Rules by removing the costs risk.

- Establishing secondary liability in relation to supply chains, for example in negligence, is similarly difficult. This could be met by the introduction of binding statutory duties beyond mere reporting requirements in relation to modern slavery.

- Representative claims are possible under Rule 19.6 of the Civil Procedure Rules, but are little used. This makes larger claims and claims seeking to vindicate indigenous peoples and communities' rights more difficult, as they involve a large logistical task of identifying and obtaining instructions from many hundreds of individuals. Greater clarity regarding the use of representative claims would assist in remedying this.

- Because of the high costs involved in preparing this kind of litigation (factual complexities, translation costs, expert costs, travel costs, evidence gathering costs, security costs etc.) then only two or three UK firms are willing to take on corporate accountability cases with an international element. These same difficulties also skew

[4] See e.g. http://www.independent.co.uk/news/uk/crime/britain-top-choice-for-international-lawsuits-windfall-for-barristers-from-oilrich-kazakhstan-8608220.html

[5] http://www.bailii.org/ew/cases/EWHC/QB/2013/4096.html

case selection towards 'high quantum' cases (usually class actions) in order to ensure recovery of the costs invested in the event of success. Deighton Pierce Glynn are endeavouring to select 'smaller scale' cases, but the viability of this model depends on the courts recognising the proportionality of the costs invested in preparing these cases. The requirement to conduct cases 'at proportionate cost' was inserted into the Civil Procedure Rules as part of the recent changes to the Civil Procedure Rules in England and Wales (the 'Jackson Reforms' in 2013).

- The Jackson Reforms have disincentivised civil litigation against corporate human rights abusers. Success fees and insurance premiums for litigation costs risk insurance ceased to be recoverable from losing defendants. Success fees were also capped in cases involving personal injury to 25% of the damages awarded to the client. The marginal 'quid-pro-quo' for these changes was to remove costs risk for cases involving personal injury so that claimants are not liable for the defendant's costs in the event of a loss. However, this has itself generated satellite litigation as to the scope of the exclusion. More importantly, without the recovery of success fees from defendants, there is little costs reward to balance the risk and investment taken on by a firm working on a 'no win, no fee' basis. Litigation would be facilitated by a regime which did not place the victim at risk of paying legal costs if they lost the claim, across the board, and by reinstating fair and proportionate compensation for the costs risk incurred – by reintroducing proportionate success fees that rise incrementally with each stage of proceedings, thus incentivising alternative dispute resolution and early settlement.

- All of the above issues are notably absent from UK Government's Action Plan for implementing the UN Guiding Principles on Business and Human Rights[6]. Out of the c.20 planned new actions, very few had a timetable for implementation and no new binding obligations on corporations were clearly signalled. As has been noted elsewhere, the Action Plan was undermined to an extent by the UK's intervention in the *Kiobel v Shell* case in the US Supreme Court[7] in support of Shell's position.

- Criminal law enforcement is important. However, these cases are complex and, even in relation to entirely domestic cases, conviction rates are very low. For example, there have been only a handful of convictions for Corporate Manslaughter in the UK[8], although the number of cases investigated by the Crown Prosecution Service is greater. Cross-border cases are more difficult still. This appears to be, in part, a problem of resourcing of the police.

- This firm is acting in complaints to the National Contact Points for the OECD Guidelines on Multinational Enterprises. The OECD process has the benefit of low cost (the UK NCP bears the cost of mediation) and does not carry any costs risk. However, it depends on good faith participation and is non-binding and is unlikely to result in compensation for victims. Moreover, the quality of investigation and decision making appears to vary between the different NCPs, the UK NCP has demonstrated

[6] https://www.gov.uk/government/publications/bhr-action-plan

[7] "'HRDD [Human Rights and Democracy Department at the FCO] is concerned that actively intervening would damage everything the Government is doing to show that good business achievement and good corporate human right behaviour are compatible with each other. Submission of a UK brief effectively defending the corporate position in this case will be perceived as inconsistent with our position on the UN Guiding Principles... of which the UK was a key supporter during their five years gestation" http://www.amnesty.org.uk/blogs/yes-minister-it-human-rights-issue/uk-government-shell-rio-tinto-human-rights-niger-delta

[8] http://www.telegraph.co.uk/finance/financial-crime/9830480/Corporate-manslaughter-cases-rise.html

that this is a viable alternative form of redress. It has adopted a flexible approach to forum in relation to foreign subsidiaries (see *Survival International v Vedanta Resources plc*[9]). And there was a notable success in the World Wildlife Fund complaint regarding Soco International plc[10]. However, the UK NCP has too often avoided dealing with issues of substantive human rights violation by refusing to find that they are material and substantiated (imposing too high a threshold for the satisfaction of this test) and concentrated on matters of corporate due diligence only. This approach needs to be revised. We adopt the recent Amnesty International recommendations in this regard.

- Codification of the principle of parent company liability for subsidiaries in the sphere of human rights breaches would be of great benefit. This may also require human rights breaches to be rendered as separate causes of action, in order to sufficiently demarcate such claims from the principle of separate corporate personality. Whilst acknowledging the difficulties if claims involved both HR and tort-based claims, we do not accept that this is unworkable. It is possible in relation to claims against state actors currently.

- More should be done to restrain extra-territorial human rights abuses by domestic corporations, starting with those corporations operating in armed conflict zones (in furtherance of the Principle 3 of the Guiding Principles on Business and Human Rights as well as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law). The commentary on Principle 2 of the Guiding Principles states that "*At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.*." The words "at present" and "generally" are important. This summary of the present state of international law should not be allowed to become a rule of international law.

DEIGHTON PIERCE GLYNN
www.dpglaw.co.uk

15 JULY 2016

[9] http://www.oecd.org/investment/mne/43884129.pdf
[10] http://www.wwf.org.uk/wwf_articles.cfm?unewsid=7019