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Corporate enterprise principles and UK regulation of modern slavery in supply chains

Abstract: The Modern Slavery Act 2015 contains an application of enterprise principles in its transparency in supply chains section [section 54]. It applies mandated disclosure regulation to the entire group once it satisfies the required conditions. This paper examines the consequential issues of extraterritoriality and potential liability.

Introduction:

The network nature of the multinational corporate enterprise and its global supply chains is an economic reality of the modern global society, which represents interconnections between countries. Enterprise principles involve the recognition in law of the multinational corporate group as a single enterprise for purposes of liability and responsibility. Yet the application of enterprise principles to multinational corporations in law is only done in exceptional circumstances and not as the rule. The general principle for corporations, is one of domestic jurisdiction with little or no recognition of a cross-national or international corporate legal personality.¹ Therefore, when issues of human and social rights arise in global supply chains, the enforcement of regulation is often domestic and not international.

This work examines the UK Modern Slavery Act 2015, section 54 on transparency in supply chains as an application of enterprise principles to large corporations. The provision requires corporations, which carry on business in any part of the UK to prepare a slavery and human

¹ J Dine *The Governance of Corporate Groups* (Cambridge, CUP 2000) see also J Dine 'Jurisdiction arbitration by multinational companies: a national law solution?' (2008) 3(1) *Journal of Human Rights and the Environment* 44-69. There are exceptions such as the German law on groups (*Konzernrecht*) and the Albanian Company law 2008 See opinion of the US Court of Appeal *Kiobel v Royal Dutch Petroleum Co.* 2nd Circuit 621 F. 3d 111 (2010). This was affirmed by the US supreme court *Kiobel v Royal Dutch Petroleum Co.* 133 S Ct 1659 (2013) https://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf <last accessed 16th December 2016>

rights trafficking statement to indicate steps taken in the financial year to ensure that slavery is and human trafficking is not taking place in its supply chains or any parts of its own business. This will cover the enterprise as a whole where it satisfies the relevant requirement and consequently applies enterprise principles in its demand for disclosure.

The paper will set out a succinct analysis of the UK Modern Slavery Act 2015 and the related California [US] legislation, and then it will examine the potential consequences of the application of enterprise principles in this area and the nature of the regulation used. Finally, it examines the potential impact by examining likelihood for litigation already demonstrated in the US and the prospects for the misleading information actions under the EU Unfair Commercial Practices Directive.² The suggestion here is that modern slavery is a human rights and social responsibility issue that the corporation faces, therefore recognising the enterprise in one area may push the case for application in other areas.

The Corporation: Entity v Enterprise

In the Barcelona Traction case, the International Court of Justice [ICJ] recognized: ‘the corporate entity as an institution created by states in a domain essentially within their domestic jurisdiction’³. Furthermore it is doubtful whether multinational corporations have an international legal personality.⁴ While they may be objects of international law, there is no consensus on whether they are subjects or direct participants of international law.⁵ Therefore

² See the 2016 guidance to Directive 2005/29/EC : http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf <last accessed 16th December 2016> p.59-64, 63

³ ICJ Case concerning the Barcelona Traction, Light & Power Company (judgement 5th February 1970) Para.38 <http://www.icj-cij.org/docket/files/50/5387.pdf> <last accessed 16th December 2016>

⁴ See n1

⁵ J E Alvarez ‘Are corporations ‘subjects’ of International Law?’ 9 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 1-36 (2011)

corporations and corporate laws are predicated on national structures which preside over each incorporated entity, often referred to as entity law.⁶

The result is that for corporations, one must always look to the domestic jurisdiction.

Muchlinski describes the situation thus:

‘Indeed if one were to look at legal sources alone the multinational enterprises would not exist: all one would find is a series of national companies whose principal shareholder happens to be a foreign company and/or a network of interlocking contracts between entities of different nationalities. No hint of the complex systems of international managerial control, through which the operations of the multinational group are conducted, would be discovered’⁷

This also represents a sense of separation of the economic reality from law. This is a position endorsed in common law as can be seen from the statement of Lord Goff in *Bank of Tokyo Ltd v Karoons*⁸, he pointed out that:

‘Counsel suggested beguilingly that it would be technical for us to distinguish between parent company and subsidiary in this context; economically, he said, they

⁶ There are different approaches & exceptions such as Germany but in the English law approach has been summarised thus:

“English Company Law possesses some curious features that generate some curious results. A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by shareholders of the parent company. If one of the subsidiary companies, to change the metaphor, turns out to be the runt of the litter and declines into insolvency to the dismay of its creditors, the parent company and other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary” LJ Templeman in *Re Southard & Co Ltd* [1979] 3 All ER 556: This extends to multinational corporations which cross national boundaries:

“... save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of Salomon v A Salomon & Co. Ltd merely because it considers that justice so requires. Our law, for better or worse, recognise the creation of subsidiary companies, which though in one sense the creature of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.” Adams v Cape plc [1990] Slade LJ

⁷ P T Muchlinski, *Multinational Enterprises and the Law* (Blackwell Publishing, Oxford 1999)

lv-lvi

⁸ [1987] AC 45

were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be abridged.’

Therefore, this conception of corporations in law, affects its regulation with regard to human rights issues such as modern slavery. This conception is a result of the externalising nature of corporate law and the strong sense of corporate law as a framework for the success of the corporation, often defined in narrow terms. The dominant entity principles entrenched in traditional corporate law are a recognition of the privilege accorded by the law’s conception of separate legal personality and the attached protection of limited liability. These specific attributes have consequently endowed the entity with some protection from risk and the ability to externalise liability. This has in turn, visibly impacted global economic life by increasing corporate power which is coupled with a level of invisibility for liability at the international level.⁹

As early as 1970 the ICJ noted that:

‘seen in historical perspective, the corporate personality represents a development brought about by new and expanding requirements in the economic field, an entity which in particular allows of operation in circumstances which exceed the normal capacity of individuals. As such it has become a powerful factor in the economic life of nations.’¹⁰

The limited nature of liability is accepted as a requisite aspect of the corporate being. Slade J in *Adams v Cape plc* admits that:

⁹ Muchlinski n6

¹⁰ ICJ Case concerning the Barcelona Traction, Light & Power Company (judgement 5th February 1970) para 39

‘Our law, for better or worse, recognise the creation of subsidiary companies, which though in one sense the creature of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.’¹¹

There has been as a result a huge dichotomy between calls for international regulation of multinational corporate enterprises for human and social rights issues and the insistence on self-regulatory modes of governance within multinational corporate enterprises with regards to such transnational human rights and social rights issues. The unsuccessful nature of efforts for a direct international regulation of multinational corporate enterprise is also somewhat a result of this entity conception at the national level. Yet national law in exceptional circumstances does confront the economic reality especially where the law reckons it may inadvertently aid a legal wrong or crime.

There is also evidence that the entity conception of the corporation, which at one time was indeed a fit for economic life, protection and growth, is now outmoded and a misfit for contemporary social issues confronting the corporation. One of the major social and human right issues confronting the multinational enterprise is the use of modern slavery in business supply chains. The global nature of business has given rise to complex network modes of business organisation and supply chains which in addition to the traditional parent-subsidiary relationship, could include other forms of non-equity modes of investment such as contract manufacturing and farming, service outsourcing, franchising and licensing.¹²

¹¹ 1990 Ch. 433 [UK]

¹² UNCTAD, World Investment Report 2011 Non-Equity Modes of Production and Development (New York/Geneva, UN 2011) p.xi

The rise of supply chains and its management is symptomatic of the global ‘boundaryless’ nature of multinational corporations and global business.¹³ This involves a management style of supply chains, which ‘integrates supply and demand management within and across companies’.¹⁴ Blumberg points out that ‘the concept of the corporation as a separate legal entity, a concept that originally had satisfactorily defined the economic as well as the legal entity, has failed to correspond to the modern realities of American and world business.’¹⁵

The application of enterprises principles in this case may have been necessitated by a growing recognition that, if the law to deal were to deal with this effectively as a ‘criminal’ activity, it must mirror its application of public policy, in some way to corporate actors. Wen reports that there was severe criticism of the earlier drafts of the UK bill when it neglected to deal with the issue regarding slavery in supply chains.¹⁶ Enterprise principles in law, have been applied in a limited number of circumstances in the national context especially by legislation, in instances where it is considered beneficial to the home or host state especially that a certain corporate activity is perceived as liable to potential fraud or crime. Examples include bribery,¹⁷ tax and bankruptcy.¹⁸ Such application raises issue of extraterritoriality and the application of legislation to an action or inaction beyond one’s borders or domestic jurisdiction.¹⁹

¹³ K Amaeshi, O Osuji and P Nnodim ‘Corporate Social Responsibility in supply chains of global brands, a boundaryless responsibility? Clarifications, Exceptions and Implications’ (2008) 81(1) Journal of Business Ethics 223-234

¹⁴ See definition of the Council of Supply Chain Management Professionals <https://cscmp.org/iMIS0/CSCMP/> <last accessed 16th December 2016>

¹⁵ See P I Blumberg *The Multinational Challenge to Corporation Law* (New York, OUP 1993) p.232 see also V Harper-Ho ‘Of enterprise principles and corporate groups: does corporate law reach human rights?’ (2013) 52 *Columbia Journal of Transnational Law* 113- 172

¹⁶ S Wen ‘The Cogs and Wheels of Reflexive Law –Business Disclosure under the Modern Slavery Act’ (2016) 43(3) *Journal of Law and Society* 327 -359, 341

¹⁷ See: the UK Bribery Act Section 7

¹⁸ s. 399 of the UK Companies Act 2016 provides for a duty to prepare group accounts. See also Blumberg n14

¹⁹ O Amao *Corporate Social Responsibility, Human Rights and the Law* (Abingdon, Routledge 2011) 249

The approach now adopted in the Modern Slavery Act involves the limited recognition of the corporate group.²⁰ It remains a somewhat mediated solution as it does not fully recognise the international legal personality of a corporation or change the dominant character of entity law, it still operates as a statutory exception.

The UK Modern Slavery Act 2015

The slave trade, in its old form was abolished over 200 years ago.²¹ Modern slavery can be seen as the ‘new slavery-like practices of our time’.²² The scope of the Modern Slavery Act is a wide one as it tries to consolidate all areas currently falling within modern slave-like practices. The Modern Slavery Act 2015²³ is the result of a combined strategy of the UK government to tackle modern slavery as an organised crime that has wide-ranging implications for human victims and society. The act as a whole demonstrates the breath of modern slavery which is classed as criminal activity. It has implications for various government agencies, non-government organisations (especially those who are part of the national referral mechanism), businesses and individuals. It also indicates the collateral effect of modern slavery on migration, financial cash flows and extraterritorial action in supply chains. This categorisation

²⁰ These principles are usually applied where the state recognises that the issues of liability that arise would only be effective when imposed on the ‘enterprise’ as a whole. See Blumberg n14

²¹ Slave Trade Act 1807 [UK] abolished the trade, Slave Abolition Act 1833 [UK] abolished slavery throughout the British Empire.

²² S. Scarpa *Trafficking in Human Beings: Modern Slavery* (Oxford, OUP 2008) 4

²³ [hereinafter the act]

as a crime means that most sections of the act adopt a traditional command and control approach.

The act covers slavery, servitude, forced and compulsory labour and human trafficking.²⁴ Modern Slavery in this context is seen as a complex criminal activity involving the use of human beings as ‘commodities over and over again for the profit of others.’²⁵ The act attempts to capture the persistence and mutation of slavery into newer forms which include forced labour, bonded labour, child labour, forced prostitution and human trafficking. Therefore, in keeping with the contemporary usage of the term, this act is also covers individuals who are ‘coerced, deceived or forced’ into a life of servitude. This would include exploitation of the individual sexually as well as those forced by threat, abuse to their persons or families, to work against their will. The act makes it an offence for a person to ‘hold another person in slavery or servitude and the person knows or ought to have known that the other person is held in slavery or servitude.’²⁶

The act also makes it an offence to require another to perform forced or compulsory labour. This sections are to be read together with Article 4 of the Human Rights Convention (ECHR) which prohibits slavery and forced labour. Section 2 covers human trafficking which is defined as arranging or facilitating the travel of another, with the view to being ‘exploited’. The word ‘exploitation’, in the act covers slavery, servitude and forced or compulsory labour, sexual exploitation, removal of organs, securing services by force, threats and deception and securing services from children and vulnerable persons.²⁷ The act enshrines the UK government strategy titled ‘Pursue, Prevent, Protect and Prepare’ and works through the lens of modern slavery as

²⁴ (Modern Slavery Act 2015, s.1 & 2).

²⁵ (Home Office, Modern Slavery Strategy, 2014 p.9)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/383764/Modern_Slavery_Strategy_FINAL_DEC2015.pdf <last accessed 16th December 2016>

²⁶ (S.1a)

²⁷ (s.3)

an organised criminal activity. Therefore the act empowers the relevant agencies to pursue through a range of penalties such as the detention by a constable or senior immigration officer of land vehicle, ship or aircraft on arrest of a person for an offence under section 2;²⁸ the order of forfeiture by courts of land vehicle, ship or aircraft upon conviction;²⁹ power of the court to make slavery and reparation orders, for payment of compensation to the victim.³⁰

Furthermore, Section 5 provides for a person found guilty of s.1 or 2 to be liable on conviction to life imprisonment, it also prescribes shorter sentences for lesser offences. Beyond imprisonment, it also amends the Proceeds of Crime Act 2002 to allow for confiscation of assets. Under the prevention and protection strategy two new key orders have been introduced: the slavery and trafficking prevention orders³¹ and the slavery and trafficking risk orders.³² The prepare strategy is reflected in the act through the appointment of the new independent anti-slavery commissioner whose key functions would include to ‘encourage good practice in (a) the prevention, detection , investigation and prosecution of slavery and human trafficking offences; (b) the identification of victims of those offences.’³³ The secretary of state also has responsibilities to make arrangements for support and representation of trafficked children [independent child trafficking advocates].³⁴ He must also issue guidance to relevant public authorities and may make regulations for identifying and supporting victims.³⁵ Specific immigration protection is given to overseas domestic workers by granting leave to remain for those who have been determined to be a victim of slavery and human trafficking.³⁶

²⁸ (s.12)

²⁹ (s.11)

³⁰ (s.8)

³¹ (s.14)

³² (s.23)

³³ (s.41(1))

³⁴ (s.48)

³⁵ (s.49 &50)

³⁶ (s.53)

Notwithstanding this traditional legal approach, the act adopts a novel approach to commercial organisations. This approach is based on a model first adopted in California. In adopting this different approach, there is a nod to the UN Guiding principles and the ‘respect’ framework which declined to make corporations directly responsible for human rights but instead pushed for corporations to ‘know and show’ they respect human rights.³⁷ This should involve provision of information that is suitable to assess the adequacy of the company’s response to human rights issues.³⁸

The California Transparency in Supply Chains Act 2010 requires large retail sellers and manufacturer doing business in this state and having annual worldwide gross receipts that exceed one hundred million dollars (\$100,000,000) to disclose their policies on slave labour on their website.³⁹ The suggested minimum content of disclosure should cover how the company does the following:

“(1) Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party. (2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit. (3) Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business. (4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding

³⁷ See commentary of guiding principle 21 of the UN Human Rights Guiding Principles http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf <last accessed 16th December 2016>, see also R Mares The Human Rights Guiding Principles on Business and Human Rights (Netherlands, Martinus Nijhoff publishers 2011) p.11

³⁸ Ibid Guiding Principle 21

³⁹ (a) (1) Every retail seller and manufacturer doing business in this state and having annual worldwide gross receipts that exceed one hundred million dollars (\$100,000,000) shall disclose, as set forth in subdivision (c), its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale

slavery and trafficking. (5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.”⁴⁰

This has been termed a ‘social and legislative experiment’ against the background of ‘opaque and complex’ supply chains of products, which end up in California.⁴¹

Section 54 of the UK act, is predicated on the California Transparency in Supply Chains Act of 2010. The government response document to the consultation on modern slavery and supply chains indicates key differences. These are firstly that it covers organisations carrying out **any** part of their business in the UK, it covers all sectors, not just retail and manufacturing and finally it covers both goods and services.⁴² However, there is also a difference in the specification of verification and internal accountability required.

This UK approach is encapsulated in section 54 which requires ‘a commercial organisation within subsection (2) to prepare a slavery and human trafficking statement for each financial year of the organisation.’⁴³ This affects commercial organisation which supply ‘goods or services’⁴⁴ and the total turnover is not less than 36 million pounds⁴⁵. This current threshold amount prescribed tallies with the threshold for large companies in the UK Companies Act 2006.⁴⁶ These large companies are also obligated under s.414A-D of the Companies Act⁴⁷ to

⁴⁰ See subdivision (c) as above. See also <http://www.state.gov/documents/organization/164934.pdf> <last accessed 16th December 2016>The Californian legislation p.93

⁴¹ See B T Greer J G Purvis ‘Corporate supply chain transparency: California’s seminal attempt to discourage forced labour’ (2015) 20(1)The International Journal of Human Rights 55-77, 55

⁴² Home Office, ‘Modern Slavery and Supply Chains Government Response’ 2015 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448200/Consultation_Government_Response_final_2_pdf.pdf <last accessed 16th December 2016>p.6

⁴³ (s.54 (1))

⁴⁴ (s.54 (2))

⁴⁵ Home Office, ‘Modern Slavery and Supply Chains Government Response’ 2015 n42, p. 16

⁴⁶ *ibid*

⁴⁷ The Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013

give a strategic review which is a form of non-financial reporting that puts forward risks and uncertainties facing the business. It requires group reports and prescribes a penalty for non-compliance.⁴⁸ In the case of quoted companies the review extends to environmental, social and community issues. Therefore, by implication issues of slavery in supply chains would be added as another ‘risk’ or issue to report on.

The aim of s.414 A-D of the Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013 is to assess how directors are carrying out their duty for the success of the company under s.172 Companies Act. S.172 introduces elements of social responsibility into company law. However using similar threshold allows for the potential, that the statement would be incorporated into this existing process.⁴⁹ The non-financial reporting requirements also requests a consolidated report where the directors of the company already prepare group accounts.⁵⁰ This represents a link being made between the financial and the non-financial. Enterprise principles had been more readily applied to the financial.

The Act in s.54 also utilises a meta-regulatory mechanism in providing for transparency (disclosure) in supply chains. Parker defines meta-regulation as inclusive of ‘any form of regulation (whether by tools state law or other mechanisms) that regulates any other form of

⁴⁸ S. 414 A (3) For a financial year in which—

(a) the company is a parent company, and

(b) the directors of the company prepare group accounts,

the strategic report must be a consolidated report (a “group strategic report”) relating to the undertakings included in the consolidation.

(4) A group strategic report may, where appropriate, give greater emphasis to the matters that are significant to the undertakings included in the consolidation, taken as a whole.

(5) In the case of failure to comply with the requirement to prepare a strategic report, an offence is committed by every person who—

(a) was a director of the company immediately before the end of the period for filing accounts and reports for the financial year in question, and

(b) failed to take all reasonable steps for securing compliance with that requirement.

(6) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to a fine;

(b) on summary conviction, to a fine not exceeding the statutory maximum.

⁴⁹ Home Office, ‘Modern Slavery and Supply Chains Government Response’ 2015 n40, p. 16

⁵⁰ See n45

regulation. Thus it might include legal regulation of self-regulation.’⁵¹ Therefore in this context, it requires large companies to formulate and publicise a slavery and human trafficking statement.⁵²

Sub-sections 4 & 5 give some more detail about this requirement:

“(4) A slavery and human trafficking statement for a financial year is—(a) a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place—(i) in any of its supply chains, and (ii) in any part of its own business, or (b) a statement that the organisation has taken no such steps.

(5) An organisation’s slavery and human trafficking statement **may include** information about—(a) the organisation’s structure, its business and its supply chains;

(b) its policies in relation to slavery and human trafficking;

(c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;

(d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;

(e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;

(f) the training about slavery and human trafficking available to its staff.”

⁵¹ C Parker ‘Meta-regulation: Legal accountability for corporate responsibility?’ in D McBarnet et al *The New Corporate Accountability: Corporate Social Responsibility and the Law* CUP, 2007, 211

⁵² The titling does not give an indication of the content as it is hoped that such a statement would be anti-slavery and anti-human trafficking that is, indicative of how companies ensure that slavery and human trafficking are not part of their supply chains.

The statement produced by companies (body corporate) must be approved by the board and signed by a director.⁵³ It must also be published on a website where the companies have a website.⁵⁴ The act specifies that a link must be included in a ‘prominent place’ on that website’s homepage.⁵⁵ The section also makes clear that ‘slavery and human trafficking’ will be defined by home standards, that is conduct which would constitute an offence in a part of the UK under the relevant provisions as if the conduct took place in the UK.⁵⁶ The oversight element here lies with the Secretary of State who can issue guidance about duties imposed on commercial organisations.⁵⁷ This may include further provision for the kind of information, which may be included⁵⁸ and even more importantly bring civil proceedings for an injunction or in Scotland, for specific performance.⁵⁹ This brand of legislation also builds on the use of disclosure popularised in corporate governance by the ‘comply or explain’ application of the UK corporate governance code [post the Cadbury report].⁶⁰

More importantly this is an attempt also to confront the problematic legal lacunas that emerge from global business forms by addressing the entire enterprise. Firstly, in calculating total turnover an enterprise approach is adopted. The government’s guidance issued following s.54(9) of the Act specifies that: ‘3.2 Total turnover is calculated as: a. the turnover of that organisation; and b. the turnover of any of its subsidiary undertakings (including those operating wholly outside the UK)’.⁶¹

⁵³ (s.54 (6) (a)

⁵⁴ (s.54 (7) (a)

⁵⁵ (s.54 (7) (B)

⁵⁶ (s.54 (12) (b)

⁵⁷ (s.54(9)

⁵⁸ (s.54(10)

⁵⁹ (s.54 (11)

⁶⁰ See The Financial Reporting Council ‘Comply or Explain’: 20th Anniversary of the UK Corporate Governance Code (2012) <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Comply-or-Explain-20th-Anniversary-of-the-UK-Corpo.aspx> <last accessed 16th December 2016> see also A . Keay ‘Comply or explain in corporate governance codes: in need of greater regulatory oversight?’ (2014) 34(2) Legal Studies 279-304

⁶¹ Transparency in Supply Chains : A practical Guide (Guidance issued under s.54(9) of the Modern Slavery Act 2015

Secondly, in the case of the reporting, the government guidance also points out that:

‘3.4 If any organisation in any part of a group structure meets these requirements, it is legally required to produce a statement. Where a parent and one or more subsidiaries in the same group are required to produce a statement, the parent may produce one statement that subsidiaries can use to meet this requirement (provided that the statement fully covers the steps that each of the organisations required to produce a statement have taken in the relevant financial year).’⁶²

More specifically: ‘3.11 Each parent and subsidiary organisation (whether it is UK based or not) that meets the requirements set out in 3.1 above must produce a statement of the steps they have taken during the financial year to ensure slavery and human trafficking is not taking place in any part of its own business and in any of its supply chains. If a foreign subsidiary is part of the parent company’s supply chain or own business, the parent company’s statement should cover any actions taken in relation to that subsidiary to prevent modern slavery. Where a foreign parent is carrying on a business or part of a business in the UK, it will be required to produce a statement.’⁶³

This will have extraterritorial effect by implication. It covers action taken in any part of its supply chain but domestic and foreign. This goes to the heart of what the ‘commercial organisation’, addressed by this legislation is. Section 54(12) specifically defines commercial organisation as including “a body corporate (wherever incorporated) which carries on a

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc_A_practical_guide_final_.pdf <last accessed 16th December 2016>

⁶² Ibid p.7

⁶³ 3.1 Any organisation in any part of a group structure will be required to comply with the provision and produce a statement if they: • are a body corporate or a partnership (described as an “organisation” in this document), wherever incorporated; • carry on a business, or part of a business, in the UK; • supply goods or services; and • have an annual turnover of £36m or more. Ibid at p.8

business or part of a business, in any part of the United Kingdom”. The interpretation of ‘carrying on business in the UK’ is to follow what the guidance calls a common sense approach where there needs to be a demonstrable presence in the UK and in some circumstances subsidiaries operating independently of the parent, may imply that parent is not operating in the UK⁶⁴ However the guidance then draws attention to reputational risk in this regards.

The guidance on the content of the report indicates an incremental responsive approach even more so when compared to the California legislation it emulates. There is an emphasis on due diligence tools more widely and an expectation of gradual improvement but it does contain the use of enterprise principles in this novel way, and this is explored further in the context of modern slavery.

Modern slavery and enterprise principles

Modern slavery is still prevalent in business supply chains.⁶⁵ The drive for profit and growth in the current neo-liberal model has resulted in a situation where commercial organisations seek cheaper labour and avoid high social costs.⁶⁶ Gao rightly observes that ‘ we are witnessing an intensive down-sizing, contracting-out or out-sourcing and off-shoring by corporations to narrow activities related to core business, to reduce and externalise labour costs and thereby

⁶⁴ See similarity with s.7 UK Bribery Act for carrying on business in the UK. On the issue of reputational risk see: 3.13 If a parent company is seen to be ignoring the behaviour of its non-UK subsidiaries, this may still reflect badly on the parent company. As such, seeking to cover non-UK subsidiaries in a parent company statement, or asking those non-UK subsidiaries to produce a statement themselves (if they are not legally required to do so already), would represent good practice and would demonstrate that the company is committed to preventing modern slavery. This is highly recommended, especially in cases where the non-UK subsidiary is in a high-risk industry or location. See also scenario on p.24

⁶⁵ Estimates by ILO for forced labour – 21 million The ILO states that “Forced labour takes different forms, including debt bondage, trafficking and other forms of modern slavery” Furthermore it points out that “Almost 19 million victims are exploited by private individuals or enterprises and over 2 million by the state or rebel groups.” see <http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>

⁶⁶ Y Gao “Secondary effect” in Implementation of CSR in supply chain’ in International Institute for Labour Studies (.ed) Governance, International Law and Corporate Social Responsibility Research Series 116 (ILO, Geneva, 2008)p.155-177, 162

maximise profits’⁶⁷ The use of supply chains is a resulting business tool but they also highlight a fundamental challenge to law based on territoriality . The use of ‘modern slaves’ in supply chains had been highlighted by incidents in host states such as the Rena Plaza disaster in Bangladesh⁶⁸ and legal cases on the use of ‘trafficked’ victims in the corporation’s home countries.⁶⁹ The capacity or desire of the host country to enforce laws on labour standards is occasionally called into question.⁷⁰ Enterprise principles, which apply to the whole group or chain of control, are a means of recognising the nature of the use of modern slavery across the entire supply chains overriding separateness of each incorporated entity.

In general the application of enterprise principles is demonstrated in the UK in statutory law situations requiring group accounts for taxation purposes and to a limited extent, in the piercing of the veil cases.⁷¹ The classic DHN Food distributors v Tower Hamlets LBC pointed out that “We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet, and profit and loss account. They are treated as one concern.”

⁶⁷ Ibid p.164

⁶⁸ See A Ruhmkorf Corporate Social Responsibility, Private Law and Supply Chains (Cheltenham, Edward Elgar 2015)

⁶⁹ US v Kil soo Lee U.S. Court of Appeals for the Ninth Circuit - 472 F.3d 638 (9th Cir. 2006); David et al v Signal International LLC et al; <https://business-humanrights.org/en/signal-international-lawsuits-re-trafficking-of-indian-workers-in-usa>

⁷⁰ Gao n 66 at 162

⁷¹ The grounds for piercing the veil are now encapsulated in the Supreme Court judgement of Prest v Petrodel (2013) UKSC 34 which narrowed its scope “Most advanced legal systems recognise corporate legal personality while acknowledging some limits to its logical implications. In civil law jurisdictions, the juridical basis of the exceptions is generally the concept of abuse of rights, to which the International Court of Justice was referring in In re Barcelona Traction, Light and Power Co Ltd [1970] ICJ 3 when it derived from municipal law a limited principle permitting the piercing of the corporate veil in cases of misuse, fraud, malfeasance or evasion of legal obligations. These examples illustrate the breadth, at least as a matter of legal theory, of the concept of abuse of rights, which extends not just to the illegal and improper invocation of a right but to its use for some purpose collateral to that for which it exists. English law has no general doctrine of this kind. But it has a variety of specific principles which achieve the same result in some cases. One of these principles is that the law defines the incidents of most legal relationships between persons (natural or artificial) on the fundamental assumption that their dealings are honest. The same legal incidents will not necessarily apply if they are not.”

However the use of piercing the veil has been severely limited by the case of *Prest v Petrodel* where the Supreme Court significantly narrowed its scope.⁷² The concept of negligence & assumption of responsibility in torts was somewhat used to lift the veil in the *Chandler v Cape plc* case but subsequent case of *Thomson v The Renwick Group plc* indicates that this may be limited to factors similar to the *Chandler* case.⁷³ Therefore enterprise principles in statute, which can go beyond piercing the veil by regarding the entire corporate group as a single juridical entity are significantly more important.⁷⁴

This may be justified either on grounds where the law would wish to reallocate liability risk within the group thus driving up incentive for such action to be avoided such as tax evasion and group accounting or where the law recognises a harm resulting from the use of an economic reality. Especially where that harm is a crime which the company without such a façade will not be allowed to get away with. The second aspect has been used in the fight against corruption. First in the Foreign Corrupt Practices Act (US) and more recently in the UK Bribery Act. It may be that in couching slavery in criminal terms, this becomes the justification for the application of enterprise principles in seeking responsibility and liability.

Yet in this aspect [s.54], the legislation is not traditional ‘command and control’ legislation, it is meta-regulatory. This means that it creates an external regulation of an internally regulated corporate responsibility. Encouraging the company to work out the exact content of its slavery

⁷² See n 71

⁷³ ‘The mere recitation of these factors demonstrates how far removed from *Chandler v Cape* is this case.’ Para 36 <http://www.bailii.org/ew/cases/EWCA/Civ/2014/635.html> <last accessed 16th December 2016>

⁷⁴ Commonwealth Secretariat, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* August 2012 p.382
https://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf <last accessed 16th December 2016>

statement while providing a guide. The content will be self-regulated, while the overall statement (even where it says there is no action) can be mandated.⁷⁵

Parker points out that ‘meta regulating law should allow space for the company itself to take responsibility for how it meets its main goals with the framework of values set down by regulation...[it] should be careful to leave space, the greatest extent possible, for the companies it regulates to decide for themselves, how to institutionalise responsibility.’⁷⁶ It also reflects a mix of a responsive and reflexive mode of regulation because on the one hand it adopts Selznick’s suggestion that ‘law should promulgate broad substantive values across a range of self-regulating or semiautonomous social fields’⁷⁷ and Teubner’s suggestion that ‘law should catalyze processes of social coordination by which people in different social fields can work out for themselves which values to apply to which problems.’⁷⁸ S.54 allows the law to promulgate its values on the abolition of modern slavery across the range of corporate policies of multinational enterprises with connections to the UK while at the same time allowing the corporations decide the exact manner and methods to apply across their supply chains.

This type of legislation is now emerging as part and parcel of the new regulatory state and the interface between law and corporate social responsibility. The use is evidenced in the disclosure and transparency rules which are backed up by regulation or legislation. It has been

⁷⁵ A combination of s.54 (4) b & s.54 (11) – A company can make a statement to say it has taken no such steps but if it doesn’t make a statement, the Secretary of State can bring a civil proceeding in the High Court for an injunction.

⁷⁶ C Parker ‘Meta-regulation: legal accountability for corporate social responsibility’ in D McBarnet, A Voiculescu and T Campbell *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge, CUP 2007) 207-237, 217

⁷⁷ C Parker ‘The Pluralisation of Regulation’ (2008) 9(2) *Theoretical Inquiries in Law* 349-369, 356. See also P Nonet P Selznick *Towards Responsive Law: Law and Society in Transition* (New Brunswick, Transaction publishers, 2005 – originally published 1978) 111 ‘Responsive law aims at enablement and facilitation’

⁷⁸ Parker *Ibid* see also G Teubner ‘Substantive and Reflexive Elements in Modern Law’ (1973) 17(2) *Law and Society Review* 239-285

asserted that Transparency has the capability to perform multiple roles in a system of privatised governance in the ‘shadow of the state’⁷⁹

Backer highlights transparency as a mechanism for accountability to stakeholders, for risk management by company boards, autonomous private governance ‘beyond the state through for example supply and value –chains’.⁸⁰ However he also points to the increasing commodification of transparency as a profit tool and its role a mediating mechanism for communication between various actors.⁸¹

The link between disclosure and transparency is often a problematic one. The basic assumption is that disclosure leads to greater transparency. This is not always the case as companies often tend to disclose positive information more than rather than negative information.⁸² The assumption is that ‘a company’s interests – and the interests of its shareholders – are best served by maintaining a ‘positive’ CSR profile’.⁸³ This is why the secretary of state’s guidance as to what should be included in the statement becomes vital as a benchmarking tool. However, the current guidance, still leaves some difficulty with the verification of content without specifying third party audits and especially in extra-territorial situations.

The further assumption is that positive responsibility and action in the area of anti-slavery will result in better relationship with stakeholders and better publicity. The web is now regarded as one of the best platforms for disclosure.⁸⁴ This is supposed to enable public scrutiny, yet public

⁷⁹ A Peters ‘Towards Transparency as a Global Norm’ in in A Bianchi and A Peters Transparency in International Law (Cambridge, CUP 2013) 534 -607, 545

⁸⁰ L C Backer ‘Transparency and Business in International law: Governance Between Norm and Technique’ in A Bianchi and A Peters Transparency in International Law (Cambridge, CUP 2013 p.477-501, 480

⁸¹ Ibid

⁸² D Hess ‘The three pillars of corporate social reporting as new governance regulation: disclosure, dialogue and development.’ (2008) 18(4) Business Ethics Quarterly 447-482

⁸³ See K Campbell D Vick ‘Disclosure law and the market for corporate social responsibility’ in in D McBarnet, A Voiculescu and T Campbell The New Corporate Accountability: Corporate Social Responsibility and the Law (Cambridge, CUP 2007) 241-278, 243

⁸⁴ D Cormier W Aerts M Ledoux M Magnan ‘Web based disclosure about value creation processes: a monitoring perspective’ (2010) 46(3) ABACUS 320-347

scrutiny as a check relies on verifiable information, public awareness and company exposure to public sanctions ‘naming & shaming’. The use of the web is an attempt to modernise Justice Brandeis recommendation that ‘publicity is justly commended as a remedy for social and industrial diseases.’⁸⁵

However without mandating what is to be disclosed it adopts a flexible approach which has been tried in corporate governance following the Cadbury report.⁸⁶ This is the concept of comply and explain which is now at the heart of corporate governance codes. Keay explains that ‘adoption of comply and explain means that compliance with the corporate governance code is not mandatory but what is compulsory is disclosing non-compliance’.⁸⁷

The presumption is that non-compliance will be penalised by shareholders and the market thereby a mediation or dialogue. ‘Comply and explain’ as a corporate governance tool has proved immensely popular but as empirical studies find has resulted in varying levels of compliance.⁸⁸ The difference here is that there is regulatory oversight however the content is flexible. It is a statement whose content is company dependant yet the making of the statement is enforceable by law. The potential enforceability will have implications for its extraterritorial effect as supply chains by their nature exist across borders.

Extraterritoriality & Liability

⁸⁵ L D Brandeis *Other People's Money: and How the Bankers Use it* (Martino publishing CT., 2009 originally published 1914) 92 In his chapter, ‘what publicity can do’, he goes on to say: ‘sunlight is said to be best disinfectants; electric light the most efficient policeman.’

⁸⁶ See The Financial Reporting Council, <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/What-constitutes-an-explanation-under-comply-or-ex.pdf> <last accessed 16th December 2016>

⁸⁷ A . Keay ‘Comply or explain in corporate governance codes: in need of greater regulatory oversight?’ (2014) 34(2) Legal Studies 279-304, 281

⁸⁸ Ibid

Extraterritoriality is seen as a corollary of state jurisdiction because jurisdiction is often defined in territorial terms.⁸⁹ The 1927 Lotus case of the Permanent Court of International Justice started with the general principle regarding jurisdiction by stating that:

“Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.”⁹⁰

However, it added that:

“It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law... Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”⁹¹

⁸⁹ K M Meessen *Extraterritorial Jurisdiction in Theory and Practice* (Netherlands, Martinus Nijhoff publishers 1996) 78-79

⁹⁰ S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) para. 45
http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm - for further analysis of the case see A Mills ‘Rethinking Jurisdiction in International Law’ *The British Yearbook of International Law* (2014)

⁹¹ *Ibid* para 46

This can be exemplified by the use of legislation and regulation to impact on actions of corporations outside their home territories in the case of foreign bribery. The US FCPA and the UK Bribery Act are examples of such use.⁹² On the one hand, some proponents view this as a viable means of addressing international challenges⁹³ but on the other hand, it has been viewed as a new form of legal imperialism.⁹⁴ Nevertheless the search is for responsibility and liability. The liberal approach adopted towards corporations granting them maximisation of wealth on the basis of limited liability for shareholders can only be justified by responsibility to society and full disclosure.⁹⁵

Notwithstanding, this use of mere transparency requirement, its reinforcement in law raises the potential of some liability issues. This is exemplified by some legal cases resulting from the California legislation. Two examples are *Sud v Costco* alleging the use of slave labour in obtaining shrimps sold by Costco⁹⁶ and *Barber v Nestle* alleging that they used fish sourced from Thailand company with slave labour⁹⁷. The Barber decision is of some interest because the court found for Nestle because there was disclosure, which was what the law required.⁹⁸ This highlights the potential hurdles that litigation on this section will face because for the purposes of complying with the section publishing a ‘slavery statement’ is sufficient. However the issue of child labour [as part of modern slavery] could be the next test case for the US

⁹² US Foreign Corrupt Practices Act 1977 (as amended) UK Bribery Act 2010

⁹³ S C Kaczmarek A L Newman ‘The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation (2011) 65(4) International Organisation 745-770

⁹⁴ V R Grundman ‘The New Imperialism: The extraterritorial application of US law’ (1980) 14 (2) The International Lawyer 257-266

⁹⁵ See Campbell & Vick n83

⁹⁶ *Monica Sud v. Costco Wholesale Corporation, et al.*, No. 15-3783, N.D. Calif.; 2016 U.S. Dist. LEXIS 5524. This was recently dismissed for lack of standing

⁹⁷ see *Barber v. Nestlé USA, Inc.*, No. 15-01364-CJC (C.D. Cal. Dec. 9, 2015)

⁹⁸ See also <http://legalnewsline.com/stories/510660064-plaintiff-loses-challenge-to-calif-law-in-forced-labor-case-over-fancy-feast-appeal-to-ninth-circuit> <last accessed 16th December 2016> Judge Cormac Carney wrote, “Plaintiffs may wish – understandably – that the Legislature had required disclosures beyond the minimal ones required by [the statute]. But that is precisely the sort of legislative second-guessing that the safe harbor doctrine guards against.” with an attorney stating that ‘the law is not to clean up or straighten out supply chains...but rather to disclose what efforts they’re taking” see also: <https://www.herbertsmithfreehills.com/latest-thinking/californian-slavery-in-supply-chain-judgment-provides-case-study-for-uk> <last accessed 16th December 2016>

Aliens Torts Statute following the Kiobel decision⁹⁹ narrowing access, as the Supreme Court in January 2016 denied a certiorari petition by Nestle USA Inc. ¹⁰⁰

Nevertheless where the statement made under the UK Modern Slavery Act itself could be found to be ‘misleading’, some recourse may be found in applying the EU Unfair Commercial Practices Directive¹⁰¹, which is the main legislation regarding business to consumer transaction. It provides in Article 6 for misleading action.

In the EU’s recent 2016 guide, it has confirmed that CSR initiatives used to show how the company is engaging with social and human rights issues could fall within the remit of Article 6 on misleading actions. The guide points out that “companies use this approach to show that they take into account ethical and human rights concerns. This may have an impact on the transactional decision of a consumer who has to choose between two competing products of similar quality and price. For this reason, such initiatives will, in most cases, be ‘directly connected with the promotion, sale or supply of a product’ and therefore qualify as a commercial practice within the meaning of the UCPD”.¹⁰²

Article 11 of the UCPD requires that member states ensure they have adequate and effective means to combat practices deemed unfair and this includes person’s ability to take legal action against such unfair commercial practices or bring such practice before an administrative body. The directive has been implemented in UK law via The Consumer Protection from Unfair Trading Regulations (CPUTR) 2008.¹⁰³ Furthermore, the Consumer Protection (Amendments)

⁹⁹ See n1

¹⁰⁰ Nestle U.S.A Inc. Petitioners v John Doe et.al. (10-56739) January 11, 2016 <http://www.scotusblog.com/case-files/cases/nestle-u-s-a-inc-v-doe/> <last accessed 18th December 2016> see also <https://www.theguardian.com/sustainable-business/2016/feb/01/nestle-slavery-thailand-fighting-child-labour-lawsuit-ivory-coast> <last accessed 18th December 2016>

¹⁰¹ Directive 2005/29/EC which now has an updated guide: http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf <last accessed 16th December 2016>

¹⁰² Guide ibid p.63

¹⁰³ Regulation 5 provides for misleading actions.

Regulation 2014 specifies that the consumer has a right of redress when the conditions are met.¹⁰⁴

This involves the consumer entering into contract with the trader, the trader engaging in a ‘prohibited action’ and this being ‘a significant factor in the consumer’s decision to enter into the contract or make the payment’. Prohibited practice includes misleading action under regulation 5. A consumer with a right to redress can bring a claim in civil proceedings to enforce that right.¹⁰⁵ There is a right to damages however:

“27J (5) A consumer does not have the right to damages if the trader proves that—
(b)the trader took all reasonable precautions and exercised all due diligence to avoid the occurrence of the prohibited practice.”

Therefore, the statement about modern slavery in supply chains outside the UK could give rise to a misleading action where the information it contained is false or misleading and where it is connected to the promotion, sale or supply of the product.

The 2016 guidance concludes thus:

‘Corporate social responsibility refers to companies taking responsibility for their impact on society by having in place a process to integrate social, environmental, ethical and consumer concerns into their business operations and core strategy. This has become a marketing tool used to meet the growing concern of consumers that traders comply with ethical standards. Companies use this approach to show that they take into account ethical and human rights concerns. This may have an impact on the transactional decision of a consumer who has to choose between two competing products of similar quality and price. For this reason, such

¹⁰⁴ See Part 4A

¹⁰⁵ 27K

initiatives will, in most cases, be ‘directly connected with the promotion, sale or supply of a product’ and therefore qualify as a commercial practice within the meaning of the UCPD.’¹⁰⁶

Conclusion

Enterprise principles used in this way is more reflective of the legal pluralistic compromise that has come to signify the relationship between the modern regulatory state and the corporation. Yet it is an improvement from the full adherence to the entity doctrine in the face of human and social issues. Therefore, in a limited sense it represents a step forward.

Nevertheless, in the face of the scale of modern slavery and its use in supply chains, it is doubtful that the disclosure and meta-regulatory approach adopted in the application of the enterprise principles is fully adequate. It is a step in the right direction but it is also reflective of a mediated solution in the face of the lack of an international corporate personality. It is also still an experiment which started with California and continues with the UK. The production of slavery statements has begun.¹⁰⁷The Business and Human Rights Resource Centre have analysed the first 75 statements with mixed results.¹⁰⁸ The civil society coalition CORE has published further guidance titled ‘*Beyond Compliance: Effective Reporting under the Modern Slavery Act*’.¹⁰⁹Publicity may feed into global pressure to review guidance issued by government and the reporting of the multinational corporations themselves but it is doubtful that successful litigation will follow.

¹⁰⁶ European Commission, Guidance on the implementation/application of the Directive 2005/29/EC on Unfair Commercial Practices Brussels 25.5.2016 SWD (2016) 163 final p.63

¹⁰⁷ The Business and Human Rights Resource Centre is maintaining a registry [a public track record of companies statements] see <https://business-humanrights.org/en/uk-modern-slavery-act-registry> <last accessed 16th December 2016>

¹⁰⁸ <https://business-humanrights.org/en/uk-modern-slavery-act-analysis-of-early-company-statements-new-guidance-available> <last accessed 16th December 2016>

¹⁰⁹ http://corporate-responsibility.org/wp-content/uploads/2016/03/CSO_TISC_guidance_final_digitalversion_16.03.16.pdf <last accessed 16th December 2016>

