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Opinion: The United Kingdom Social Action, Responsibility and Heroism [SARAH] Act 2015 and Corporate Social Responsibility [CSR]: potential connections.¹

Innovative use of law and legal processes thrive in the field of corporate social responsibility (CSR). From the attempts in the USA to use the Alien Torts Statutes,² to the use of duty of care and assumption of responsibility in the UK courts; from the attempts to use criminal litigation in French courts to the use of emerging human rights frameworks. The drive is for CSR both within, beyond and framed by law.³ The Social Action Responsibility and Heroism (SARAH) Act 2015 which received royal assent quite unnoticed on the 12th of February 2015, may present another such opportunity⁴. The SARAH act covers social action, responsibility and heroism. It is focused on protections against a claim for negligence and breach of statutory duties for ‘persons’. This would include companies, who are equally regarded as ‘persons’ in the law. This short act with only five sections was put forward on a platform of counteracting the “health and safety culture”. To this end, the then Justice secretary stressed that:

“Not only have responsible small businesses been stifled by unnecessary insurance costs and the fear of being sued but volunteers have been deterred from taking part in socially beneficial activities and brave people have been put off from helping someone in trouble”.⁵

The SARAH Act was regarded as an indication from parliament that these groups or individuals who act for the ‘benefit of society’ should have some protection from negligence or breach of statutory duty claims.

However there is nothing in this act excluding the application of its provisions to much larger companies and providing them with protection from negligence claims too, especially where they engage in a linked action for the ‘benefit of society’. Such application is particularly important in the light of the court of appeal decision in *Chandler v Cape plc* (2012) which applied duty of care (negligence test) to establish assumption of responsibility on the part of a parent company. For that reason, this opinion examines what implications this act may have for corporate social responsibility of large multinational companies with the United Kingdom as home state of the parent company. The Chandler Court of Appeal decision established the possibility of assumed responsibility between parent and subsidiary companies and thus the ability to breach that assumed responsibility. This paved the way

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² Now limited by the United States Supreme Court *Kiobel* decision- *Kiobel v Royal Dutch Petroleum Co.* (2013) 133 S.Ct. 1659

³ An illustrative set of papers can be found in the book D McBarnet, A Voiculescu, T Campbell (eds.) *The New Corporate Accountability: CSR and the Law* (CUP, 2007). It is also a theme which will be examined in my forthcoming monograph *Legal Approaches and CSR: Towards a Llewellyn’s law-jobs approach* (Routledge, 2016); R. McCorquodale ‘Waving not Drowning: *Kiobel* outside the United States’ (2013) 107 AJIL 846-851

⁴ Thanks to James Goudkamp of Keble College, University of Oxford for bringing this act to my notice at the Inner Temple Academics Dinner, April 2015.

⁵ Justice Secretary, Chris Grayling <http://www.lawgazette.co.uk/law/royal-assent-for-inducements-ban-and-sarah-act/5046764.article> <last accessed 17th August 2015>

for imaginative use of torts law to hold multinational companies accountable for breach of assumed responsibility of the subsidiary company in the developing country.⁶

The Court of Appeal found that ‘in appropriate circumstances the law may impose on a parent company, responsibility for the health and safety of its subsidiary's employees.’⁷ This leaves large companies open to breaches of assumed duty of care of their subsidiaries, even where these companies remain separate for company law purposes. The Chandler case has been cited as a case at the ‘intersection’ of torts law and company law, as it achieves an effect similar to lifting of the veil of incorporation, without the use of that now limited concept.⁸ The crucial question posed here is whether the SARAH Act has the potential to serve as defence or mitigation for negligence claims, thus inadvertently encouraging large companies to embrace a strategic version of corporate social responsibility?

THE ACT:

SARAH Act applies only, ‘when a court, in considering a claim that a person was negligent or in breach of statutory duty, is determining the steps that the person was required to take to meet a standard of care.’⁹ Companies are legal persons and there is an intention to cover natural persons and legal persons in the section.¹⁰ The legal concept of ‘duty of care’ is crucial to the question of who can bring an action for negligence and against whom. The Caparo test¹¹ lays down the three part test for the duty of care (reasonable foreseeability, proximity between parties, fair, just and reasonable and policy). This has been applied to companies to find for an assumption of responsibility. Most relevantly in the Chandler case the courts found that:

“In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice

⁶ R. McCorquodale ‘Waving not Drowning: *Kiobel* outside the United States’ (2013) 107 AJIL 846-851, 851

⁷ *Chandler v Cape plc* (2012) EWCA Civ. 525 para.80

⁸ M Petrin ‘Assumption of Responsibility in Corporate Groups: *Chandler v Cape plc*’ (2013) 76(3) MLR 589-619, see also *Prest v Petrodel* (2013) UKSC 34 per Lord Sumption

⁹ Section 1

¹⁰ *Salomon v Salomon* (1897) AC 22 . The explanatory notes also point out that it could apply to individuals and organisations. ‘It is general in its application so could apply to claims against individuals or organisations (including employers)’ <http://www.legislation.gov.uk/ukpga/2015/3/notes/division/2>

¹¹ *Caparo Industries Plc v Dickman* (1990) UKHL 2

of intervening in the trading operations of the subsidiary, for example production and funding issues.”¹²

This imposition of responsibility is based on the assumption of duty of care and this opens up the possibility that the courts can in future apply the mitigation available under the SARAH act in a claim which is determining the steps required to meet a certain standard of care. This standard of care could be as carried out by the subsidiary or as assumed and ‘delegated’ through policy by the parent company.

The act outlines three factors which **must** be considered by the court in relevant circumstances: ¹³The first factor can be found in section 2, and it introduces the notion of ‘benefit of society’. It requires that ‘The court **must have regard to** whether the alleged negligence or breach of statutory duty occurred, when the person was acting *for the benefit of society or any of its members*’. Societal benefit is an elusive concept which will require subjective interpretation by the courts.

It may be open to similar issues of interpretation that have plagued section 172 Companies Act, with one view seeing this section as a ‘connection between what is good for a company and what is good for society at large’.¹⁴ In a wider CSR sense, the drive for corporate actions for the benefit of society has faced a division between those who focus wholly on economic benefit and those who advocate additional social action on the part of companies. The first group would also include those who accept some limited social action geared at economic benefit. The question of a legitimate legal basis for such social action is an issue in company law, where success of the company for benefit of its ‘members as a whole’ is still paramount. The advocacy of social action may have inadvertently received a boost from the legislation. The self-centered view would be to engage in social action beneficial to society as a potential defence, although the unspecific nature opens up debate about what type of social action the court must have regard to. There is already evidence of company involvement in a wide range of social action programmes.¹⁵The 2013 UK government document on ‘encouraging social action’ points to issues like giving money, giving time and community action.¹⁶Will this mitigate negligence in a linked social action? For example: the donation and building of a community well in a developing country that then gets polluted from the company’s mining activities and causes widespread poisoning.

¹² Chandler v Cape plc (2012) EWCA Civ. 525 para.80

¹³ This has been highlighted as a crucial difference with s.1 Compensation Act 2006 which states ‘may’ have regard to.

¹⁴ M Hodge ‘Duties of Company Directors’ Ministerial Statements, UK Department of Trade and Industry (DTI) June 2007 p.1

<http://webarchive.nationalarchives.gov.uk/20070603164510/http://www.dti.gov.uk/files/file40139.pdf> <last accessed 17th August 2015>

¹⁵ JD Margolis, JP Walsh ‘Misery Loves Companies: Rethinking social initiatives by business’ (2003) 48(2) Administrative Science Quarterly 268-305

¹⁶ <https://www.gov.uk/government/publications/encouraging-social-action> <last accessed 17th August 2015>

The next section brings focus on a second factor, which is even more relevant. This factor is responsibility or more specifically a 'predominantly responsible' approach¹⁷ Responsibility can be viewed in many senses. It is often used in a causal sense as in 'responsible for'¹⁸ but it can also be used in a relational sense. Parkinson asks a relevant question which is: "what kinds of behavior are envisaged when it is said that a company should act in a socially responsible way?"¹⁹ He distinguishes between relational responsibility and social activism. In a sense, a distinction between actions which fall into section 2 and action in section 3. For social activism, he attempts to identify social action of benefit to society outside of the scope of the company's normal business operations. While for relational responsibility, employee welfare, customer care, the fair treatment of stakeholders and the minimizing of the damaging direct impact of company's normal business would feature highly. This could therefore refer to the responsible approach to the protection of employee safety or customer safety when the alleged negligence or breach of statutory duty occurred.

The final substantive section²⁰ deals with heroic intervention as another considered factor. This is of limited relevance to the company save to say that corporate activity may make heroic activity possible. It is unlikely that companies can undertake heroic activity in and of themselves but they can encourage or discourage heroic activities of its members or employees. Nevertheless there is business literature on 'heroic leadership'.²¹

CSR & CORPORATE ACTIVITY

How then could this relate to wider CSR? The definition of CSR is contested²² but there is significant consensus that elements of relational responsibility and social action are involved. The EU in 2011 put forward a new definition for CSR as "the responsibility of enterprises for impacts on society".²³ There are various theories which seek expression through CSR. They include ethical, political, instrumental, integrative and legal theories²⁴ Pillay & Ireland suggest that CSR from a legal standpoint can be seen from two differing perspectives: ameliorative CSR and transformative CSR²⁵ The ameliorative CSR is indicative

¹⁷ S.3 The court must have regard to whether the person, in carrying out the activity in the course of which the alleged negligence or breach of statutory duty occurred, demonstrated a predominantly responsible approach towards protecting the safety or other interests of others.

¹⁸ J Feinberg 'Action and Responsibility' in M Black *Philosophy in America* (Allen & Unwin, 1965) p.134-160

¹⁹ J Parkinson *Corporate Power and Responsibility: Issues in the theory of company law* (OUP, 1993) p.267

²⁰ S.5 is the extent, commencement and short title section.

²¹ W A Cohen *Heroic Leadership: Leading with integrity and honor* (John Wiley & Sons, 2010)

²² A Okoye 'Theorising CSR as an essentially contested concept: Is a Definition necessary?' (2009) 89(4) *Journal of Business Ethics* 613-627

²³ http://ec.europa.eu/growth/industry/corporate-social-responsibility/index_en.htm <Last accessed 17th August 2015>

²⁴ E Garriga and D Mélé, 'Corporate Social Responsibility theories: Mapping the territory' (2004) 53(1-2) *Journal of Business Ethics* 51-71

²⁵ P Ireland R G Pillay 'Corporate Social Responsibility in a neoliberal age' in P Utting J C Marques (eds) *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?* (Palgrave Macmillan/ UNRISD, 2013) p.77-104

of much of the current CSR agenda where the objective is “trying to ensure that maximisation of shareholder value is not pursued by corporations without their having some regard to the impact of their activities on society at large.”

”²⁶. The core difference in position between both perspectives stem from debates about the purpose of the company. If it is focused on profit for shareholders (shareholder-centred perspective) then CSR is seen as an externality while if it transforms the company to a ‘social institution’²⁷ then CSR is a core business objective and can be pursued in a ‘profit-sacrificing’ manner.²⁸ Parkinson also points out that : “an acceptance of activism or constraint –based responsibility that is not premised on a return to the company would require a transformation of the legal model from one founded on shareholder-wealth maximization to one that explicitly reflected public welfare functions.”²⁹ This ‘transformative CSR’ strain is thus typified by the corporate accountability movement of CSR, who seek to identify law’s involvement across subject boundaries in compelling and coercing companies to embrace socially responsible actions. It also highlights how law frames voluntary action through regulation.³⁰

There is doubt that the SARA act 2015 engages with this debate in any form, however its use of words such as ‘social action’ and ‘predominantly responsible approach’, in light of current corporate practice will prompt some discussion around the overlaps that may be found. The extent of social action involved can be captured in debates that identify certain corporate philanthropic themes that still feature under CSR such as staff volunteering, community action, charitable giving and so on.

SARA and CSR

There are two possible linkages that may occur from the passage of SARA. It may be taken as yet another incentive to engage in visible social action for the ‘benefit of the society’. It may however be embraced as a defensive mechanism against any future claims against companies for breach of assumed duty of care in cases such as the Chandler case. The extent to which this would result in any mitigation of responsibility will depend on the subjective interpretation of the courts. The question of company policies throughout the group, corporate code of conduct and processes which spell out beneficial social action and procedures may feature highly in any potential arguments before the courts.

Yet at face value the act does not purport or intend to have extraterritorial reach, although this does not preclude the incidental effect that could occur through “assumption of responsibility”. The final message which is undoubtedly endorsed by this act, albeit in a limited context is that responsibility pays. The type of ‘responsible action’ is largely

²⁶ *ibid* p.89

²⁷ Ireland & Pillay n.25 echoing an earlier idea from R A Dahl ‘A Prelude to Corporate Reform’ (1972) *Business and Society Review* 17-23

²⁸ Parkinson n.19, p.279

²⁹ Parkinson n.19, p.280-281

³⁰ C Parker ‘Meta-regulation: Legal accountability for CSR’ in D McBarnet, A Voiculescu, T Campbell (eds.) *The New Corporate Accountability: CSR and the Law* (CUP, 2007) 207-240

undefined but it definitely encourages the embrace of visible action geared towards the benefit of society.

Conclusion

SARAH Act appears targeted at heroic individuals and small companies but its sections are wide enough to apply to larger corporations. As a result, it could trigger a range of unintended consequences. The use of words like 'social action' and 'responsible approach' could raise possibilities of application to large 'socially responsible' companies. Yet for CSR lawyers who seek a specific framework in law on the issue, this will prove unsatisfactory as it is not the intended focus of this act. However there are still potential implications that warrant further consideration. The overt engagement of large companies in social action and initiatives as part of corporate social responsibility raises the possibility of overlaps. The experimental nature of law surrounding CSR means that intersections between company law and torts law are used in novel ways such as seen in the UK Court of Appeal Chandler case. The act may be viewed as a bolster to company philanthropic actions or as a defensive mechanism for when such social action goes wrong. Either way it proves very restricted when considering law frameworks for corporate social responsibility.