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**Strategic Litigation as a Tool to  
Combat Modern Slavery**

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# Strategic Litigation as a Tool to Combat Modern Slavery

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### Abstract

The legal, political and commercial landscape surrounding modern slavery has developed significantly since 2008. However, the relative weakness of enforcement mechanisms within legislation designed to combat labour exploitation has meant that there have been few meaningful changes to abusive commercial practices. This article explores whether corporate accountability litigation could fill the enforcement void. It looks at the prospects for such litigation in the UK and concludes that there are significant challenges to be overcome. For litigation to be a successful lever of corporate change, it will require jurisprudential developments, extensive resourcing and dedicated, persistent professionals.

**Key words:** vicarious corporate accountability; slavery in supply chains; corporate veil; transnational litigation; Modern Slavery Act

# Strategic Litigation as a Tool to Combat Modern Slavery<sup>1</sup>

## Introduction

The term ‘modern slavery’ has gradually entered the political and legal lexicon since the passage of the US Victims of Trafficking and Violence Protection Act 2000. Modern slavery encompasses many harmful activities, including, forced labour, bonded labour, child labour, trafficking for sexual or labour exploitation, and many associated forms of abuse. Such abuses are thought to affect over 40 million people worldwide at any given time.<sup>2</sup>

It is often difficult to delineate one form of modern slavery from another and they frequently co-exist within the same scenario. For example, a migrant worker recruited in Nepal may be required to pay a large fee to obtain his or her job. A 2017 report published by Amnesty International suggests that the average fee payable by Nepalese workers for construction work in the Middle East is \$1,346.<sup>3</sup> More lucrative security roles in high threat environments can command higher fees of between \$4,000 and \$5,000.<sup>4</sup> As the worker is unlikely to have sufficient funds to pay this fee, he or she may have to borrow the money at very high rates of interest from a local money broker. The Amnesty report found that such interest rates averaged 36% per year.<sup>5</sup> Professor Ray Jureidini has found rates as high as 60%.<sup>6</sup> This ‘debt bond’ means that the worker will have to dedicate a significant part of their wages to debt repayments for months or years of their employment. If their case were to be studied, this worker would be classified as one of the 8 million people working in the global private economy thought to suffer from bonded labour practices.<sup>7</sup>

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<sup>1</sup> This article represents an academic debate in uncertain legal terrain, it is not legal advice and should not be relied upon as such.

<sup>2</sup> Alliance 8.7, *Global Estimates of Modern Slavery: forced labour and forced marriage* (Geneva: International Labour Organisation, Walk Free Foundation and International Office for Migration, 2017), 7, [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_575479.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf).

<sup>3</sup> Amnesty International, *Turning people into profits: Abusive recruitment, trafficking and forced labour of Nepalese migrant workers* (London: Amnesty International Ltd, 2017), 38, <https://www.amnesty.org/download/Documents/ASA3162062017ENGLISH.PDF>.

<sup>4</sup> James Sinclair, “Contractorisation and bonded labour in military and diplomatic outsourcing of security services”, in *Public procurement and human rights: Opportunities, risks and dilemmas for the state as buyer*, ed. Claire Methven O’Brien and Olga Martin-Otega (London: Edward Elgar, forthcoming).

<sup>5</sup> Amnesty International, *Turning people into profits*, 27.

<sup>6</sup> Ray Jureidini, *Ways forward in recruitment of low-skilled migrant workers in the Asia-Arab States corridor* (Geneva: International Labour Organization, 2016), 8.

<sup>7</sup> Alliance 8.7, *Global Estimates of Modern Slavery*, 7.

However, it is also quite likely that the worker may have been deceived as to the true nature of the job that awaited them. Jureidini has documented the common practice of contract substitution, whereby a job seeker is promised terms and conditions of employment during their recruitment process, which differ materially from those which eventually govern their service.<sup>8</sup> At the job site, the worker may also find that they are forced to live in squalid conditions and may be prevented from resigning, by threats from the employer, identity document retention, or via the imposition of exit visa requirements which have been a feature of the *Kafala* system of employment regulation in several Middle Eastern countries for decades.<sup>9</sup> These instances of deception, coercion and lack of freedom may mean that the bonded worker is also in a form of forced labour. Additionally, their case would almost certainly meet the threshold for human trafficking, defined as the movement of people for the purpose of exploitation, whether for sexual purposes or for work.

As shocking as such a scenario may seem to some readers, this is the reality of life for millions of vulnerable workers, particularly migrants and those with lower-value skills. Moreover, it is an existence lived within the supply chains of well-known global companies. Such companies have come under much greater scrutiny over recent years as a result of changes to legislation and a growing consumer intolerance of corporate wrongdoing. These legislative developments have largely come from the US, the UK and France. The UK passed the Bribery Act in 2010 and the Modern Slavery Act in 2015. The US has incrementally strengthened its Trafficking in Persons Regulations since 2009 and France introduced its ‘Duty of Vigilance’ law in 2017. However, there is an increasing realisation that new laws have not resulted in much meaningful additional pressure on companies to root out modern slavery abuses in their supply chains. As such, activists and lawyers are looking to strategic litigation to force companies to take more seriously the duties they owe to the workers who help create the value in their organisations.

## **The law as a lever of change**

### *Vicarious accountability*

The type of litigation under consideration in this article is unusual; it is *vicarious* corporate liability litigation. This means establishing responsibility on the part of one company for wrongdoing committed by another company, albeit one with which the first company shares a close relationship. The circumstances

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<sup>8</sup> Jureidini, Ways forward in recruitment of low-skilled migrant workers in the Asia-Arab States corridor , 11.

<sup>9</sup> In September 2018, the government of Qatar enacted Law No.13 of 2018, which substantially abolishes the requirement for migrant worker exit visas, a significant change to the *Kafala* system.

under which the law will permit one party to be held liable for the wrongdoing of another party are restricted. In company law, this is reflected in a doctrine known as the *corporate veil*, which separates companies into distinct legal personalities with separate directors and shareholders. However, there are instances when the courts have determined that vicarious liability can be ascribed. Typically, in such cases the Claimant asserts that a parent company, domiciled in a well-regulated jurisdiction should be held liable for the actions of a subsidiary company that it owns and/or largely controls in a less well-regulated jurisdiction. Several such cases have reached the English courts in recent years, including *Lungowe and others v Vedanta Resources PLC and Konkola Copper Mines PLC*<sup>10</sup> and *Okpabi and others v Royal Dutch Shell*.<sup>11</sup> The jurisprudence is still developing in this area, but these cases indicate a direction of travel in which a general principle is established that there are circumstances in which parent companies can and should be held liable for the wrongdoing of their subsidiaries overseas. This could have profound consequences for global corporations operating in jurisdictions where modern slavery and other corrupt practices are rife. Previously, such companies have relied on lengthy and opaque supply chains, complete with liability clauses flowing down the contractual chain, and the *corporate veil* rule, to insure themselves against liability for labour and environmental abuses.<sup>12</sup> If these mechanisms are no longer effective, it creates a problem for global companies and an opportunity for human rights lawyers and activists.

There are several potential reasons for seeking to bring claims in parent company jurisdictions of, say, the UK, US or France as opposed to the courts of the countries in which the harm originates or materialises. Three obvious reasons are: (i) because the rule of law is often stronger and the chances of a fair trial are therefore higher; (ii) because the bulk of the assets and insurance cover held by the company group are likely to be held in, or controlled from, the parent jurisdiction; and (iii) because the reputation impact, and thus the prospects of corporate culture change, will be greater in a media rich environment.

In the analysis that follows, I sketch out some of the challenges and opportunities associated with corporate accountability litigation in the UK. For those who would like to see greater transnational corporate accountability, there are reasons for optimism, even if that must be tempered by the very real challenges that lie ahead.

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<sup>10</sup> *Lungowe & others v Vedanta Resources PLC and Konkola Copper Mines PLC* [2017] EWCA Civ. 1528.

<sup>11</sup> Examples include *Lungowe and others v Vedanta Resources PLC and Konkola Copper Mines PLC* [2017] EWCA Civ. 1528; *Okpabi and others v Royal Dutch Shell and another* [2017] EWHC 89.

<sup>12</sup> Kamil Omoteso Hakeem Yusuf, "Accountability of transnational corporations in the developing world: The case for an enforceable international mechanism," *Critical Perspectives on International Business* 13, no. 1 (2017): 64, <https://www.emeraldinsight.com/doi/pdfplus/10.1108/cpoib-08-2014-0040>.



### *Factual matrix*

For the purposes of this analysis, I will apply the following fictitious factual matrix (hereinafter called the ‘Test Case’) to all the legal scenarios considered below. A ‘parent’ company — the senior company with a significant ownership stake or *de facto* operational control within a group of companies — is domiciled in the UK. The parent company partially owns and/or controls a Middle Eastern based subsidiary, for example in the construction or hospitality sector. The subsidiary engages a recruitment agent in a labour source country to recruit workers for a project. The workers are subject to bonded and forced labour practices, paying illegal fees to the agent and then suffering additional, consequential harms. The fees are used to pay kickbacks to senior managers at the subsidiary and both the subsidiary and the parent company gain or retain a commercial advantage by, effectively, paying nothing for the recruitment of their workers and/or receiving kickbacks from the recruitment agent and saving money on other employer liabilities. The basic parameters of the Test Case are not unusual and are documented extensively in Jureidini’s research.<sup>13</sup>

### *Criminal Litigation*

Bonded and forced labour abuses are not simply breaches of internationally accepted standards of employment and, in many jurisdictions, crimes. They also give rise to sources of unlawful financial benefit for the companies ultimately employing the abused workers. This financial benefit can arise in several ways; in saving recruitment fees and thus obtaining a competitive advantage when bidding for contracts, in savings resulting from paying wages or other benefits below the legal minimum, and in the receipt of illegal kickbacks from source country recruitment agencies. Any one of these illicit financial benefits could potentially give rise to criminal prosecutions in the UK under two statutes; the Bribery Act 2010 and the Proceeds of Crime Act 2002.

Bringing proceedings for offences relating to forced or bonded labour practices under either of these Acts would be extremely challenging. Cases would require very specific sets of factual circumstances, uncommonly strong and direct evidence of corporate wrongdoing, and, in some circumstances, the prior personal consent of the Director of Public Prosecutions applying a public interest test.<sup>14</sup> As

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<sup>13</sup> Jureidini, Ways forward in recruitment of low-skilled migrant workers in the Asia-Arab States corridor.

<sup>14</sup> “Consents to Prosecute”, Crown Prosecution Service, accessed 10 October 2018, <https://www.cps.gov.uk/legal-guidance/consents-prosecute>.

these circumstances currently appear unlikely in the UK context, this article will not focus on the UK criminal litigation angle.

### *Civil litigation*

An alternative approach is to bring a claim in the civil courts for financial compensation based on common law principles of negligence. This would have the benefit of obtaining a form of remedy or redress for the victims, a key consideration and part of the third limb of John Ruggie's 'Respect, Protect, Remedy' formulation in the UN Guiding Principles on Business and Human Rights.<sup>15</sup> It would also bring significant media scrutiny to the operations of the defendant company and, potentially, impose a meaningful financial sanction on them. Several such cases have been brought by environmental activists against multinational extractive companies in recent years. Claimants in these cases have typically argued that the local subsidiary company has engaged in acts of environmental destruction harmful to local people and that the UK domiciled parent company should be ultimately responsible for those losses. A case alleging modern slavery abuses would be brought along similar jurisprudential lines; a UK based parent company should be held liable for modern slavery practices within its international operations.

A key current case in this area of law is that of *Lungowe & others v Vedanta Resources PLC and Konkola Copper Mines PLC*.<sup>16</sup> Mr Lungowe is the lead claimant for 1826 farmers in Zambia, who have alleged that they have suffered losses as a result of contamination of their land by the activities of Konkola Copper Mines (KCM), a subsidiary of Vedanta Resources (Vedanta), which is domiciled in the UK. In 2015, Vedanta sought to strike out the claim at an early stage, arguing that the UK was not the appropriate jurisdiction for the case, which they asserted should be brought in Zambia. That application was rejected by the High Court, which accepted jurisdiction and set the matter down for trial. Vedanta appealed, but the High Court's decision was upheld by the Court of Appeal in May 2017. The question for both the High Court and Court of Appeal essentially turned on whether there was an 'arguable case' against Vedanta. Mr Justice Coulson in the High Court concluded that there was, and the Court of Appeal saw no reason to disturb that judgment. However, in March 2018, the Supreme Court gave Vedanta permission to appeal the jurisdiction point, which will now need to be resolved

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<sup>15</sup> United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights* (New York:United Nations, 2011), 102, [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>16</sup> *Lungowe & others v Vedanta Resources PLC and Konkola Copper Mines PLC* [2017] EWCA Civ. 1528.

before the case proceeds further.<sup>17</sup> If the Supreme Court rules that the UK is not the correct jurisdiction for the case, the matter will end there. However, if the Supreme Court upholds the view of the High Court and Court of Appeal, the matter will then proceed to a full trial on the facts, at which the issues of parent company liability for subsidiary wrongdoing and harm to third parties will be forensically examined. That trial is likely to clarify the law and, if the claimants are successful, provide a template for vicarious corporate accountability litigation alleging involvement in modern slavery abuses.

### *Legal tests*

The gravamen of the Vedanta case is based on legal principles set down by the Court of Appeal in the 2012 case of *Chandler v Cape PLC*.<sup>18</sup> This was a landmark judgment as it established the rule that, in certain limited circumstances, it was appropriate for a parent company to be held liable for the health and safety of employees of its subsidiary. That case turned on whether Cape PLC could be held liable for damages relating to Mr Chandler's lung disease, which he developed whilst working for a now defunct subsidiary, Cape Products. In *Chandler v Cape PLC*, The High Court applied the classic three-part legal test of foreseeability, proximity and fairness that has been required to establish a duty of care in negligence cases since the 1990 case of *Caparo v Dickman*.<sup>19</sup> In the High Court, Mr Justice Wyn Williams held that, as Cape PLC had known about the possibility of harm caused by asbestos, and as it exercised a degree of control over the health and safety of Cape Products employees, it owed a duty of care to ensure that the employees of Cape Products were not harmed. The Judge made it clear that the existence of such a duty largely arose because Cape PLC had assumed that responsibility, rather than it being a necessary function of the parent-subsidiary company relationship. However, he also stressed that such a relationship does not completely preclude vicarious liability on *corporate veil* grounds. In that sense, the *corporate veil* rule was upheld, but clarified.<sup>20</sup>

The key element of the *Caparo* test, when applied to vicarious corporate liability cases, is that of proximity. Specifically, for liability to be ascribed to the parent, it is necessary to establish a clear and close relationship of control by the

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<sup>17</sup> For an interesting discussion on the challenges of jurisdiction in transnational tort litigation, see Aristova. Ekaterina Aristova, Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction." *Utrecht Law Review* 14, no.2 (2018): 6-21.

<sup>18</sup> *Chandler v Cape PLC* [2012] EWCA Civ. 525.

<sup>19</sup> *Caparo v Dickman* [1990] 2 AC 605.

<sup>20</sup> *Chandler v Cape* [2011] EWHC 951(QB) paragraph 66 to 77.



parent company over the actions of the subsidiary. In giving judgment in the *Chandler v Cape* appeal case, Lady Justice Arden set out four tests that must be met for proximity to be established in vicarious corporate accountability cases, they are (in paraphrase):

- (i) That the business of the parent and subsidiary company are substantially the same.
- (ii) That the parent has, or ought to have, superior knowledge of the health and safety violation *vis a vis* the subsidiary.
- (iii) The subsidiary's system of work is unsafe and the parent knew, or ought to have known, that it was unsafe.
- (iv) That the parent knew, or ought to have foreseen, that the subsidiary would rely on the parent intervening to protect the employees from the unsafe system.<sup>21</sup>

It should be noted that the Arden tests may not be applied directly to a modern slavery scenario, as they were dealing with a personal injury, health and safety matter rather than labour exploitation and abuse. It seems likely that the High Court, when considering a modern slavery case may proceed with assistance from the Judgment of Lady Justice Arden but amend the tests to produce a *sui generis* formulation. Such a formulation might read into the second limb a superior knowledge of modern slavery practices by virtue of the parent company's size and its public statements on its efforts to combat modern slavery, as required by section 54 of the Modern Slavery Act. It may also use the section 54 compliance statement, and other pertinent evidence obtained during the disclosure phase, to infer knowledge that the subsidiary's system was unsafe and vulnerable to modern slavery abuses. Indeed, I would expect lawyers for the claimant to argue that the parent company was obliged to undertake enhanced scrutiny of its suppliers and subsidiaries in circumstances where it was sourcing its workers from countries or regions known to suffer comparatively high levels of modern slavery abuses, for example, parts of South Asia and East Africa.

The fourth limb of the Arden test is a difficult proposition to meet in any event and would be especially so in transnational corporate accountability litigation. However, it could be argued that a 'failure to prevent' form of doctrine could be extended here, inspired by the requirements of S.7 of the Bribery Act 2010. Such a provision would require companies to prove that they had done all they reasonably could to prevent slavery in their supply chains, failing which they would be held liable. This is a partial reversal of the burden of proof and would require companies to demonstrate that they had sufficient anti-slavery procedures

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<sup>21</sup> *Chandler v Cape PLC* [2012] EWCA Civ. 525 at paragraph 80.

in place. As such, it would be a controversial extension of the current position and would almost certainly require the consideration of the Supreme Court and, ultimately, Parliament.

### *Evidence*

In any event, to establish that the parent company should be held liable for the actions of the subsidiary in the Test Case, it will be necessary to establish a clear evidential pathway between the harm caused to the workers and the actions, omissions or failures of the parent company. Section 54 of the Modern Slavery Act 2015 may be a useful starting point for investigators to identify the policies and procedures that the parent company is applying to its subsidiaries. If those subsidiaries are sourcing workers from a jurisdiction where bonded and forced labour practices are known to be widespread, this should be an identified risk within the section 54 statement and should be accompanied by additional scrutiny of the recruitment and management practices followed by the subsidiary. Such corporate policy documents, amongst other evidence, played a key role in establishing the necessary proximity in the initial Vedanta hearings.<sup>22</sup> If evidence can be adduced of the bonded and forced labour harms in the supply chain and the necessary proximity nexus is established, the parent company may be in difficulty if it cannot demonstrate that it had in place reasonable systems to prevent the harms from occurring. The widespread nature of bonded and forced labour practices in certain geographies and sectors suggests that if multinational companies operating in such areas do have procedures to confront modern slavery abuses, they are not very effective.

However, whilst discussing section 54 of the Modern Slavery Act, we must acknowledge that its goal, which was to encourage a ‘race to the top’ in corporate practices through the publication of shared experiences, has not yet been achieved. With some notable exceptions, such as the statements from John Lewis, Marks & Spencer and the Co-Operative Group, many companies have so far used the exercise as a chance to engage in public relations and/or flatly deny that they have any exposure to modern slavery issues. Indeed, in April 2017 the Independent Anti-Slavery Commissioner was compelled to write to Chief Executives of large UK companies to express his “disappointment” with the “weak” statements produced to date.<sup>23</sup> In some ways, reticence to be open and engaging on the issue is an understandable reaction when companies are coming under ever greater legal

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<sup>22</sup> *Lungowe & others v Vedanta Resources PLC and Konkola Copper Mines PLC* [2017] EWCA Civ. 1528 at paragraph 23, referencing paragraphs 80-90 of the Claimant’s Particulars of Claim.

<sup>23</sup> Kevin Hyland to Chief Executive Officers, April 4, 2017, accessed 10 October 2018, <http://www.antislaverycommissioner.co.uk/media/1134/letter-to-ceos-on-section-54-of-modern-slavery-act-1-year-on.pdf>.

scrutiny particularly in relation to their international operations. Not wishing to see their section 54 statement in an evidence file in a case against them alleging vicarious corporate wrongdoing, has driven many legal departments to neuter any attempts to be open and honest about the challenges presented by global supply chains.<sup>24</sup> Moreover, when there are no meaningful penalties for failing to disclose bad practices, and commercial incentives not to do so, it is hardly surprising that companies take the easy option and publish meaningless statements. This is not meant to excuse corporate chicanery, it is merely acknowledgment that a regulatory system which relies on appealing to the better aspects of corporate nature is unlikely to achieve much.

It is also important to recognise that the threat of vicarious corporate accountability litigation itself may have the unintended consequence of causing multinational organisations to pay even less attention to wrongdoing in their supply chains. One of the reasons why Cape PLC was held liable to Mr Chandler was their demonstrable knowledge of the problem and their apparent willingness gratuitously to intervene on occasion to protect employee health and safety at Cape Products. This engagement has been recognised and codified in the Arden tests set down in the *Chandler v Cape* appeal case. Whilst it would be unlawful for companies to engage in ‘wilful blindness’ to obvious illegality, it is foreseeable that risk managers and lawyers within multinationals may choose to erect corporate or commercial structures to try and insulate the parent company from any traceable knowledge or connivance in modern slavery activities. A ‘failure to prevent’ doctrine would counter some of this, however, such rules would almost certainly require primary legislation, which is not currently under consideration.

### *Damages*

Assuming the various evidential and jurisprudential challenges could be overcome and the Test Case was successful, with liability established against the defendant company on *Vedanta* and *Chandler v Cape* grounds, the next question would be the quantum of damages that the court should award.

In English law, victims of negligence are generally entitled to be compensated for their loss or injury. In this case, it would mean seeking redress from the defendant company for the bonded and forced labour practices and/or human trafficking they had suffered. This would include refunding illegal fee payments, plus associated interest, and other specific payments extorted from victims for amounts they were underpaid. Added to this would be a general sum to

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<sup>24</sup> Core Coalition, Risk Averse? Company reporting on raw material and sector specific risks under the Transparency in Supply Chains clause in the UK Modern Slavery Act (London: Core Coalition, 2017), 11-13. [http://corporate-responsibility.org/wp-content/uploads/2017/10/171003\\_Risk-Averse-FINAL-1.pdf](http://corporate-responsibility.org/wp-content/uploads/2017/10/171003_Risk-Averse-FINAL-1.pdf).

compensate the victims for their suffering. Estimating a likely quantum of damages in the Test Case is virtually impossible as there are so many variables to consider. However, it is worthy of note that there have been examples of quite large overall damages payments being made by the English courts to victims of human rights violations. These include the £19.9m paid in 2012 by the British government to 5,280 claimants in relation to the Mau Mau torture cases in Kenya during colonial rule in the *Mutana* case.<sup>25</sup> At first sight this appears to be a considerable award and one that would generate significant media interest and corporate concern. However, this overall sum was spread between thousands of claimants and included a contribution to legal costs, so the amount of compensation paid to each victim was less than £3,000. Based on the Amnesty and Jureidini research, the claimants in the Test Case may have incurred direct bonded and forced labour losses of between \$2,000 and \$5,000.<sup>26</sup> A further sum may be added to compensate the victims for their suffering. However, bearing in mind the relatively small sum awarded to each of the Mau Mau claimants, it is unlikely that this will result in more than a few thousand additional pounds per claimant. An award of perhaps £10,000 per victim may be significant for an individual who is used to earning £500 per month, but it is unlikely to cause a multinational company many concerns unless the class of claimants was very large with a commensurately large aggregate award.

If the court wanted to go beyond restitution and compensation for victims, it could order an additional punitive or exemplary award to mark its displeasure at the behaviour of the defendant company. The basis of such additional awards is not especially well understood in English law and they are sometimes confused with the very large, jury awarded damages against tobacco or oil companies in the United States of America. The circumstances in which exemplary awards can be made in the English courts (they are not permitted in Scotland) are highly restricted and the amounts awarded are usually relatively modest. One study, published in 2018, found that there had been 146 claims for punitive damages in the courts of England, Wales and Northern Ireland between 2000 and 2015.<sup>27</sup> Such claims were successful in 54.7% of cases relevant to corporate wrongdoing (category two cases in Lord Devlin's landmark formulation in the 1964 case *Rooks v Barnard*).<sup>28</sup>

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<sup>25</sup> *Mutana Others v Foreign and Commonwealth Office* [2012] EWHC 2678.

<sup>26</sup> Jureidini, Ways forward in recruitment of low-skilled migrant workers in the Asia-Arab States corridor, 6.

<sup>27</sup> James Goudkamp James and Elini Katsampouka, "Elini. 2018. *An Empirical study of Punitive Damages in Action*," Oxford *Business Law Blog*, 6 July 2017, <https://www.law.ox.ac.uk/business-law-blog/blog/2017/07/punitive-damages-action>.

<sup>28</sup> *Rooks v Barnard* 1964 AC 1129 HL.

However, the average award was just £18,181.<sup>29</sup> The claimants in the Test Case could request damages that would inflict a meaningful penalty on a multinational company, but based on the findings of Goudkamp and Katsampouka, it seems unlikely that a very large award would be made. On this analysis, the prospect of inflicting a large financial penalty on a company and thus generating future corporate behavioural change to avoid such penalties seems remote. Of course, the publicity and media interest surrounding the Test Case is likely to be such that the experience would be uncomfortable for the directors and shareholders of the defendant company, and this alone may drive improvements in corporate accountability. However, we must acknowledge that such publicity might be achieved more quickly and cheaply using other methods, such as widely published investigative journalism.

### *Costs and funding*

A further issue is that of legal costs. Preparing a vicarious corporate liability claim can be a lengthy and expensive process requiring the time of several lawyers, paralegals, investigators, translators and other support staff to interview victims and prepare the case for trial. It can take several years to undertake this work and is likely to require many hundreds of thousands of pounds of resources. Legal aid is not available for civil cases of this sort and the basic position in UK litigation is that the ‘loser pays’ both their own costs and those of the winning side at trial. This can be a very significant amount of money and can act as a deterrent to legitimate claimants. If a claimant is unable to meet in advance the costs of their legal representation and/or to risk the possibility of having to meet the costs of the other side in the event of a loss, they may ask their lawyers to act on a conditional fee arrangement underpinned by after-the-event insurance cover. This involves the legal team sharing the risk of losing, in which case they do not get paid and the insurance pays the winner’s costs, but in which they can charge up to double their normal rate if they succeed. A ‘contingency fee’ or ‘damages based’ arrangement is also possible, in which the lawyers agree to act without an initial fee, in return for a promise to participate in a capped percentage of the award made to the victims. These agreements are less satisfactory as they reduce the compensation payable to victims. Campaigning human rights lawyers such as Leigh Day, the firm representing the claimants in the Vedanta case, have been known to assist claimants on a conditional fee basis.<sup>30</sup> However, such arrangements represent a

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<sup>29</sup> Goudkamp and Katsampouka, “Punitive Damages in Action.”

<sup>30</sup> Leigh Day, *Pushing the Boundaries, taking a stand* (London: Leigh Day, 2018). Accessed 10 October 2018. [https://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Brochures/International-brochure\\_Aug2018.pdf](https://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Brochures/International-brochure_Aug2018.pdf).



significant commercial risk for any law firm and would only be available in cases with strong prospects of success and where potential losses can be insured or otherwise defrayed.

Alternatively, it may be possible to obtain funding for the Test Case from a commercial litigation fund. Such funds have grown very quickly in recent years to fill the gap created by the withdrawal of civil legal aid. The industry in the UK is now reported to be worth more than £10 billion, with banks, hedge funds and private investors tempted by “150% to 300% returns on investment”.<sup>31</sup> Such funds invest in a wide spectrum of cases within a certain risk profile, thus aggregating and spreading the risk of individual cases failing. However, to qualify for funding, a case will need to meet a threshold of likely success, which frontier corporate accountability litigation is unlikely to meet unless the evidence base is especially clear and compelling. Moreover, even a large group action, is unlikely to generate the scale of damages necessary to attract commercial funders and, even if they were, there would be significant ethical questions arising from the transfer of damages payments from victims to hedge funds. As Philip Marshall QC has noted, “funders are essentially quite picky - they are looking for large claims that make it worth their while and one where the client is willing to take a significant discount on recovery [in exchange] for the funding”.<sup>32</sup> In essence, third party commercial litigation funding is an expensive form of borrowing and one which seems ill suited to human rights focused cases.

An alternative means of funding the Test Case could be provided by crowdfunding platforms, such as Crowd Justice or the Good Law Project and/or contributions from philanthropic or development organisations, such as the Open Society Foundations (OSF) or Freedom Fund.

Crowd Justice, and similar sites, provide activists with a platform for their campaign and have facilitated some quite significant fundraising. Examples include the £170,550 raised to support Grahame Pigney in his challenge to the Brexit Article 50 process, which resulted in a Supreme Court hearing. Crowd Justice charges a fee of 3% of money raised, which is attractive compared with the large returns on investment required by commercial litigation funders. The Good Law Project has a slightly different model. It takes on a relatively small number of cases, which are then funded by members, who make monthly contributions to support the general work of the Project and/or make contributions via sites such as Crowd Justice. There are several benefits of platforms such as these, including access to a wide funding pool and the ability to leverage the reputation of the

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<sup>31</sup> Barney Thompson, “Lawsuit funders raise £10bn from yield-hungry investors,” *Financial Times*, 19 November 2017, <https://www.ft.com/content/926355de-c941-11e7-ab18-7a9fb7d6163e>.

<sup>32</sup> Thompson, “Lawsuit funders raise £10bn from yield-hungry investors.”

platforms in bringing worthwhile cases. However, as with all fundraising campaigns, success or failure will be determined by the efforts of the campaigners in designing, maintaining and communicating a compelling narrative to potential funders. Also, it is important to note that crowdfunding platforms are currently unregulated and that could act as a brake on the ability to raise very large sums of money in support of the Test Case.

OSF has a program called the Open Society Justice Initiative (OSJI). Established in 2007, the OSJI is an operational (as opposed to pure funding) unit of OSF. Its declared intent is to “use law to protect and empower people around the world”.<sup>33</sup> OSJI has the capacity and the focus to lead the Test Case and, if clear *prima facie* evidence of wrongdoing was compiled, could be a useful partner in this work. Similarly, Freedom Fund has published a useful guide to strategic litigation in conjunction with the Human Trafficking Pro Bono Legal Center, called ‘Ending Impunity, Securing Justice: using strategic litigation to combat modern day slavery’.<sup>34</sup> The focus of this initiative is to create a network of lawyers, investigators, NGOs and donors to resource cases such as the Test Case. The work of organisations such as OSJI and Freedom Fund has the potential to galvanise the support and resourcing necessary to investigate and prepare the Test Case for trial and offers a tangible avenue for progress.

However the necessary funds and resources are raised, those developing the Test Case would need to approach the evidence gathering process with great care. At all times, they would need to prioritise the welfare of the claimants. As lawyers, we must always exercise ‘client care’ but in these circumstances it is especially important. Victims may be vulnerable to reprisals from powerful vested interests, such as the debt bondage money lenders, the employment agents, or traffickers. There may be cultural sensitivities around ‘victimhood’ and the perceived shame of abuse or exploitation. The team would also need to be careful not to act as a ‘pull factor’ for spurious claims. If stories of large compensation payments proliferate, it could encourage fraudsters, thus undermining the claims of genuine victims. At all times, the team would need to remember that obtaining a meaningful remedy for the victims is paramount. If victims remained in employment with an allegedly abusive employer, a delicate balance would need to be struck between pursuing their case for the sake of bolstering a legitimate legal claim against the defendant company and jeopardising the livelihood of victims and their families. There are no

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<sup>33</sup> “Open Society Justice Initiative,” Open Society Foundations, accessed 10 October 2018, <https://www.opensocietyfoundations.org/about/programs/open-society-justice-initiative>.

<sup>34</sup> Martina E. Vandenberg, *Ending Impunity, Securing Justice: using strategic litigation to combat modern day slavery* (New York: Freedom Fund, 2015), <https://d1r4g0yjvcc7lx.cloudfront.net/uploads/STRATEGIC-LITIGATION-FINAL-FOR-EMAIL.pdf>.

easy answers to these issues and they would require sound legal and moral judgement.

### *Conclusions*

The legal and political landscape has developed significantly over the past 20 years, with much greater emphasis placed on the protection of human rights within global corporate supply chains. However, enforcement of these provisions remains a challenge. Despite the best intentions of lawmakers in passing anti-slavery laws, modern slavery practices remain stubbornly endemic. Ultimately, companies will only start to invest meaningful resources into tackling slavery in their supply chains if they perceive either a significant benefit in doing so, or a significant disbenefit in failing to do so. Moreover, as companies are concerned about maintaining a level playing field *vis-a-vis* their competitors, they are unlikely to invest in expensive compliance procedures unless they can be sure that their competitors are similarly investing. Those who invest ahead of the curve may place themselves at a competitive disadvantage compared to other, less scrupulous companies. While there are no meaningful penalties for engaging in or tolerating modern slavery practices, it is difficult to convince companies to invest in compliance. In short, the costs of legal and ethical compliance are perceived to be high and the risks of non-compliance perceived to be low.

Arguably, the most effective way to clarify this uncertain legal terrain and ensure a level commercial playing field would be for Parliament to strengthen section 54 of the Modern Slavery Act 2015 with a 'failure to prevent' provision inspired by section 7 of the Bribery Act 2010. This would place a clear obligation on multinationals to enact measures that would more effectively police the practices of their subsidiaries and suppliers. It would encourage companies to invest in protecting the workers in their supply chain and create a level commercial playing field, incentivising good actors and dis-incentivising bad actors. Allied to a robust whistleblowing provision, with appropriate protections for workers encouraged to report abuse, this could radically increase the pressure on companies to protect workers. However, such strengthened provisions are unlikely to materialise from the UK Parliament unless pursued in conjunction with European and American counterparts to produce a harmonised transnational legal framework. A unilateral approach would invite business flight that the UK government would be unlikely to risk. Regrettably, in the context of Brexit entailing the need for the UK to pursue international trade deals and President Trump's disdain for multilateralism, the legislative route to greater corporate accountability looks blocked for the foreseeable future.

Strategic litigation may be a mechanism through which existing legal measures can be clarified, strengthened and enforced. Shining a legal spotlight on corporate failings may result in directors taking their responsibilities towards workers in their supply chains more seriously. However, those seeking to bring such cases face serious challenges. Almost inevitably, those representing victims will be at a significant financial disadvantage when confronting a multinational company. Public funding is not available and the costs associated with investigations and case preparation and trial are high. In common law cases in the UK, there is a lack of any direct precedent relating to vicarious corporate accountability for labour rights abuses overseas. Moreover, companies may choose to interpret the Arden tests as a warning not to engage with the protection of subsidiary employees for fear of voluntarily attracting liability. There are also significant practical, financial and ethical challenges relating to evidence gathering. Modern slavery practices are often interwoven with violent, organised criminality, which can be difficult and dangerous to investigate. Finally, legal countermeasures by well-funded multinationals could be used to threaten the livelihoods or liberties of human rights defenders.

However, many of these challenges could be addressed by a patient and well-capitalised funder, allied to a brave and dedicated team of lawyers, investigators, journalists and support staff. Those who are prepared to invest the time and effort to bring a successful labour exploitation case may be rewarded with the kind of corporate culture shift apparently intended by the legislators in the UK, US and France, but which has hitherto been lacking. A persuasively argued legal case backed by solid evidence highlighting the ecosystem of corruption and abuse endemic in the employment of vulnerable workers worldwide could send a strong corporate accountability message. It could thus contribute to a significant improvement in corporate respect for the rights of workers employed in the supply chains of UK based multinationals. This is surely a prize worth fighting for despite the scale of the legal, commercial and practical obstacles involved.

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