

# CALIFORNIAN SLAVERY IN SUPPLY CHAIN JUDGMENT PROVIDES CASE STUDY FOR UK

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Legal Briefings - By **David L Wallace**, **Joanne Keillor** and **Oliver Elgie**

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A recent decision in The District Court of California has potential relevance to the reporting obligations companies have under English law regarding the use of forced labour in their supply chains.

According to the ruling, which related to the California Transparency in Supply Chain Act of 2010 (the **CTSCA**), companies are not required to report on the possibility of the use of forced labour in their supply chains, but rather are protected by the 'safe harbour' doctrine, meaning that they are only required to report in accordance with the limited disclosure obligations under the CTSCA.

The reporting requirements under the CTSCA are similar to those under the UK Modern Slavery Act 2015 (the **MSA**). As such, the Californian decision, whilst having no authority in England, serves as a case study as to how an English Court may interpret the MSA reporting requirements.

## THE REPORTING REQUIREMENTS: THE CTSCA VS. THE MSA

The CTSCA requires any retail seller or manufacturer which does business in California with annual worldwide gross receipts of over \$100 million to disclose on its website the company's efforts to "*eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale*".

The CTSCA states that the disclosures should include: the extent to which the company engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery; and the extent the company conducts audits of suppliers to evaluate supplier compliance with its standards for trafficking and slavery in supply chains. The CTSCA does not create a positive duty on companies actually to take any steps – it is a disclosure obligation only and one which does not include an obligation to disclose every possible instance of slave labour at the most indirect parts of their supply chains.

Whilst the CTSCA only applies in California in the US, there is a federal law in the pipeline, as described in the Business Supply Chain Transparency on Trafficking and Slavery Act of 2015, which will require companies to make disclosures similar to those required by the CTSCA.

Under the MSA, a company with a business presence in the UK, which supplies goods or services and has an annual turnover of over £36 million must publish an annual Transparency Statement on its website, setting out the steps that it has taken to ensure that slavery and human trafficking is not taking place in any of its supply chains or in any part of its own business. Alternatively, the company can make a statement that it has taken no such steps. For more details on the reporting obligations under the MSA.

The MSA is broader than the CTSCA in four material respects: (i) there is no minimum 'footprint' threshold for 'carrying out business', (ii) it applies to all sectors, not just retail and manufacturing, (iii) it applies to both the sale of goods and the supply of services, and (iv) the turnover threshold is lower. However, once triggered, the reporting obligation is broadly similar. IN particular, like the CTSCA, the MSA requires companies to report on the steps taken to eradicate slavery and forced labour, not on the possibility of slave labour existing in its supply chains.

The reporting requirements of the MSA came into force on 29 October 2015 (albeit with transitional application until 31 March 2016), and so, to date, there has been no case law testing how the reporting obligations contained in the MSA will be interpreted and enforced.

## **THE CALIFORNIAN DECISION**

On 9 December 2015, the Central District of California dismissed a claim that Nestlé was obliged to inform consumers that some proportion of its cat food products may include seafood which was sourced from forced labour (see *Barber v. Nestlé USA, Inc.*, No. 15-01364-CJC (C.D. Cal. Dec. 9, 2015)).

Nestlé markets and distributes 'Fancy Feast' cat food, a variety of which contains seafood caught in the waters between Thailand and Indonesia. To source the seafood, Nestlé works with a Thai company who receives the seafood ultimately from small fishing ships. It was accepted by both parties that these small fishing ships use forced labour, but that it was impossible to quantify how pervasive the problem is.

In dismissing the claim, the Californian Court held that the CTSCA had created a 'safe harbour', meaning that "the Legislature has permitted certain conduct or considered a situation and concluded that no action should lie". Because the CTSCA has spoken directly to the issue of what disclosures companies are required to make to customers about potential forced labour in their supply chains, disclosure is only required by companies to the extent provided for in the CTSCA and no further. The disclosures which the plaintiffs were asking for were beyond that required under the provisions of CTSCA.

For a more detailed analysis of the US position see *Seller Beware: A Look at Liability Risk for the Labor Practices of Business Partners in the Global Supply Chain*.

## POSSIBLE IMPLICATIONS FOR ENGLISH LAW

The Californian decision is not binding on an English Court. However:

- Just like the CTSCA, the MSA contains no positive obligations on a company to report on instances of possible forced labour in its supply chain. Rather, they both simply require a company to disclose what, if any, steps it has taken to ensure there is no slavery in its supply chains,
- This level of disclosure appears to have been intended by the UK parliament, and
- The UK government has openly admitted that its approach 'draws on' the CTSCA.

In this way, the logic of the Californian Court that "*the Legislature already decided what level of disclosure would be sufficient to adequately inform consumers, and codified that level of disclosure*" holds equally true for the MSA.

The Californian decision represents an interesting insight into how an English Court may interpret the reporting requirements under the MSA. However, the significance of those requirements and, in particular, the due diligence that a company should undertake (including with respect to its supply chains) before making positive statements regarding the steps it has taken, should nevertheless not be underestimated.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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