High Court Declines Jurisdiction in Supply Chain Claims Against Dyson Companies

28 November 2023

Summary. On 19 October 2023, the High Court refused to allow group supply chain claims to proceed further against Dyson, on the basis that the foreign jurisdiction (Malaysia) where the alleged acts and omissions occurred was a more appropriate forum and justice did not otherwise require that the claims be tried in England, *i.e.*, on *forum non conveniens* grounds. The Court's decision in *Limbu & 23 Ors v Dyson Technology Limited and Ors* [2023] EWHC 2592 KB ("*Limbu*") suggests that, following Brexit and the non-applicability of the Brussels Recast Regulation, claims concerning events abroad may less frequently proceed to trial in England.

Background. The claims in *Limbu* were brought by 24 migrant workers, employed by a Malaysian third-party supplier of products and components to the Dyson Group. The claimants alleged that they were subjected to forced labour and exploitative and abusive working and living conditions between 2011 and 2022. The case theory broadly followed that of recent claims in the English courts arising out of the alleged liability of England-domiciled parent companies for the acts or omissions of foreign subsidiaries. As decided in *Lungowe v Vedanta Resources PLC* [2019] UKSC 20 9 ("*Vedanta*"), claimants seeking to establish parent-company liability in such cases must meet the so-called "intervention" test by showing that the parent company:

- took over the management or jointly managed the relevant activity of the subsidiary;
- provided defective advice and/or promulgated defective group-wide safety/environmental policies;
- promulgated group-wide safety/environmental policies and took active steps to ensure their implementation by the subsidiary; or
- held itself out as exercising a particular degree of supervision and control over the subsidiary.

In *Limbu*, the claimants sued three members of the Dyson Group—two based in England and one in Malaysia (the "Dyson Group Defendants")—in negligence and

unjust enrichment, instead of the alleged primary perpetrator/tortfeasors, *i.e.*, (i) the supplier company responsible for manufacturing products and components for Dyson-branded products; (ii) an additional manufacturer which manufactured Dyson products; and (iii) the Malaysian police. The claimants alleged that the Dyson Group Defendants were jointly liable with the three primary tortfeasors for the torts of false imprisonment, intimidation, assault and battery. The claimants alleged that the Dyson Group Defendants' liability arose from the corporates' exertion of a high degree of control over the manufacturing operations and working conditions at the third-party supplier's factory facilities, where all the claimants were employed.

The Dyson Group Defendants were also said to have implemented mandatory policies and standards regulating the living and working conditions of workers employed in the Dyson Group's supply chain (including the third-party supplier). In particular, the two Dyson companies based in England had promulgated: (i) a "Supply Chain Foreign Migrant Worker Recruitment and Employment Policy" stipulating minimum requirements for the treatment of migrant workers by Dyson suppliers; (ii) the Dyson Ethical and Environmental Code of Conduct, which prohibited the use of forced labour in the Dyson Group supply chain and required suppliers' adherence to the same code; and (iii) the Dyson Modern Slavery and Human Trafficking Statement 2020, which provided for risk assessments of supply chains and audits to ensure compliance, as well as remediation mechanisms for noncompliance. The Dyson Group Defendants also employed persons to whom they designated oversight over the management and implementation of these policies. The Malaysian Dyson entity was itself alleged to be responsible for the promulgation, implementation and enforcement of welfare standards for workers in the Dyson Group's supply chains in South East Asia, as well as carrying out regular and comprehensive audits across manufacturers (including the third-party supplier).

Dyson's Successful Challenge. While the United Kingdom was an EU Member State, it was subject to the European Union's framework governing jurisdiction over civil and commercial matters, known as the "Recast Brussels Regulation". Under that framework, the English courts effectively lost their power to decline jurisdiction over claims against a UK-based defendant on the basis of *forum non conveniens*, *i.e.*, that England was not the most natural or appropriate forum. In short, a UK defendant could be sued "as of right" under the EU framework.

The Recast Brussels Regulation was not retained within domestic law after the United Kingdom's withdrawal from the European Union. It therefore ceased to apply to new claims commenced against England-domiciled parties after 31 December 2020. Concurrently, the English courts regained the *forum non conveniens* apparatus, reverting to the principles first established in *Spiliada Maritime Corporation v Canslex Ltd.* [1987] 1

AC 460 ("*Spiliada*"). For "service in" cases (where the defendant company is based in England, such as the first two Dyson Group Defendants), the *Spiliada* test has two parts:

- the defendant must prove that England is not the natural or appropriate forum and that there is another available forum which is clearly and distinctly more appropriate; and

- if the defendant proves this, to avoid *forum non conveniens*, the claimant must prove that there are nevertheless special circumstances such that justice requires the trial to take place in England.

For "service out" cases (where the defendant is based abroad, such as the Malaysian Dyson Group Defendant), the burden of test shifts from the defendant to the claimant:

- the claimant must prove that England is the appropriate forum to hear the case and that it is clearly the "proper place to bring the claim"; and

- if the claimant fails to prove this, to avoid *forum non conveniens*, they must prove that there are nevertheless special circumstances such that justice requires the trial to take place in England.

Both the "service in" and "service out" tests were applied by the judge in *Limbu*. The judge held that Malaysia was "clearly and distinctly more appropriate" to hear the claim. He considered several factors to reach this conclusion:

- **Applicability of Malaysian law**: The fact that Malaysian law was the applicable law weighed in favour of letting the case be heard there, including because the claimants pleaded several novel legal arguments where Malaysian law was said to diverge from English law.

- **Malaysia was the jurisdiction in which the alleged harm occurred**: While the alleged events had occurred in both England and Malaysia, the latter was nevertheless "*the centre of gravity of this case*", given liability for the alleged mistreatment would form a considerable portion of the case. The Judge acknowledged that this might result in "*a multiplicity of proceedings and of irreconcilable judgements*", particularly in light of a separate claim being brought by the Dyson Group against Channel 4 for an allegedly defamatory broadcast on its labour practices. Nevertheless, the Judge reached the view that Malaysia was the "centre of gravity" of the case, because this was where the primary underlying actions occurred, and Malaysian law governed the dispute. That view was crucial to the Judge's determination that England was not the natural or appropriate forum to hear the case.

- **No overriding reason requiring the claim to be heard in England**: The claimants advanced a number of reasons that were said to constitute special circumstances requiring the claim to be heard in England, all of which were dismissed. These included:

  - **Alleged difficulties in migrant workers' ability to obtain access to legal representation in Malaysia**: This was contradicted by "*clear evidence*" that many migrant workers had access to high-quality legal representatives.

  - **Lack of suitably qualified and experienced advocates in Malaysia**: Though there was evidence that Malaysian labour/migrant lawyers had not argued this precise type of case before, there was also evidence that lawyers had argued complex cases in Malaysian courts, which indicated that they could argue the tort and unjust enrichment aspects of this case.

  - **Complexity of case management and difficulties of splitting out the issue of unjust enrichment**: The judge considered that as the claim only involved 24 migrant workers, the unjust enrichment issues were unlikely to be a major part of the case in any event.

  - **The claims involved financial risk for the claimants' legal representatives, compounded by an aggressive approach taken by the defendants with no effective limitation on its resources, which would dissuade them from representing the claimants**: The judge did not consider this relevant, provided that the defendants and their legal representatives acted within the law and in accordance with relevant ethical standards. In any event, any financial risk could be counterbalanced by the claimants' legal representatives charging a higher success fee.

  - **Both full and partial CFAs are illegal in Malaysia, and even if partial CFAs were legal, the basic fee payable must not be nominal, and therefore a partial CFA was unaffordable for the claimants**: The judge found that partial contingency fee agreements were not unlawful in Malaysia; they were, in fact, frequently used in that jurisdiction. Moreover, there was no case law to support the position that a low basic fee would be struck down as being "nominal".

A powerful countervailing factor in the Court's analysis under the second limb of *Spiliada* was the Dyson Group Defendants' willingness to submit to the Malaysian jurisdiction and enter a number of related undertakings, which ultimately led to the Court "*making its decision in reliance on the undertakings given by the Dyson Defendants*". As well as the England-domiciled Dyson Group Defendants undertaking to be sued in Malaysia, the defendants agreed to pay the claimants' reasonable costs to enable their

giving evidence in Malaysia (whether in person or remotely) and to pay for the claimants' share of certain disbursements. The extent of the defendants' undertakings effectively neutralised many of the financial and practical burdens that the claimants otherwise may have faced in proceeding in Malaysia, leaving the claimants with a gap in funding of only some £300, which was, in any event, likely to be funded by local NGOs in Malaysia.

The judge therefore found that the second limb of the test in *Spiliada* was not met, as there was no real risk that the claimants would not be able to have their cases heard fairly in Malaysia. Accordingly, he declined jurisdiction over the claims.

Implications. *Limbu* offers welcome guidance on how English courts may use their renewed powers to determine *forum non conveniens* challenges under the *Spiliada* test.

However, the judge's overall determination that England was not the most natural forum for the claims appears to have been influenced, at least in part, by the extensive undertakings offered by the Dyson Group Defendants—*i.e.*, the second limb of the *Spiliada* analysis. Importantly, the Dyson Group Defendants' agreement to submit to the Malaysian jurisdiction was likely a critical factor enabling the successful challenge to the English court's jurisdiction on the basis of *forum non conveniens*. This was reflected in the judge's observation that "*where defendants domiciled in England have agreed to submit to a foreign jurisdiction, but the claimant has made a deliberate choice to sue in this forum*", the claimant "*engender[s] the risk of irreconcilable judgments*".

It remains to be seen whether other England-domiciled companies being sued in relation to alleged events concerning the activities of their foreign subsidiaries will follow suit in submitting to foreign courts' jurisdiction and offering similar undertakings. That will be a key strategic decision to be made by companies facing such actions, including in order to improve the likelihood of success of any *forum non conveniens*-based jurisdictional challenge.

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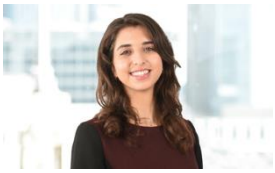

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