Court of Appeal Allows Supply Chain Litigation to Proceed to Trial

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The Court of Appeal in *Kumar Limbu & Others v Dyson Technology Limited & Others* [2024] EWCA Civ 1564 ("*Limbu*") has recently overturned the High Court's decision which determined that Malaysia was the more appropriate forum for claims brought against three companies in the Dyson group of companies by migrant workers in Malaysia. *Limbu* is also another example of a claim brought against UK-headquartered companies in relation to human rights, labour standards and environmental impacts abroad. The decision follows a trend of recent appeal authorities in which concerns about perceived inequality of arms have led to favourable decisions for claimants.

The decision suggests that it may not be straightforward for a UK-headquartered company to challenge jurisdiction in claims of this nature (although inevitably each case will turn on its facts, which we explore further below). We make some general observations about the current litigation landscape before considering the decision in more detail.

- The appellate courts see the English justice system, which comes with access to well-resourced claimant firms and litigation funding, as an appropriate jurisdiction to hear claims against UK-based companies for alleged oversight of ethical and environmental practices used by subsidiaries and supply chains. The importance of access to justice and equality of arms in pursing these types of claims were significant factors in the Court of Appeal's decision in allowing the claim to proceed in England.

- Whether these novel claims will succeed if/when they proceed to trial remains to be seen. However, it appears that the appellate courts are reluctant to shut them out at an early stage. This is demonstrated by a number of recent high-profile decisions where the appellate courts have overturned decisions at first instance in which group claims brought by vulnerable claimants against well-resourced commercial defendants had been struck out or (in this case) stayed on the grounds that England was not the appropriate forum (see, e.g. *Municipio de Mariana & Others v BHP Group (UK) Ltd & Others* [2022] EWCA Civ 95; *Okpabi & Others v Royal Dutch Shell Plc & Another* [2021] UKSC 3).

- These claims are often vague or amount to little more than speculation about how the internal operations of a company *might* operate. It will be interesting to see how the lower courts deal with the potential tension between an apparent desire to allow these claims to progress, versus the need to ensure that significant time and costs are not wasted on frivolous claims.

- *Limbu* was unusual as the judgment records that there was a real likelihood that the underlying allegations of abuse would not be in issue, such that the focus of the litigation would be on what (if any) liability could attach to the UK based Dyson entity. In cases where the underlying allegations about events overseas are contested, or the role of a foreign subsidiary is more prominent, it may be that the court will be more amenable to arguments that the foreign jurisdiction is the appropriate forum given the centre of gravity of the case is more likely to point to the foreign jurisdiction.

- Regardless, it seems inevitable that more supply chain-related claims will be framed along similar lines. The Claimants in *Limbu* have relied on the test for parent company liability as articulated in *Vedanta* (which concerned the circumstances in which a parent company may assume a duty to claimants allegedly harmed by the acts or omissions of a foreign subsidiary) but have gone one step further. The Claimants argue that because public commitments had been made by Dyson to the effect that its supply chain meets certain basic minimum standards, Dyson could be liable for the actions of its third-party supplier (i.e. a party **outside** the Dyson group). That is a novel point that would involve a considerable expansion of parent company liability.

Background

The claim concerns the degree of oversight and control exercised by Dyson over the living and working conditions of workers employed by third-party suppliers in the Dyson group's supply chain. The Claimants allege that they were trafficked to Malaysia and subjected to conditions of forced labour, and exploitative and abusive working and living conditions. Dyson are said to have known of the high risk of forced labour in Malaysia and exerted a high degree of control over the manufacturing operations and working conditions at supplier's factories by promulgating and implementing mandatory policies and standards concerning worker conditions.

The High Court concluded that Malaysia was the more appropriate forum for the claims to be heard and that there was no real risk of the claimants being unable to access justice there. On the issue of appropriate forum, the High Court held that the centre of gravity

in the case is Malaysia as the place where the underlying alleged mistreatment took place. The High Court held that Malaysia is therefore the forum with "*the most real and substantial connection*", applying the test of Lord Goff in *Spiliada*. The High Court also identified Malaysian law as the governing law, and the policy reasons for "*letting Malaysian judges consider the novel points of law that are being raised in this claim within the context of their jurisprudence, rather than letting an English Court second guess what they might decide*."

On the issue of access to justice, the High Court was satisfied that there were no real difficulties in obtaining access to justice for migrant workers, and that the Claimants could find suitably qualified advocates to deal with this kind of case.

The High Court was also asked to consider the relevance of related defamation proceedings brought by the UK Dyson Defendants. The defamation proceedings were commenced in February 2022 against UK news broadcasters, following a news broadcast concerning similar allegations of abusive working conditions at the factory which manufactured Dyson products. The Claimants sought to argue that there was a significant risk of duplication and inconsistent judgments if the Claimants were required to pursue their claims in Malaysia, given the same factual allegations will be investigated and determined by the English courts in the defamation proceedings. The High Court concluded that this factor— multiplicity of proceedings and irreconcilable judgments— did favour hearing the Claimants' case in England. However, this factor must be weighed with all the other factors that favour hearing the case in Malaysia. The High Court also noted that there would be a risk of irreconcilable judgments even if the Claimants' claim is heard in England because it was "unlikely" that the defamation case and the Claimants' case would be managed together or "even with a real eye on one another".

An unusual feature of the case was that the Defendants provided various undertakings to the Court as to how they would conduct the proceedings if the claim was brought in Malaysia. This included the Defendants submitting to the jurisdiction of the Malaysian courts and meeting the Claimants' costs for certain disbursements to enable the Claimants to give evidence in Malaysian proceedings.

Court of Appeal Decision

The Court of Appeal overturned the High Court decision, identifying five errors of principle.

First, the High Court failed to take account of the important connection between two of the Defendants and their domicile in England and that they had been served in England as of right.

Second, the High Court failed to have sufficient regard to the fact that the real dispute is concerned with acts in England. The Court of Appeal held that although the primary underlying abusive conduct occurred in Malaysia, the promulgation of policies took place in England. It determined that the focus of the trial would be Dyson UK's role and activity in England and that the failure by the High Court to account for the location of all the conduct or events relevant to duty, breach and harm amounted to an error of principle. The Court deemed that overall, the connection with the issues pointed more towards England than Malaysia or at most was neutral.

Third, the High Court made a serious error of principle in considering that there was a real risk of irreconcilable findings in relation to related defamation proceedings even if the current proceedings proceed in England. The Court of Appeal considered it would be overwhelmingly likely that proceedings could be coordinated to avoid, or at least reduce, duplication of proceedings and inconsistent judgments.

Fourth, the High Court failed to have regard to the fact that the Defendants' defence would be coordinated from England. The Court of Appeal accepted this ground and found that the fact that Dyson UK would be coordinating the litigation from England (as that is where the Dyson legal team is based) on behalf of all the defendants, wherever it takes place. That was a further connecting factor with England.

Fifth, the Judge was wrong to conclude that there was no real risk that the claimants and NGOs would be unable to fund the disbursements necessary to pursue their case in Malaysia. The Court of Appeal found that the undertakings offered were "unprecedented" and would create a conflict of interest. It rejected the idea that the defendants could be expected to comply with the ill-defined notion of the "spirit" of the undertakings when it came to approving requests from the Claimants. The Court of Appeal determined that the likelihood of disputes over what costs were reasonable and necessary and the potential need for legal professional privilege to be waived during disbursement requests would give the Defendants an improper advantage. Additionally, the Court noted that disbursements were likely to arise in the future that fall outside of the claims as currently particularised and that these would then not be covered under the offered undertakings. Given these issues and based on evidence that suggested NGO funding would not be sufficient, the Court determined that the Claimants would not be able to bring the claims in Malaysia, as even with a partial CFA there would be certain disbursements that could not be funded. The Court was keen not to criticise the Malaysian justice system but found that these case-specific funding issues point overwhelmingly in favour of England as a more appropriate forum.

In light of these findings, it would appear that undertakings which seek to address access to justice issues as regards the foreign proceedings may not be adopted in future claims (or if they are, they will need to be sufficiently broad to address the types of concerns raised by the Court of Appeal).

Having identified those errors of principle the Court of Appeal proceeded to exercise its own evaluation and concluded that England was clearly and distinctly the appropriate forum.

Whilst Dyson's jurisdiction challenge failed in this case, it will of course remain open to other UK-headquartered companies in future claims to challenge the jurisdiction of the English Court if it is believed that another jurisdiction is plainly the more appropriate forum. Ultimately, each claim will turn on its own facts. As noted, if the underlying allegations are challenged that is likely to give rise to different considerations. The location of witnesses and a common language between the witnesses and the court may be more important factors in other cases. It may also be the case that the English Court will be more cautious when faced with claims governed by a law that does not (largely) follow English law; and of course, if it can be shown that it is possible for the claimants to obtain funding for its claims in the foreign jurisdiction this is likely to be a powerful factor in favour of allowing the jurisdiction challenge.

The claim will now be remitted to the High Court to proceed to trial. There are very few decisions that consider the circumstances in which a company may assume a duty to claimants allegedly harmed by the acts or omissions of a foreign subsidiary. The extension of those principles to a third-party supplier is completely novel and would involve a significant extension of the law. Assuming the case progresses, this is likely to be the first time *Vedanta*-type liability for the activities of a supply chain is examined on the evidence. This will be a case to watch in 2025 and beyond.

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