The Jurisdiction Puzzle: Dyson, Supply Chain Liability and Forum Non Conveniens

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On 19 October 2023, the English High Court declined to exercise jurisdiction in *Limbu v Dyson Technology Ltd*, a case concerning allegations of forced labour and dangerous conditions at Malaysian factories which manufactured Dyson-branded products. The lawsuit commenced by the migrant workers from Nepal and Bangladesh is an example of business and human rights litigation against British multinationals for the damage caused in their overseas operations. Individuals and local communities from foreign jurisdictions secured favourable outcomes and won jurisdictional battles in the English courts over the last years in several notable cases, including *Lungowe v Vedanta*, *Okpabi v Shell* and *Begum v Maran*.

The *Dyson* case is particularly interesting for at least two reasons. First, it advances a novel argument about negligence and unjust enrichment of the lead purchasing company in a supply chain relationship by analogy to the parent company liability for the acts of a subsidiary in a corporate group. Second, it is one of the few business and human rights cases filed after Brexit and the first to be dismissed on *forum non conveniens* grounds. Since the UK's EU referendum in 2016, the return of *forum non conveniens* in the jurisdictional inquiry has been seen as a real concern for victims of business-related human rights and environmental abuses seeking justice in the English courts. With the first case falling on jurisdictional grounds in the first instance, the corporate defendants started to collect a 'Brexit dividend', as cleverly put by Uglješa Grušic in his case comment.

Facts

The proceedings were commenced in May 2022. The claimants were subjected to forced labour and highly exploitative and abusive conditions while working at a

factory in Malaysia run by a local company. The defendants are three companies in the Dyson corporate group, two domiciled in England and one in Malaysia. The factory where alleged abuses took place manufactured products and components for Dyson products. Claimants argued that Dyson defendants were liable for (i) negligence; (ii) joint liability with the primary tortfeasors (the Malaysian suppliers running the factory and local police) for the commission of the torts of false imprisonment, intimidation, assault and battery; and (iii) unjust enrichment. They further alleged that the Dyson group exercised a high degree of control over the manufacturing operations and working conditions at the factory facilities and promulgated mandatory ethical and employment policies and standards in Dyson's supply chain, including in Malaysian factories.

The English courts are already familiar with the attempts to establish direct liability of the English-based parent companies for the subsidiaries' harms relying on negligence and the breach of duty of care owed to the claimants. In *Vedanta* and *Okpabi*, the UK Supreme Court made it clear that the parent company's involvement and management of the subsidiary's operations in different ways can give rise to a duty of care.

Broadening the scope of the parent company liability in a corporate group beyond strict control opened paths to supply chain liability. While lead purchasing companies, like Dyson, are not bound by shareholding with their suppliers, they often exercise a certain level of managerial control over independent contractors. Such involvement with particular aspects of a supplier's activities leads to the argument that a lead company could also be liable in negligence for a breach of the duty of care. The unjust enrichment claim that Dyson group has been enriched at the claimant's expense is a relatively novel legal basis, although it has already been raised in similar cases. To the best of my knowledge, in addition to the *Dyson* case, at least four legal actions focusing on supply chain liability are progressing in England: Malawian tobacco farmer claims against British American Tobacco and Imperial, Malawian tea farmer claims against PGI Group Ltd, Ghanaian children accusations against cocoa producer Olam and forced labour allegations by Burmese migrants against Tesco and Intertek.

Judgment

The court had to resolve the jurisdictional question of whether the case would proceed to trial in England or Malaysia. The English common law rules are

founded on service of the claim form on the defendant and are based on the defendant's presence in the jurisdiction. In general terms, jurisdiction over English-domiciled parent companies is effected within the jurisdiction as of right. Following Brexit, proceedings against an English parent company may be stayed on *forum non conveniens* grounds. Foreign subsidiaries are served outside the jurisdiction with the court's permission, usually on the basis of the 'necessary or proper party' gateway. In the *Dyson* case, the English defendants asked the court to stay the proceedings based on *forum non conveniens*, and the Malaysian defendant challenged the service of the claim form, arguing that Malaysia is a proper place to bring the claim.

The court agreed with the corporate defendants, having applied the two-stage test set out by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd*. The first stage requires consideration of the connecting factors between the case and available jurisdictions to determine a natural forum to try the dispute. The court concluded that Malaysia was 'clearly and distinctly more appropriate' [122]. Some factors taken into account were regarded as neutral between the different fora (convenience for all of the parties and the witnesses [84], lack of a common language for each of the witnesses [96], location of the documents [105]). At least one factor was regarded as a significant one favouring England as the proper place to hear the claim (risk of a multiplicity of proceedings and or irreconcilable judgments [109]). However, several factors weighed heavily in favour of Malaysia (applicable law [97], place where the harm occurred [102]). As a result, Malaysia was considered to be the 'centre of gravity' in the case [122].

Under the second limb of the *Spiliada* principle, the English courts consider whether they should exercise jurisdiction in cases where the claimant would be denied substantial justice in the foreign forum. The claimants advanced several arguments to demonstrate that there is a real risk of them not obtaining substantial justice in Malaysia [125–168], including difficulties in obtaining justice for migrant workers, lack of experienced lawyers to handle the case, the risk of a split trial, the cost of the trial and financial risks for the claimants and their representatives, limited role of local NGOs to support the claimants. The court did not find cogent evidence that the claimants would not obtain substantial justice in Malaysia [169]. A stay of proceedings against English defendants was granted, and the service upon the Malaysian company was set aside [172]. Reaching this conclusion involved consideration of extensive evidence, including contradictory

statements from Malaysian lawyers and civil society organisations. The Dyson defendants have given a number of undertakings to submit to the jurisdiction of the Malaysian courts and cover certain claimants' costs necessary to conduct the trial in Malaysia, which persuaded the court [16].

Comment

The *Dyson* case marks a shift from the recent trend of allowing human rights and environmental cases involving British multinationals to proceed to trial in the UK courts. Three principal takeaways are worth highlighting. First, the claimants in the business and human rights cases can no longer be certain about the outcome of the jurisdictional inquiry in the English courts. The EU blocked the UK's accession to the Lugano Convention despite calls from NGOs and legal experts. The risk of dismissal on *forum non conveniens* grounds is no longer just a theoretical concern.

Second, the *Dyson* case demonstrates the difficulties of finding the natural forum under the doctrine of *forum non conveniens* in civil liability claims involving multinationals. These complex disputes have a significant nexus with both England, where the parent or lead company is alleged to have breached the duty of care, and the foreign jurisdiction where claimants sustained their injuries. The underlying nature of the liability issue in the case is how the parent or lead company shaped from England human rights or environmental performance of its overseas subsidiaries and suppliers. In this context, I agree with Geert van Calster, who criticises the court's finding about Malaysia being the 'centre of gravity' in the case. I have argued previously that the *forum non conveniens* analysis should properly acknowledge how the claimants frame the argument about liability allocation between the parent company and other entities in the group or supply chain.

Finally, the *Dyson* case is not the first one to be intensely litigated on the *forum (non) conveniens* grounds. In *Lubbe v Cape*, *Connelly v RTZ* and *Vedanta*, the English courts accepted jurisdiction, acknowledging that the absence of a means of funding or experienced lawyers to handle the case in a host state will lead to a real risk of the non-availability of substantial justice. The court in *Dyson* reached a different conclusion, but its analysis of the availability of substantial justice for claimants in Malaysia is not particularly persuasive, especially considering the claimants' 'fear of persecution, detention in inhumane conditions and deportation

should they return to Malaysia' [71].

One aspect of the judgment is notably concerning. Claimants referred to the conduct of the Dyson defendants as being 'aggressive' and 'heavy-handed' [71], [73]. In concluding remarks, the court accepted there were deficiencies in Dyson's responses to the claimants' requests for the documents [173]. Yet despite this acceptance, the court has on multiple occasions relied on the defendants' undertakings to cooperate with the claimants to ensure the trial can proceed in Malaysia [136], [147], [151], [152], [166], [169]. Undoubtedly, the ruling will be appealed, and it remains to be seen if the English courts will be willing to try cases involving British multinationals in the post-Brexit landscape.