SLAUGHTER AND MAY/

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OVERSEAS SUPPLY CHAIN RISK – A CHANGE OF APPROACH FROM THE ENGLISH COURTS?

Introduction

In a positive move for corporates, the High Court's decision in Limbu v Dyson indicates the English courts are now willing (and able) to decline to hear claims against UK companies concerning their overseas operations and supply chains in favour of local courts, but corporates need to be prepared to fight the same claims abroad without a 'home' advantage.

As new human rights and supply chain laws come into force in different countries and regions, the question of where companies face legal risks, where claims may be brought, and the scope of a company's responsibility for the operations of its group and/or international supply chain is becoming increasingly challenging for companies to navigate.

In the UK, a number of companies have faced tort-based liability claims (e.g. actions in negligence), for the alleged harms of their foreign subsidiaries and supply chains as claimants seek to bring innovative claims under existing laws. However, a recent decision from the English High Court in *Limbu v Dyson Technology & Others* shows it may now be easier for UK-based companies to persuade the English courts not to hear these claims. Even so, where the English courts refuse jurisdiction, UK-based companies need to be prepared to defend the same claims outside of their 'home' courts.

Parent company and supply chain liability in the English courts

The English courts have become a leading destination for foreign claimants seeking compensation from UK-based multinational corporations for alleged environmental and human rights-based harms suffered in connection with the operations of their foreign subsidiaries (see our briefing). Negligence has been the favoured basis to argue that a UK parent company owes a duty of care to the people affected. To demonstrate this duty, claimants have relied on group policies and public statements to try to establish the degree of control exercised by the parent over its subsidiary. More recently, claims (e.g. *Begum v Maran*) have reached beyond the corporate group's conduct and sought to hold a corporate liable for alleged wrongdoing of third parties in their overseas supply chain. As well as raising complex questions as to companies' liability in these circumstances (which remains unresolved), these cases test the extent to which the English courts have jurisdiction to hear claims which relate to harm suffered overseas.

A possible sea change post-Brexit?

Claimants have typically relied on EU jurisdiction rules, which required the English courts to accept jurisdiction in claims against UK-based companies, to bring these cases in the English courts. However, the position has changed following Brexit. The English courts are now able to exercise their discretion whether to hear claims against UK-based defendants by applying the wider list of considerations which go to the most appropriate forum for a claim. UK-based defendants are now in a better position to argue that England is not the appropriate forum and that any such claims should instead be brought in the relevant foreign court. [1]

In one of the first cases to consider these issues post-Brexit, the English High Court has recently declined jurisdiction in a Malaysian supply chain group action brought against English and Malaysian companies in the Dyson Group.

The Dyson supply chain case

The claims were brought by a group of Nepalese and Bangladeshi migrant workers who had been employed to work at the Malaysian factory facilities of a third-party supplier which manufactured products and components for Dyson products. The workers claimed they had been subjected to forced labour and highly exploitative and abusive working and living conditions while working for Dyson's Malaysian supplier, and mistreatment by the Malaysian police. The workers

[1] The post-Brexit change to the English courts' jurisdiction rules was first considered in an earlier competition law case for cartel damages. In that case, the High Court declined jurisdiction "with little hesitation" finding that the claim had very limited connection with England, the UK 'anchor defendants' were "far from central to the dispute" and the German courts were instead the natural forum (*Mercedes-Benz v Continental Teves*).

alleged that the Dyson defendants were: (i) liable for negligence; (ii) jointly liable (with the Malaysian supplier and Malaysian police, who were not parties to the proceedings) for false imprisonment, intimidation, assault and battery; and (iii) unjustly enriched at the expense of the workers.

The workers relied on Dyson Group policies and standards to allege that the Dyson defendants exerted a high degree of control over operations and working conditions at the Malaysian supplier's facilities, and the working and living conditions of workers across the Dyson Group's supply chain.

The Dyson defendants challenged the English court's jurisdiction arguing that the claims should instead be heard in Malaysia.

England not the appropriate forum for Dyson supply chain claim

The High Court refused jurisdiction holding that England was not the appropriate forum to hear the claims. Applying the two-stage test to identify the appropriate forum, the High Court held:

Stage 1 - Malaysia is the "clearly and distinctly more appropriate" forum

The High Court held that England was not the natural or appropriate forum and Malaysia was another available forum which was "clearly and distinctly more appropriate". The Court pointed to the following "key factors":

- Neither England nor Malaysia was practically convenient for all the parties and witnesses and there was no one common language among the witnesses. Although most of the workers were located outside Malaysia and were unlikely to return to Malaysia to give evidence, the risk that a Malaysian court would not allow them to give evidence remotely was not a real one.
- As Malaysian law governed the dispute, there were good policy reasons for Malaysian judges to consider the novel points of law being raised, including whether joint liability can apply in supply chain relationship, rather than letting an English court "second guess" what Malaysian judges might decide.
- Malaysia was the "centre of gravity" for the case as the primary allegations of harm (on which the claims against the Dyson defendants were contingent), occurred in Malaysia.
- Disclosable documents between the parties were held in England and Malaysia, but obtaining documents from the (non-party) Malaysian supplier and Malaysian police would be more difficult were the case heard in England.
- There was a real risk of multiple proceedings and irreconcilable judgments wherever the claim was heard.

Stage 2 - No real risk claimants cannot obtain "substantial justice" in Malaysia

Having found England was not the appropriate forum, the High Court considered whether there were special circumstances which meant that justice required the claims be heard in England. Arguments focused on whether the workers would be able to obtain suitability qualified legal representation and funding to bring the claims in Malaysia.

The High Court acknowledged that "cogent evidence" subject to "anxious scrutiny" was required to conclude that foreign courts could not provide substantial justice because of the risk of undermining international comity.

The High Court held there was no real risk the workers would not be able to access justice in Malaysia. There was no real risk the workers could not find suitably qualified legal representation or alternative fee arrangements. The claims were not therefore one of the "exceptional cases" in which the absence of litigation funding in a foreign jurisdiction (where funding is available in England) would lead to a real risk of substantial injustice.

Significantly, the High Court relied on extensive undertakings offered by the Dyson Defendants to bolster their arguments that the claims could be brought in Malaysia. The Dyson Defendants promised:

- to submit to the Malaysian courts were a claim to be brought there;
- not to seek costs or security for costs against the workers;
- to pay the workers' reasonable costs to give evidence;
- not to oppose an application for the workers to attend hearings remotely;
- to pay the workers' share of court costs including interpretation fees, transcription fees and joint expert evidence;
- not to challenge any success fee arrangement; and
- not to oppose an application for a split trial.

What this means for corporates

Companies are facing increasing risks in connection with their overseas supply chains. English litigation risk remains a real prospect and companies still face the expense of persuading the English courts that these cases are more appropriately dealt with elsewhere. What is now less clear is where risks may crystallise in terms of where companies may face claims and which courts will hear them.

In addition to complying with the applicable regulatory frameworks, companies can mitigate their supply chain risk by ensuring their public statements are accurate and verified, that the level of oversight through supplier contracts, policies and procedures is set at an appropriate level, undertaking effective due diligence

and ensuring appropriate checks and protections are included in supplier contracts. Where issues are identified in the supply chain, it is important to consider appropriate remediation measures. For further information on group and supply chain governance mechanisms see our briefing.

Slaughter and May is a market-leader in complex commercial litigation with expertise in large group actions, including those concerned with sustainability and ESG matters, and issues of parent/subsidiary and supply chain liability. We are instructed in some of the largest proceedings currently before the English courts and the Competition Appeal Tribunal.

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