The Evolution of Business and Human Rights Litigation against Multinational Companies

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ABSTRACT

This article will examine the evolution of business and human rights litigation against UK based multinational companies (MNCs) commenced by the victims of their alleged wrongdoing abroad in wake of the UK Supreme Court's decisions in *Vedanta v Lungowe* and *Okpabi v Shell*. It will be argued that a methodologically pluralist private international law's symbiotic relationship with the incremental development of the duty of care in negligence in the law of torts is carving avenues for access to justice for aggrieved foreign litigants. These developments are of significance for transnational corporate accountability. There is, however, an underlying need to pause, reflect and assess whether these developments justifiably distort the value neutrality of the law on jurisdiction and whether the extension of the duty of care in penumbral cases is warranted. In the process, the post-Brexit private international law regime's implications for the viability of such claims against MNCs will be assessed. In particular, Scots law's and English law's response to this emerging litigation phenomena will be analysed with reference to the paradigmatic appellate court decisions in *Campbell v James Finlay (Kenya) Ltd* and *Limbu v Dyson* respectively. A perspective will be offered on how the law should develop to preserve its internationalist values whilst balancing the countervailing imperative of the provision of access to justice in appropriate cases.

INTRODUCTION

The rapid growth in the cross-border activities of multinational companies (MNCs) has given rise to human rights implications. MNCs outsource production to legal systems with minimal shareholder regulation or the least costly stakeholder protection. This translates to low labour costs, and low environmental, social, governance (ESG) and health and safety standards. In essence, "a race to the bottom" amongst the legal systems of the developing world is incentivised because international competition for inward investment tends to keep down both standards of care and levels of compensation. The economic power of the foreign investor coupled with the political power of the local government may result in human rights abuses that are condonable by the local applicable law. Such human rights abuse may, for instance, include environmental damage, mistreatment of employees, expropriation or land-grabbing, forced migration, curtailment of freedom of expression, and child labour. The existential asymmetry between the power wielded by large MNCs and those individuals from developing countries aggrieved by their overseas operations is apparent.

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MNC's often utilise a corporate group structure to operate with impunity across different legal systems. The separate legal personality and limited liability of companies is a foundational principle of company law.[1] This "corporate veil" ensures that the shareholders are not liable for the operations of the subsidiary company.[2] This will be an impediment for victims where the direct damage has been caused by an out-of-pocket subsidiary. The distinct legal personality and limited liability of each entity within a corporate group is also recognised.[3] A parent company is normally not liable for the legal infractions and unpaid debts of its subsidiaries. In the transnational legal context, a "jurisdictional veil" will be an additional hurdle to overcome for victims of alleged wrongdoing seeking a remedy from the parent company in its home jurisdiction.[4] It will be observed that the direct imposition of a duty of care on parent companies for torts committed by their subsidiaries has emerged as an exception to the bedrock company law principles of separate legal personality and limited liability.[5] UK courts have, however, expanded the reach of the duty of care and are addressing several of business and human rights central issues without any direct reference to human rights law.[6]

Private international law offers a structural coordinating framework that allocates regulatory authority[7] and may thereby facilitate disadvantaged litigants from developing countries in seeking an appropriate remedy from the parent company abroad. Jurisdictional rules play a significant role in proceedings against parent companies.[8] The question of jurisdiction is the first challenge facing claimants and the regulatory consequences of the court's decision may be far reaching.[9] Indeed, companies may be willing to negotiate a settlement once jurisdiction is resolved in favour of the claimants.

Private international law rules are traditionally based on Savigny's paradigm of value-neutralism.[10] The onset of globalisation, however, requires the law to respond to the demands of a sustainable and socially responsible economic growth. Private international law's reluctance in regulating cross-border economic activities has been challenged.[11] A global

[1] See, for instance, Companies Act 2006 s.3; "The company is at law a different person altogether from the subscribers to the memorandum": *Salomon v Salomon & co Ltd* [1896] UKHL 1 (Lord Macnaghten).

[2] On the "evasion principle" as the basis for "piercing" the corporate veil, see *Prest v Petrodel Resources Ltd & Others* [2013] UKSC 34 at [35], for the "concealment principle" as the basis for "lifting" the corporate veil, see *Prest* at [28] (Lord Sumption) and for veil piercing as a remedy of last resort, see *Prest* at [62] (Lord Neuberger).

[3] The leading case in the UK on the issue of corporate personality and limited liability relating to corporate groups is *Adams v Cape Industries plc* [1990] Ch 433 at 536 (Slade LJ) in which the court rejected the single economic unit argument made in the *DHN Ltd v Tower Hamlets LBC* [1976] 1 WLR 852 decision, and also the approach that the court will pierce the corporate veil if it is necessary to achieve justice. See also, *Bank of Tokyo Ltd v Karoon* [1986] 3 All ER 468 at 486 (Goff LJ); *Re Southard Ltd* [1979] 3 All ER 556 at 565 (Templeman LJ).

[4] *Grand Aerie Fraternal Order of Eagles v Haygood* 402 S.W.3d 766 at 779 (Tex. 2013); P. Muchlinski, "Limited Liability and Multinational Enterprises: A Case for Reform?" (2010) 34 *Cambridge Journal of Economics* 915, 920.

[5] *Chandler v Cape plc* [2012] EWCA Civ 525 at [69] (Arden LJ).

[6] E. Aristova, *Tort Litigation Against Transnational Corporations* (OUP 2024) 120-121; D. Palombo, "Business, Human Rights and Climate Change: The Gradual Expansion of the Duty of Care" (2024) 44 *Oxford Journal of Legal Studies* 889, 901.

[7] A Mills, *The Confluence of Public and Private International Law* (CUP 2009) Chapter 1.

[8] Aristova, *Tort Litigation Against Transnational Corporations* Chapter 4.

[9] R. Fentiman, *International Commercial Litigation* (2nd Edition, OUP 2015), [7.09].

[10] F.K. Von Savigny, *Private International Law, A Treatise on the Conflict of Laws* (first published 1869, William Guthrie trans, Forgotten Books, 2012).

[11] H. Muir-Watt, "The Relevance of Private International Law to the Global Governance Debate" in H. Muir-Watt & D. Fernandez Arroyo (eds), *Private International Law and Global Governance* (OUP 2014) 1, 6.

governance approach to private international law harnessing methodological pluralism may carefully adjust the application jurisdictional and choice of law rules to regulate the transnational conduct of MNCs.[12] Although such proceedings are based on causes of actions in the law of torts/s where the function is corrective justice *inter partes*,[13] a deterrent value is an indirect dividend.[14] The vibrant experience of choice of law theory, where the once antagonistic unilateral and multilateral choice of law rules co-exist with the emergence of a "*pluralisme des méthodes*",[15] may also be invoked in support of a similar heterogeneity of techniques in the law of jurisdiction. Private international law's role as enabler of a remedy for disadvantaged litigants from developing countries against a parent company abroad upholds the letter and spirit of the UN Guiding Principles on Business and Human Rights.[16] In redressing the balance of power between MNCs and the adversely affected litigants, private international law also contributes to the UN Sustainable Development Goals.[17]

The next section examines the evolution of the duty of care in direct liability claims against UK based parent companies.

THE DEVELOPMENT OF THE DUTY OF CARE IN DIRECT LIABILITY CLAIMS AGAINST MNCs

Direct liability claims against MNCs are brought under civil causes of action, with a predominance of claims based on the tort of negligence. Claimants attempt to establish that the corporate defendant owed them a duty of care, the duty was breached, and the breach caused damage.

The synergy between the evolving duty of care in the law of torts and a global governance approach to private international law in business and human rights litigation against MNCs in the UK is noteworthy. Since the end of the last century, aggrieved foreign litigants have attempted to invoke the jurisdiction of English courts to seek remedies against parent companies for the extraterritorial human rights abuses allegedly perpetrated by their overseas subsidiaries.[18] The UK Supreme Court has recently granted jurisdiction and allowed such claims to proceed on the merits in *Vedanta v Lungowe* and *Okpabi v Shell*.[19] Although these were jurisdictional decisions, they have simultaneously influenced a corpus of precedent on the tortious liability of parent companies. In the process, the contours of the law of torts have been stretched via the common law's characteristic and unending incremental metamorphosis.

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[12] M. Ahmed, "Private international law and substantive liability issues in tort litigation against multinational companies in the English courts: recent UK Supreme Court decisions and post-Brexit implications" (2022) 18 *Journal of Private International Law* 56.

[13] J. Thomson, *Delictual Liability* (5th Edition, Bloomsbury 2014) 1. Cf. Thomson, *Delictual Liability*, 7, discussing the role of "distributive" justice in delictual liability; E.J. Weinrib, *The Idea of Private Law* (OUP 2012) 210-214.

[14] Aristova, *Tort Litigation Against Transnational Corporations* 123.

[15] H. Batiffol, *Le pluralisme des méthodes en droit international privé* (1973) 139 *Recueil des Cours* 75, 106.

[16] The United Nations Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (2011).

[17] In particular, Goal 16 and Target 16.3 of the UN Sustainable Development Goals.

[18] *Connelly v RTZ Corporation Plc* [1997] UKHL 30, [1997] 3 WLR 373; *Lubbe v Cape Plc* [2000] UKHL 41, [2000] WLR 1545.

[19] *Vedanta Resources Plc v Lungowe* [2019] UKSC 20 (Lord Briggs); *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3 (Lord Hamblen). See Ahmed, "Private international law and substantive liability issues in tort litigation" 63-74.

The existence of the duty of care is established under one of the relationships recognised by precedent or under the three-stage test in *Caparo v Dickman* for novel scenarios.[20] The test stipulated by Lord Bridge in *Caparo* provides that, the damage should be foreseeable, there should be a relationship of proximity or neighbourhood and it should be fair, just and reasonable to impose a duty of care.[21] The UK Supreme Court has further clarified the scope of the test in *Caparo*.[22] There is no one size fits all duty of care test that applies to negligence claims.[23] The courts will only consider the test in *Caparo* if an extension of the established law on negligence is warranted. In easy cases,[24] the law is clear that a particular relationship, or recurrent factual situation, gives rise to a duty of care. In such cases, courts rely on an established line of judicial authority unless a departure from the chain of case law is considered necessary. In hard cases,[25] the courts consider the closest analogies to existing law,[26] with a view to preserving the coherence and consistency of the law.[27]

In general, a defendant is not liable for the wrongs committed by a third-party.[28] The defendant (parent company) may, however, be held liable for the wrongs committed by a third party (subsidiary company):[29]

- where there was a special relationship between the defendant and the claimant based on the assumption of responsibility by the defendant;
- where there was a special relationship between the defendant and the third party based on control by the defendant;
- where the defendant was responsible for a state of danger which might be exploited by a third party to cause damage;
- where the defendant was responsible for a property which might be used by a third party to cause damage.

The domestic decisions of the Court of Appeal in *Chandler v Cape* and *Thompson v The Renwick Group* clarified the scope of the duty of care in parental liability cases where employees of corporate groups allegedly sustained loss.[30] In *Chandler* and *Thompson*, it was

[20] *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617 (HL) (Lord Bridge).
[21] *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 618.
[22] *Michael v Chief Constable of South Wales Police (Refuge intervening)* [2015] AC 1732 at [106] (Lord Toulson); *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] 2 WLR 595 at [24] (Lord Reed). The approach in *Robinson* was subsequently approved by the UK Supreme Court in *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50.
[23] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 at [21]-[30] (Lord Reed), [100] (Lord Hughes); *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 at [15].
[24] R. Dworkin, *Law's Empire* (Harvard University Press 1986) 265-266, 353.
[25] R. Dworkin, 'Hard Cases' (1975) 88 *Harvard Law Review* 1057.
[26] *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at pp 43-44 (Brennan J) (High Court of Australia).
[27] D. Nolan and J. Davies, "Torts and Equitable Wrongs" in A. Burrows (ed.), *Principles of the English Law of Obligations* (OUP 2015), [2.45].
[28] *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 1 AC 874, [80] (Lord Brown); *Maloco v Littlewoods Organisation Ltd* 1987 SC (HL) 37, 1987 SCLR 489, 1987 SLT 425. Cf. *Dorset Yatch Co Ltd v Home Office* [1970] UKHL 2, [1970] AC 1004. See Nolan and Davies, "Torts and Equitable Wrongs" [2.95]-[2.97]. See also, Thomson, *Delictual Liability* 129-131.
[29] M. Jones, A. Dugdale and M. Simpson, *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 23rd Edition, 2020), [7-60].
[30] *Chandler v Cape Plc* [2012] EWCA Civ 525; *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635.

alleged that the parent company owed a duty of care to the subsidiary's employees who sustained injury from asbestosis. The Court of Appeal in *Chandler* accepted a broad view of the concept of "assumption of responsibility" and validated its use as a tool for tort victims that were injured by the activities of a subsidiary and sought to hold the parent company liable. The Court of Appeal unanimously held that the parent company owed a duty of care on the basis of the *Caparo* test. In applying the *Caparo* test Arden LJ stated:[31]

> "Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge of some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection."

The Court of Appeal's decision in *Chandler* represents the first time that an injured employee of a subsidiary company established that their employer's parent company owed them a duty of care. Arden LJ dismissed any suggestion that the case involved piercing the corporate veil, but the outcome has an equivalent effect by imposing direct tort liability upon a parent company despite the fact that the parent company is a legal entity separate from that of its subsidiary.[32] *Chandler* opened the door for claimants allegedly harmed by the conduct of a subsidiary to initiate proceedings in the English courts against the parent company in transnational cases.

Okpabi and *Vedanta* confirmed that the duty of care might depend on the relationship between the parent and subsidiary. The Court of Appeal in *Okpabi* had been wrong to approach the issue of parent company liability in negligence as a special category of liability. Citing *Vedanta*, the UK Supreme Court in *Okpabi* stated that the normal principles of the law of negligence applied in determining questions of parent liability for the acts and omissions of a subsidiary. The Supreme Court in *Okpabi* treated the following factors as relevant but not exhaustive:[33]

- taking over the management or joint management of the relevant activity;
- providing defective advice and/or promulgating defective group-wide policies;
- taking steps to adopt and implement group-wide policies;
- holding out that it exercises a particular degree of supervision and control of a subsidiary.

The reference to the application of the normal principles of the law of negligence in the case of parent company liability may have implications for the incremental development of the duty of care in tort law. The mere non application of the *Caparo* test for novel situations does not assist in clearly establishing to which category of precedent do parent company liability

[31] *Chandler v Cape plc* [2012] EWCA Civ 525 at [80].
[32] *Adams v Cape Industries plc* [1990] Ch 433, 536 (Slade LJ); Cf. *DHN Ltd v Tower Hamlets LBC* [1976] 1 WLR 852, 860 (Lord Denning).
[33] *Okpabi v Shell* [2021] UKSC 3 at [26]-[27].

cases belong.[34] In this regard, it is suggested that characterising parent company liability cases in a fuzzy edged 'quasi' category within the broad category of third-party liability may assist in understanding the legal framework. In view of the variety of corporate group structures, parent-subsidiary relationships and supply chain complexities, a fuzzy edged 'quasi' category may be easily reconciled with the 'non-exhaustive' indicia identified in *Okpabi*. Hence, offering a constructive way forward by synthesising the demands of legal certainty in identifying a definite category with the flexibility necessary for the incremental development of the law in appropriate cases. A parent company's liability remains a fact sensitive enquiry that depends on the nature and extent of the involvement of the parent in the subsidiary's activities.[35]

The dynamic approach in the *Okpabi* decision signals that English courts may consider claims to be "arguable" against a wider set of entities, than if, as the Court of Appeal had seemed to advocate, a "special" duty in this situation applied, tied to the presence of the shareholding relationship.

According to the UK Supreme Court's analysis, formal control is not necessarily the determining factor for liability, and any entity that is involved with the management of a particular function risks being held responsible for any damage flowing from the performance of that function. This gives rise to the possibility of claims extending, for instance, to entities involved in the supply chain, investors and joint venture partners. Whilst promulgating group wide policies may be used to suggest involvement of a parent in the acts of a subsidiary, a parent company should also not ignore governance or fail to provide effective policies down the supply chain.[36] Although UK companies may not have an equity relationship with their suppliers comparable to a parent-subsidiary relationship, they could still be held liable in negligence for a breach of the duty of care by an overseas supplier.

The decision of the Court of Appeal in *Begum v Maran* stretches the law of negligence to value chain claims.[37] The proceedings were commenced by the widow of a Bangladeshi worker who fell to his death during the course of the demolition of an oil tanker in a ship breaking yard in Bangladesh. The defendant (an English shipbroker) was responsible for the arrangement of ship breaking services in Bangladesh. The claimant alleged that the defendant owed them a duty of care arising out of control of the sale of the ship with the knowledge that the ship would be demolished in highly dangerous working conditions. The Court of Appeal accepted that the creation of danger by the acts of a third party (Zuma Enterprise Yard) was a recognised exception that may give rise to a duty of care. Notwithstanding, it was recognised that the claim raised "an unusual argument".[38] The decision in *Begum* illustrates that the law on the direct liability of MNCs where the damage has been caused by a third party is currently "at the forefront of the development of the law of negligence".[39]

THE ROLE OF PRIVATE INTERNATIONAL LAW IN DIRECT LIABILITY CLAIMS AGAINST MNCs

[34] Palombo, "Business, Human Rights and Climate Change" 898-899.
[35] Aristova, *Tort Litigation Against Transnational Corporations* 118-119.
[36] *Limbu v Dyson* [2024] EWCA Civ 1564 (Popplewell LJ).
[37] *Begum v Maran* [2021] EWCA Civ 326.
[38] *Begum v Maran* [2021] EWCA Civ 326 at [116] (Coulson LJ).
[39] *Begum v Maran* [2021] EWCA Civ 326 at [71] (Coulson LJ).

Before Brexit, jurisdiction over EU domiciled defendants (including UK based MNCs) in civil and commercial matters with a cross-border element was determined pursuant to the Brussels Ia Regulation (Brussels Ia).[40] Where a matter fell outside the material scope of Brussels Ia,[41] or the defendant (subsidiary) was not domiciled in an EU Member State, the residual national jurisdictional regime applied.[42] The national jurisdictional regime in England and Wales is the common law jurisdictional regime based on service of process whereas Scotland relies on Schedule 8 of the Civil Jurisdiction and Judgments Act 1982 (CJJA 1982).[43] The necessary and proper party jurisdictional gateway is utilised to join to an overseas subsidiary in proceedings against an English MNC (the anchor defendant).[44] The UK jurisdictional regimes draw a distinction between the *existence* and *exercise* of jurisdiction. Therefore, UK courts may stay proceedings or decline jurisdiction in favour of another more appropriate forum that is available to the parties under the doctrine of *forum non conveniens*.

Brussels Ia continued to apply in the UK where proceedings were commenced prior to the end of the Brexit transition period (IP Completion Day).[45] The Rome II Regulation (Rome II) governing conflict of laws for non-contractual obligations in civil and commercial matters continued to apply in the UK in relation to events giving rise to damage, where such events occurred before IP Completion Day.[46] Therefore, UK courts may yet continue to render judgments where jurisdiction is governed by Brussels Ia in relation to proceedings commenced before 1 January 2021.

Post-Brexit, the application of Brussels Ia in the UK has come to an end. The UK was not permitted to join the Lugano Convention (2007), which could have served as an effective surrogate for the jurisdiction and judgments regime of Brussels Ia. As a result, the national jurisdictional regimes of England and Scotland have moved from the periphery to the foreground. The respective regimes will apply in asserting jurisdiction over all UK based MNCs.

The plea of *forum non conveniens* has become much more relevant in transnational cases commenced after 1 January 2021.[47] The constraints of EU civil procedural law no longer fetter the plea of *forum non conveniens* in UK courts.[48] Lord Goff of Chieveley laid down the principles governing *forum (non) conveniens* in *Spiliada Maritime Corp v Cansulex Ltd (Spiliada)*.[49] The court must consider whether England is the clearly or distinctly more appropriate forum in which "the case can be suitably tried for the interests of all the parties

[40] Council Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.
[41] Article 1 of Brussels Ia.
[42] Article 6 of Brussels Ia.
[43] Cf. jurisdiction in consumer and employment matters under Sections 15A to 15E of the CJJA 1982.
[44] CPR PD6B, para 3.1(3).
[45] Article 67(1)(a) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 October 2019 (EU Withdrawal Agreement).
[46] Article 66(b) of the EU Withdrawal Agreement.
[47] Cf. Article 5 of the Hague Choice of Court Agreements Convention 2005.
[48] Case C-281/02 *Owusu v Jackson* [2005] ECR I-10383.
[49] [1986] UKHL 10.

and for the ends of justice".[50] This "evaluative"[51] or "balancing exercise"[52] involves determining the centre of gravity of the proceedings (not the substantive claim) or the litigation's "most real and substantial connection".[53] A court may decide not to exercise jurisdiction over a MNC and its overseas subsidiary by staying proceedings or declining jurisdiction where the preponderance of connecting factors and their relative significance indicate that there is another available forum that is more appropriate for the trial of the dispute. These connecting factors include those affecting convenience or expense, the governing law, the place where the parties reside or carry on business, the place where the wrongful acts and harm occurred,[54] and the risk of parallel proceedings giving rise to inconsistent judgments is a "very important factor".[55] Where foreign law applies, it has been said that "if the competing fora have domestic laws which are substantially similar, the governing law will be a factor of little significance".[56] The latter factor will, however, be particularly significant where there are complex issues of law and there is evidence of relevant differences in the rules or principles applicable to such issues in the two countries contending as the appropriate forum.[57] It is very likely that the extraterritorial nature of the activities of the subsidiary would indicate that the preponderance of connecting factors localise in a forum abroad. The two-stage *Spiliada* approach to *forum non conveniens* provides a fine-tuned response to jurisdictional battles in international commercial litigation. The demands of a natural forum abroad (where the subsidiary is based) is balanced with the interests of justice requiring the matter to be nevertheless heard in the UK. The availability of the *forum non conveniens* control may assist the UK courts in repelling jurisdictional challenges against MNCs for damage caused by their subsidiaries at the outset. However, in "exceptional cases", the claimant's lack of financial and litigation strength in the natural forum abroad would be considered under the interests of justice limb of *Spiliada* test which may lead to an English court deciding not to stay proceedings or decline jurisdiction.[58] English law does not expressly endorse a *forum necessitatis* doctrine but in the latter instance English courts might demonstrate a willingness to function as such.

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[50] [1986] UKHL 10 at 476C, 476E, 477E, 480G; *Vedanta v Lungowe* [2019] UKSC 20 at [60].

[51] *VTB Capital Plc v Nuritek International Corp* [2013] 2 AC 337 at [156] (Lord Wilson); *Limbu v Dyson* [2024] EWCA Civ 1564 at [4], [63]-[76] (Popplewell LJ); [2023] EWHC 2592 (KB) at [27] (Clive Sheldon KC). Cf. A. Briggs, *Private International Law in English Courts* (OUP 2014) 337, favouring the view that a "discretion" rather than a "judgment" is involved in the search for the appropriate forum.

[52] *VTB Capital Plc v Nuritek International Corp* [2013] 2 AC 337 at [96] (Lord Neuberger).

[53] [1986] UKHL 10 at 478A (Lord Goff).

[54] [1986] UKHL 10 at 478A-B; *Vedanta v Lungowe* [2019] UKSC 20 at [66]; Cf. *VTB Capital Plc v Nuritek International Corp* [2013] 2 AC 337 at [51] (Lord Mance).

[55] *Vedanta v Lungowe* [2019] UKSC 20 at [69].

[56] *Navigators Insurance Company and others v Atlantic Methanol Production Company LLC* [2003] EWHC 1706 (Comm) at [48]; L. Collins and J. Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (London: Sweet & Maxwell, 16th Edition, 2022), [12-033].

[57] *VTB Capital Plc v Nuritek International Corp* [2013] 2 AC 337 at [46] (Lord Mance).

[58] *Vedanta v Lungowe* [2019] UKSC 20 at [93]: 'exceptional cases'; *Lubbe v Cape plc* [2000] UKHL 41 at [28] (Lord Bingham): '*special and unusual* circumstances of these proceedings' (emphasis added); *Connelly v RTZ* [1997] UKHL 30 at [30] (Lord Goff): '…. the availability of financial assistance in this country, coupled with its non-availability in the appropriate forum, may *exceptionally* be a relevant factor in this context' (emphasis added) Cf. *Connelly v RTZ* [1997] UKHL 30 at [39] (Lord Hoffmann): '…. the action of a rich plaintiff will be stayed while the action of a poor plaintiff in respect of precisely the same transaction will not'. *Limbu v Dyson* [2023] EWHC 2592 (KB) at [43], [171].

The House of Lords in *Connelly* and *Lubbe* adjudicated that Namibia and South Africa were the natural fora respectively. Notwithstanding, the English courts had jurisdiction as the claimants' were unable to litigate in the natural fora due to a lack of financial resources. This would be tantamount to a denial of substantial justice under the interests of justice (second) stage of the *Spiliada* test.[59] In the period between death of *Harrods* at the behest of *Owusu*[60] and IP Completion Day, English courts were still able to exercise the *forum conveniens* discretion to determine whether claimants are permitted to serve process out of jurisdiction with permission on an overseas (non-Member State) subsidiary. The High Court and Court of Appeal in *Vedanta* adjudicated that an arguable claim against the parent company rendered England as the natural forum to proceed against the subsidiary (Konkola Copper Mines) under the first stage of the *Spiliada* test. The risk of irreconcilable judgments emanating from parallel proceedings which was a significant consideration in determining the applicability of the necessary and proper party jurisdictional gateway test was also prioritised as a connecting factor that rendered England as the *forum conveniens* or proper place for the litigation. The UK Supreme Court decided that Zambia was the proper place for the adjudication of the dispute based on a preponderance of connecting factors localising there. However, the Supreme Court allowed claims against both the parent and subsidiary to proceed on the merits as there was a real risk that the claimants in Zambia would not obtain substantial justice due to the lack of litigation funding.[61] In this regard, 'cogent evidence' will be required but this does not mean 'unchallenged evidence'.[62] The court is not conducting a trial with a balance of probabilities standard of proof in relation to the real risk of substantial justice not being delivered.[63] Therefore, proceedings will be allowed to continue in England if the claimants can establish that on balance more connecting factors render England as the natural forum or in exceptional cases they would be denied substantial justice in the forum abroad.

The next section will examine the development of the law on holding UK based MNCs to account for their overseas conduct from the perspectives of the Scottish Court of Session's decision in *Hugh Hall Campbell KC v James Finlay (Kenya) Limited* and the English Court of Appeal's decision in *Limbu v Dyson*. Since the proceedings giving rise to the latter decisions were commenced after IP Completion Day, the Brussels Ia Regulation is no longer applicable.[64] Therefore, these decisions will serve as paradigmatic appellate authorities for analysis of the developing law on business and human rights litigation against MNCs in Scotland and England. In the process, insights may be gained from the simmering jurisdictional discontent that was largely masked during the application of Brussels Ia in the UK coupled with the identification of areas for potential reform.

A TALE OF TWO DECISIONS AMIDST JURISDICTIONAL DISCONTENT

[59] [1986] UKHL 10 at page 478D-E (Lord Goff); *AK Investment CJSC v Kyrgyz Mobil Tel Limited and Others* [2011] UKPC 7 at [91]-[95] (Lord Collins).

[60] *Re Harrods (Buenos Aires) Ltd (No 2)* [1992] Ch 72 (CA); Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383. See A. Briggs, 'The Death of Harrods: Forum Non Conveniens and the European Court' (2005) 121 *Law Quarterly Review* 535.

[61] *Vedanta v Lungowe* [2019] UKSC 20 at [88].

[62] *Vedanta v Lungowe* [2019] UKSC 20 at [96].

[63] *Cherney v Deripaska* [2009] 2 CLC 408 at [29] (Waller LJ).

[64] [2023] EWHC 2592 (KB) at [27].

In *Hugh Campbell KC v James Finlay (Kenya) Limited*,[65] the Court of Session (Inner House) was tasked with determining whether the present and past employees (via a representative party) of James Finlay (Kenya) Ltd (JFKL) could sue in Scotland for musculoskeletal injuries allegedly sustained as a result of JFKL's negligence whilst tea picking in Kenya.[66] At the outset, the facts giving rise to the case are not unusual for two reasons. First, there is clear precedent for occupational injury and disease claims by employees going as far back as the House of Lords decisions in *Connelly* and *Lubbe*. Second, the Scottish registered JFKL carries out its business activities directly in Kenya without relying on a local subsidiary or intermediary.

Before adjudication on the interim anti anti-suit interdict, jurisdictional and *forum non conveniens* issues, it was decided that the issues of fact or law were sufficiently similar or related to justify the grant of permission for group proceedings under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.[67] JFKL then proceeded to seek and was granted an anti-suit injunction by the Kenyan Courts preventing the representative party from pursing the group proceedings in Scotland. Failure to abide by an anti-suit injunction order is enforceable by the penalty of contempt of court proceedings in Kenya against the Kenya based group members. In retaliation, an interim anti anti-suit interdict was sought and granted by the Scottish courts in an attempt to force JFKL to discharge the Kenyan anti-suit injunction.[68]

The injunctive relief may be granted where a Scottish court has jurisdiction over JFKL, there is *prima facie* evidence that JFKL's conduct is unconscionable, vexatious or oppressive and there is a favourable balance of convenience. The tactical delay by JFKL in issuing the Kenyan anti-suit injunction proceedings when the Scottish proceedings were well under way coupled with allegations of harassment of employees, misrepresentation in the Kenyan proceedings and misuse of the group register were relevant considerations in granting the anti anti-suit interdict. Alternatively, the grant of anti anti-suit relief may be justified in terms of protecting the jurisdiction of the Scottish courts. Attempts were made by JKLF to challenge the interim anti anti-suit interdict on the basis of infringement of comity, but these were treated with short shrift.

JFKL's registered office in Aberdeen means that they are domiciled in Scotland and subject to the jurisdiction of the Scottish courts.[69] JFKL argued that an exclusive choice of court agreement in Clause 9 of the employment contracts and the Collective Bargaining Agreement prorogated the jurisdiction of the Kenyan courts:[70]

> "**9. Industrial Sickness**
> The terms of the relevant national legislation shall apply."

[65] [2023] CSIH 39.
[66] See generally, B Lindsay, "Reading the Tea Leaves: *Campbell v James Finlay (Kenya) Ltd*" (2024) 28 *Edinburgh Law Review* 123; M Poesen, "A Scots Perspective on forum non conveniens in business and human rights litigation: *Hugh Campbell KC v James Finlay (Kenya) Ltd*" (2025) 21 *Journal of Private International Law* 135.
[67] [2022] CSOH 12; [2022] CSIH 29 at [5] (Lord Carloway).
[68] [2022] CSOH 57 (Lord Braid); Affirmed in [2022] CSOH 94 (Lord Weir).
[69] Rule 1, Schedule 8 of CJJA 1982 (the general rule on jurisdiction in Scots law).
[70] [2023] CSIH 39 at [4].

> Section 16 of the Workers Injury Benefits Act 2007 (WIBA)[71]
> "No action shall lie by an employee ... for the recovery of damages in respect of any occupational accident or disease resulting in the disablement ... of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement ...".

This is a problematic contention from at least two perspectives. First, it was held that the dispensation of a quasi-judicial administrative procedure by the Director of Occupational Safety and Health (DOSH) under the Workers Injury Benefits Act 2007 (WIBA) does not prorogate the exclusive jurisdiction of a 'court' under the applicable law.[72] It is argued that the lack of agreement of the contracting parties to resolve disputes before a "court" may be characterised as a requirement of formal consent rather than formal validity or material validity. Indeed, any question of validity and effect arises logically after the existence of such a clause is determined. Formal consent is autonomously and expressly governed by rule 6 of the CJJA 1982. The lack of a clear, certain and unambiguous Kenyan choice of court agreement is apparent in this case. Second, Clause 9 does confirm the applicability of Kenyan employment law and was therefore held to be a choice of law clause.[73] Alternatively, the same conclusion may be arrived at by applying the retained Rome II.[74] First and foremost, Kenyan law is the applicable under Article 4(1) as the law of the place of damage (*lex loci damni*). Moreover, the accessory choice of law rule in Article 4(3) would also lead to the application of Kenyan law (as the "manifestly more closely connected" law) to the delict because the employment contracts are governed by Kenyan employment legislation.[75] Although the judicial treatment of the prorogation of jurisdiction issue could have been comprehensive, the clause in the employment contracts was rightly held not to be an exclusive Kenyan choice of court agreement.

JFKL also argued that the Scottish courts should not exercise jurisdiction as Kenya is the natural forum for the dispute.[76] The preponderance of connecting factors indicated that Kenya is the clearly and distinctly more appropriate forum.[77] The group members lived in Kenya. The group members sued on the basis of injury on tea estates in Kenya as a result of the defenders' alleged breach of duty of care. JFKL retained a registered office but had no operations in Scotland. The officers who gave evidence for the group members were all based in Kenya. The

[71] [2023] CSIH 39 at [7].
[72] [2023] CSIH 39 at [54]-[56]; Rule 6(1), Schedule 8 of the Civil Jurisdiction and Judgments Act 1982, states: "If the parties have agreed that a *court* is to have jurisdiction to settle any disputes which may have arisen……" (emphasis added); Cf. [2023] CSIH 39 at [12] (provision for appeal to the Employment and Labour Relations Court).
[73] [2023] CSIH 39 at [55].
[74] [2023] CSIH 39 at [55]. The retained Rome II Regulation has now been legally transposed into the "assimilated" Rome II from 1 January 2024 pursuant to Section 5 of the Retained EU Law (Revocation and Reform) Act 2023.
[75] The second sentence in Article 4(3) of Rome II states: "A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question".
[76] For an insightful distillation of the application of the plea of *forum non conveniens*, which was approved by the Court of Session (Inner House) in [2023] CSIH 39 at [65], see P. Beaumont in *Anton: Private International Law* (SULI, W Green 2011), [8.409].
[77] "…. non-result-oriented practical factors…." are relevant in considering the appropriateness of the alternative forum: Beaumont, *Anton: Private International Law* [8.409].

circumstances giving rise to the claims would require investigations in Kenya. There were significant practical issues about whether Scottish routine orders for the recovery of documents and property could be enforced in Kenya. The Outer House held that even though Kenya was the natural forum, the group members would be at real risk of not receiving substantial justice in Kenya due to the likely expense, lack of legal aid, inability of Kenyan law firms in handling the complexities arising from such claims and lack of legislation facilitating group proceedings.[78] The Inner House differed from the Outer House's determination that WIBA did not apply to the group members' claim.[79] The Inner House held that WIBA as interpreted by the Kenyan Supreme Court brought musculoskeletal injuries and other work-related injuries within the exclusive material scope of the Act.[80] This posed a "jurisdictional dilemma", as the Court of Session lacked experience in applying the WIBA scheme which could only award no fault compensation.[81] The difficulties in determining, understanding and correctly applying foreign law cannot be understated.[82] The applicability of WIBA is a significant factor, if not, outcome determinative as far as the decision of the Inner House on JFKL's *forum non conveniens* plea is concerned.[83] The Inner House agreed with the Outer House that Kenya is the clearly or distinctly more appropriate forum. However, the Inner House determined that the substantial justice exception under *Spiliada's* second stage was not applicable where there is a statutory no fault compensation scheme that works well without the need for legal representation and is free of charge.[84] The court refrained from stating that WIBA could not deliver "substantial justice" for the group members.[85] In this regard, the Inner House's decision is in line with Lord's Goff observation that the "advantage of financial assistance available here to obtain a Rolls Royce presentation of his case, as opposed to a more rudimentary presentation in the appropriate forum" is not sufficient to justify the refusal of a stay of proceedings.[86] It should be noted that the "general public interest"[87] has no implications for the concept of "substantial justice" within the *forum non conveniens* test and a suggestion otherwise would be inconsistent with established authority of the apex court.[88] In similar vein, any comparison with the quantum and "heads of loss" available in Scotland is futile.[89] The Inner House decided to sist the Scottish proceedings

[78] [2023] CSIH 39 at [66].

[79] [2023] CSIH 39 at [61]-[64].

[80] *Law Society of Kenya v Attorney General* [2019] eKLR (Supreme Court); In *Samuel Otieno Musumba* v *Industrial & Commercial Development Corp* [2022] eKLR, the claimant (a driver) was able to obtain compensation under WIBA for back problems as a result of driving for long periods. The Inner House noted at [2023] CSIH 39 at [64] that, "There is no reason to suppose that the recent decision in *Samuel Otieno Musumba* does not represent the correct law in Kenya".

[81] [2023] CSIH 39 at [68].

[82] Lord Mance, 'The Future of Private International Law' (2005) 1 *Journal of Private International Law* 185, 191.

[83] [2023] CSIH 39 at [57]-[64].

[84] [2023] CSIH 39 at [67].

[85] [2023] CSIH 39 at [69].

[86] *Connelly v RTZ* [1997] UKHL 30 at [32] (Lord Goff); See also, *Limbu v Dyson* [2023] EWHC 2592 (KB) at [44], [47], [62]. Cf. 'Tesla service' in England is not sufficient to justify the refusal of a stay of proceedings: *Limbu v Dyson* [2023] EWHC 2592 (KB) at [132], [169].

[87] [2023] CSIH 39 at [69].

[88] *Lubbe v Cape* [2000] UKHL 41 at [33] (Lord Bingham), [51]-[54] (Lord Hope of Craighead); See also, *Limbu v Dyson* [2024] EWCA Civ 1564 at [41] (Popplewell LJ). Cf. *Union Carbide Corporation Gas Plant Disaster at Bhopal* (1986) 634 F. Supp. 842; *Piper Aircraft Company v Reyno* (1981) 454 U.S. 235.

[89] [2023] CSIH 39 at [69]. Kenyan law applies to determine 'the existence, the nature and the assessment of damage or the remedy claimed' according to Article 4(1) read along with Article 15(c) of the retained Rome II Regulation.

pending the resolution of claims under the Kenyan statutory administrative procedure.[90] The Scottish group proceedings could be resuscitated if the claims in Kenya were not determined according to WIBA or faced unreasonable delays.[91]
Although towards the end of the Inner House judgment it is stated that the plea of *forum non conveniens* has not been determined,[92] the most reasonable contextual reading of the decision will arrive at the opposite conclusion. Section 49 of the CJJA 1982 does permit a sist on grounds "other" than *forum non conveniens*. For instance, English courts have an inherent power to order a case management stay to await the outcome of proceedings in a foreign court or arbitration in "rare or compelling circumstances".[93] However, there is a sharp contrast between this isolated reference in the judgment and the judicious approach of the Inner House in adjudicating on the plea of *forum non conveniens*.[94] In this regard, perhaps the judgment could have been couched in clearer language that would benefit the uninitiated.

Other commentators have argued that the protective jurisdiction provision in Section 15C of the CJJA 1982 should have been effectively utilised because the employer's alleged negligence towards its employees during the course of employment falls within its scope.[95] There is one reference to Section 15C of the CJJA 1982 in the Outer House's judgment but its jurisdictional implications are not addressed at all.[96] Section 15C aims to redress the jurisdictional asymmetry in the employer-employee relationship in individual contracts of employment. The ability of the parties to enter into choice of court agreements in employment contracts is restricted.

Significantly, Section 15C would have implications for the plea of *forum non conveniens*. It has been suggested that the plea of *forum non conveniens* may not be available under Section 15C.[97] The exclusive and mandatory protective jurisdiction provisions for consumer and employment matters under Section 5 of Brussels Ia have been grafted into the Scottish (and English) jurisdictional framework(s), which permit a discretionary sist or stay on the basis of *forum non conveniens*. These protective jurisdiction rules do not exist in isolation from the national jurisdiction regimes of Scotland and England. A degree of interpenetration between the context from which these rules have been extracted and the different UK jurisdictional regimes is to be expected. It is argued that as the constitutional architecture within which

[90] [2023] CSIH 39 at [69].
[91] [2023] CSIH 39 at [69]; *De Mulder v Jadranska Linijska* (*Jadrolinija*) 1989 SLT 269 at 275; *Mengiste & Anor v Endowment Fund for the Rehabilitation of Tigray & Ors* [2013] EWHC 599 (Ch), [2014] EWHC 4196 (Ch), [125]. See P. Torremans (ed.), *Cheshire, North & Fawcett, Private International Law* (15th Edition, OUP 2017) 402; Briggs, *Private International Law in English Courts* 335 (on applications for stays "indefinitely" or "temporarily").
[92] [2023] CSIH 39 at [70].
[93] Dicey, Morris & Collins, *The Conflict of Laws* [12-018].
[94] [2023] CSIH 39 at [70].
[95] U Grusic, 'Scottish Court Stays Proceedings in a Business and Human Rights Dispute' (12 December 2023) <https://eapil.org/2023/12/12/scottish-court-stays-proceedings-in-a-business-and-human-rights-dispute/> accessed 28 May 2025; Lindsay, "Reading the Tea Leaves" 127-128; Poesen, "A Scots Perspective on forum non conveniens" 147-149.
[96] [2023] CSOH 45 at [87].
[97] A. Briggs, *Private International Law in English Courts* (2nd Ed, OUP 2023) 194; L Merrett, *Employment Contracts and Private International Law* (2nd ed, OUP 2022) 165; Cf. A. Briggs, "What Remains of the Brussels I Regulation in the English conflict of laws" (2024) 20 *Journal of Private International Law* 539, 540-541.

these rules operated has changed,[98] there is a need to interpret them with a purpose that aligns with a unilateral jurisdictional regime. First, Section 49 of the CJJA 1982 explicitly allows a sist on the basis of *forum non conveniens*. Additionally, the Court of Session in Scotland may more broadly exercise an equitable and inherent jurisdiction known as *nobile officium* to order a sist of proceedings.[99] This allows the court to intervene in cases where the strict application of the law might lead to injustice. Therefore, there may be no need to resolve an apparent textual conflict between an exclusive and mandatory Section 15C and the discretion in Section 49 by creating an explicit exception to Section 49 of the CJJA 1982,[100] where an inherent jurisdiction exists for such matters in Scotland and England. Second, *forum non conveniens* may be subsumed within a unilateral jurisdictional regime where there is an absence of a multilateral system for the recognition and enforcement of judgments premised on the protective jurisdictional rules. Third, the pre-IP Completion Day CJEU jurisprudence and expert reports on the Brussels regime retain persuasive interpretative value and are not strictly binding under Section 15E(2) of the CJJA 1982. Therefore, it remains possible for UK courts to depart from CJEU judgments on the Brussels regime. On balance, a stay of proceedings would still be possible in theory on the basis of *forum non conveniens* but whether courts *ought* to order a stay is a different matter.[101] The latter decision will undoubtedly be influenced by the underlying policy rationale for superimposing these protective rules on the national jurisdictional regimes in the first place. In the instant case, the contention of the non-availability of *forum non conveniens* could have been effectively employed to resist the stay of Scottish court proceedings.

Section 15C could give rise to a *right* to sue the employer in Scotland and a corresponding *duty* not to be sued abroad. As a result, JFKL's argument that a Kenyan exclusive choice of court agreement ousted the jurisdiction of the Scottish court could have been set aside with finesse as the *right* of invoking the Scottish court's jurisdiction would prevent the employees from being sued in an allegedly chosen forum or elsewhere. The invocation of the *right* to sue in Scotland and the corresponding *duty* not to be sued elsewhere might also give rise to a legal basis for the grant of an anti-suit interdict that is different from the one relied upon by the group members' to obtain the Scottish anti anti-suit interdict.[102] The exclusive and mandatory invocation of Scottish court proceedings may be enforced by way of an anti-suit interdict.[103]

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[98] Lord Sales, "Retained EU law: purposive interpretation when the constitutional architecture changes" Annual Lecture of the UK Association for European Law (20 November 2023) <https://supremecourtuk.co.uk/uploads/speech_231120_4fec7910a0.pdf> accessed 28 May 2025.

[99] Poesen, "A Scots Perspective on forum non conveniens" 142. Cf. In England, Section 49(3) of the Senior Courts Act 1981 is a statutory provision that preserves the court's power to stay proceedings 'where it thinks fit to do so', while the inherent equitable power is a broader principle that allows the court to take actions to prevent injustice or unfairness if there isn't a specific legal rule that directly authorises it.

[100] Briggs, "What Remains of the Brussels I Regulation" 541.

[101] Dicey, Morris & Collins, *The Conflict of Laws* [12-012].

[102] Article 22(1) of Brussels Ia gave rise to the employee's right enforceable by an anti-suit injunction to be sued only in the courts of its Member State of domicile: *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723 at [39]-[44] (Tuckey LJ); *Petter v EMC Europe Ltd* [2015] EWCA Civ 828 at [29], [31] (Moore-Bick LJ) and [55] (Sales LJ).

[103] There is English authority under Section 15C for an anti-suit injunction enforcing an employee's right to be sued by the employer only in the courts of the place of the employee's domicile but not for the obverse scenario of the employer's right to be sued by the employee only in the courts of the place of the employer's domicile, see *Robert Gagliardi v Evolution Capital Management LLC* [2023] EWHC 1608 (Comm) at [35]-[44] (Foxton J). Cf. *Soleymani v Nifty Gateway LLC* [2022] EWCA Civ 1297 at [55] (Popplewell LJ).

Commentators have, however, argued that in Hohfeldian terms, “the right not to be sued” in a particular court created by Brussels Ia, is actually a *privilege* combined with an *immunity*, not a *right* which imposes a private law *duty* not to sue elsewhere.[104] Moreover, there is a fundamental contradiction between the ability of courts to stay proceedings on the basis of *forum non conveniens* on the one hand and grant anti-suit injunctions grounded on rights and duties arising from the very same jurisdictional rule on the other. This lingering disconnect is quite akin to approbation and reprobation. The lack of clarity on the precise jurisdictional implications of the protective jurisdiction provisions for the plea of *forum non conveniens* and anti-suit interdicts needs to be addressed by the courts in the UK. It is hoped that this discussion may offer some guidance for those grappling with such issues in the study, practice and application of the law.

In *Limbu v Dyson*, the English Court of Appeal adjudicated on whether England or Malaysia is the appropriate forum for claims brought by Nepalese and Bangladeshi migrant workers against three companies in the Dyson group.[105] It was not contested that the claims had a real prospect of success. It was alleged that workers were trafficked to Malaysia and there subjected to forced labour, abusive working and living conditions and in some cases detention, torture and beating, in the course of manufacturing components and parts for two companies in the supply chain of the Dyson group.[106] The first and second defendants (‘Dyson UK’) are English companies, which were served as of right at their place of business, and sought a stay on *forum non conveniens* grounds. The third defendant (‘Dyson Malaysia’) is a Malaysian company, which was served out of the jurisdiction with permission via the necessary and proper party gateway.[107] Dyson Malaysia sought to set aside service on the basis that England was not the proper place (*forum conveniens*) to bring the claim.[108]

The defendants are alleged to exert a high degree of control over the manufacturing operations and working conditions at the factories operated by two companies in the supply chain in Malaysia.[109] The defendants are also alleged to have promulgated mandatory policies and standards concerning the working and living conditions of workers in the Dyson group’s supply chain, and implemented them through processes of training, supervision and enforcement.[110] The causes of action advanced against the defendants are in negligence for breach of a duty of care resulting in economic loss and personal injuries; tort liability for false imprisonment, intimidation (by the supply chain companies) and assault (by threats of violence and actual violence by the supply chain companies and in the case of four claimants by the Royal Malaysian Police (RMP)); the supply chain companies are the primary tortfeasors; a restitutionary claim for unjust enrichment.[111]

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[104] T. Raphael QC, *The Anti-Suit Injunction* (2nd edn, OUP 2019) 90-93; T. Raphael QC in "Do As You Would Be Done By: System-transcendent Justification and Anti-suit Injunctions" [2016] *Lloyd's Maritime and Commercial Law Quarterly* 256, 266; M. Ahmed, “A Dangerous Chimera: Anti-Suit Injunctions Based on a 'Right to Be Sued' at the Place of Domicile Under the Brussels Ia Regulation?” (2020) 136 *Law Quarterly Review* 379. See generally, W.N. Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 *Yale Law Journal* 16.
[105] *Limbu v Dyson* [2024] EWCA Civ 1564 (Popplewell LJ); *Limbu v Dyson* [2023] EWHC 2592 (KB).
[106] [2024] EWCA Civ 1564 at [1]; [2023] EWHC 2592 (KB) at [5].
[107] CPR PD6B para 3.1(3).
[108] CPR 6.37(3).
[109] [2024] EWCA Civ 1564 at [12]-[15].
[110] [2024] EWCA Civ 1564 at [12]-[15].
[111] [2024] EWCA Civ 1564 at [16].

The High Court decided that Malaysia is the natural forum[112] and there was no real risk of the claimants being unable to access justice there.[113] The judge considered the connecting factors:[114] practical convenience and common language are neutral factors; the applicable law strongly favours Malaysia; the centre of gravity of the dispute strongly favours Malaysia; the location of documents slightly favours Malaysia; parallel proceedings involving contribution claims against the supply chain companies slightly favours Malaysia but there is no real risk of inconsistent judgments; there is a risk of parallel proceedings and inconsistent judgments against RMP but this is a relatively minor aspect of the claim; Dyson UK's defamation proceedings was a significant factor in favour of England vis-à-vis Malaysia.

The Court of Appeal highlighted the evaluative nature of the *forum non conveniens* enquiry.[115] Lord Templeman's expectation in *Spiliada* that appellate courts should be reluctant to interfere is echoed in the Court of Appeal's justification for its own evaluative reassessment of the *forum non conveniens* issue.[116]

The Court of Appeal held that England is the more appropriate forum and the High Court's judgment involved multiple errors of principle and reached conclusions which were plainly wrong.[117] In reaching this conclusion, it was held, *inter alia*, that the domicile of Dyson UK,[118] the location of documents, practical convenience[119] and equality of arms favour England.[120] It is noteworthy that both "domicile" and "presence" are employed interchangeably as a basis for service as of right on Dyson UK but *ex lege* only the latter is correct under the English common law jurisdictional regime.[121] The Court of Appeal deemed Dyson UK responsible for promulgating and implementing policies and relegated Dyson Malaysia as the ancillary defendant.[122] The centre of gravity of the dispute is England where the acts and alleged breaches of duty and unjust enrichment occurred rather than Malaysia, the place where the abuse occurred.[123] Alternatively, the centre of gravity is a neutral factor. The Court of Appeal held that Dyson UK's defence of the claims will be coordinated and conducted from England.[124] The Court of Appeal agreed with the Judge's assessment on parallel proceedings and inconsistent judgments, but the defamation proceedings were irrelevant as they had been discontinued. There was a conflict of interest in treating the undertakings as a satisfactory mechanism to meet the "reasonable" and "necessary" disbursement needs of the claimants. The Court of Appeal held that, the claimants' poverty meant there was at least a serious risk that they would be unable to bring claims in Malaysia.[125]

[112] [2023] EWHC 2592 (KB) at [122]-[123].
[113] [2023] EWHC 2592 (KB) at [171].
[114] [2023] EWHC 2592 (KB) at [84]-[121].
[115] [2024] EWCA Civ 1564 at [4].
[116] [2024] EWCA Civ 1564 at [4]; *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460 at 465 (Lord Templeman).
[117] [2024] EWCA Civ 1564 at [31]-[62].
[118] [2024] EWCA Civ 1564 at [34]-[36], [65].
[119] [2024] EWCA Civ 1564 at [66]-[68].
[120] [2024] EWCA Civ 1564 at [75].
[121] [2024] EWCA Civ 1564 at [34].
[122] [2024] EWCA Civ 1564 at [36].
[123] [2024] EWCA Civ 1564 at [70].
[124] [2024] EWCA Civ 1564 at [69].
[125] [2024] EWCA Civ 1564 at [63].

The Court of Appeal in *Limbu* sets a significant precedent in favour of aggrieved foreign litigants seeking access to justice in business and human rights claims against MNCs. There is, however, an underlying need to pause, reflect and assess whether such a development justifiably distorts the traditional value neutral structure of the law on jurisdiction. The ruling calls into question the established *forum non conveniens* approach and may be subjected to a threefold critique. The verities of the criticisms from a business and human rights perspective are examined in tandem and in the conclusion.

First, the decision in *Limbu* conflates and obfuscates the two stages of the *forum non conveniens* test by treating the real risk of not obtaining substantial justice abroad as a relevant factor in determining the appropriate and available forum at the first stage of the *Spiliada* test.[126]

> "[Inequality of arms] is not something which gives rise to a real risk of substantial injustice at Spiliada stage 2. However, it is a consideration in the overall assessment of the appropriate forum in which the case may most suitably be tried, because inequality of arms in one of the two fora is factor pointing to the other as more appropriate."[127]
>
> "Whether [lack of funding to bring Malaysian proceedings] is addressed as a stage 1 or stage 2 issue, it points overwhelmingly in favour of England as the distinctly more appropriate forum."[128]
>
> "The inability of the claimants to fund proceedings in Malaysia, and an assessment of the relevant connecting factors, make England clearly and distinctly the appropriate forum in which the case should be tried."[129]

Under this bespoke approach, the defendant would have to discharge the additional burden of proving that the appropriate and available forum abroad is "available in practice".[130] The latter is a concern that is traditionally dealt with under the second stage of the *Spiliada* test where the onus shifts onto the claimant.[131] This recalibration of the procedural rights of the claimants vis-à-vis the defendant in favour of the claimants would spare the latter from discharging the onus at the second stage.[132] It has been suggested that a principle of general applicability should not be derived from an approach where the lack of availability of

[126] [2024] EWCA Civ 1564 at [76], [23] (Popplewell LJ), [77] (Warby LJ), [78] (Sir Geoffrey Vos MR). Cf. *Vedanta v Lungowe* [2019] UKSC 20 at [88].
[127] [2024] EWCA Civ 1564 at [59].
[128] [2024] EWCA Civ 1564 at [63].
[129] [2024] EWCA Civ 1564 at [76].
[130] *Mohammed v Bank of Kuwait and the Middle East KSC* [1996] 1 WLR 1483 at 1490F (Evans LJ with whom Saville LJ and Morritt LJ agreed); See A. Arzandeh, *Forum (Non) Conveniens in England* (Hart Publishing 2019) 77-79.
[131] *Municipio De Mariana v BHP Group (UK) Ltd* [2022] EWCA Civ 951 at [333]-[342]; *Connelly v RTZ* [1997] UKHL 30 at [25] (Lord Goff); *Askin v Absa Bank Ltd* [1999] ILPr 471 at [27]-[29] (Tuckey LJ); *Cherney v Deripaska* [2008] EWHC 1530 (Comm) at [252] (Christopher Clark J), affirmed on appeal in [2009] EWCA Civ 849.
[132] A. Briggs, 'Forum non conveniens and unavailable courts' (1996) 67 *British Yearbook of International Law* 587, 589.

substantial justice is relevant at the first stage.[133] This tension in the judicial authorities will manifest itself in cases where the onus shifts from the defendant to the claimant.[134] In particular, future business and human rights litigation against MNCs would provide fertile impetus for resolving this tension in the divergent strands of case law and in the process develop the law on *forum non conveniens* and jurisdiction. It has been observed that the line dividing the two stages in the *Spiliada* test is "neither completely impermeable nor drawn in such a way that there are no factors which do not appear on both sides of it".[135] Ultimately, the Court of Appeal in *Limbu* adopted a "single holistic" exercise to identify where the case can most suitably be tried in the interests of the parties and for the ends of justice.[136] It is likely that Court of Appeal's decision in *Limbu* will not be the last word on the matter in this rapidly developing area of law. The tailored and claimant friendly approach to *forum non conveniens* benefits the access to justice needs of disadvantaged litigants from developing countries and encourages forum shopping in England.

Second, the concept of "[in]equality of arms"[137] in relation to the lesser standard of representation for the claimants in Malaysia and remote hearing of the claimants in Malaysia arguably diverges from established judicial authority of the highest echelons by relegating *substantial* injustice in the foreign forum to the diminished standard of *relative* injustice.[138] In similar vein, the application of the concept of "[in]equality of arms" is inconsistent with the English courts' practice of refusing a stay of proceedings in "exceptional cases" where there is an absence of a means of funding litigation in the forum abroad in comparison to England. The ingenuity of the Court of Appeal in *Limbu* in redressing the asymmetry between the MNC and the disadvantaged litigants is notable. The departure from the conservative exceptionalism of previous authorities is likely to incentivise business and human rights litigation against MNCs and lead to fewer stays of proceedings on *forum non conveniens* grounds.

Third, there are concerns of international comity where an English court refuses a stay of proceedings because it concludes that the forum abroad would not provide substantial justice.[139] However, the Court of Appeal in *Limbu* did state that it had the highest regard for the Malaysian justice system in the same breath as recognising the fact sensitive nature of such a claim which gave rise to a refusal of a stay.[140]

There are issues of law in this case and there is evidence of differences between the law applied by English and Malaysian courts.[141] It is uncontested that Malaysian law is the governing law of all the claims including unjust enrichment.[142] In relation to the latter cause

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[133] Torremans (ed.), *Cheshire, North & Fawcett, Private International Law* 396-397.
[134] *Askin v Absa Bank Ltd* [1999] ILPr 471 at [29] (Tuckey LJ); *Municipio De Mariana v BHP Group (UK) Ltd* [2022] EWCA Civ 951 at [338].
[135] Quotation from Dicey, Morris & Collins, *The Conflict of Laws* [12-032] cited in *Municipio De Mariana v BHP Group (UK) Ltd* [2022] EWCA Civ 951 at [342] and [2023] EWHC 2592 (KB) at [32].
[136] [2024] EWCA Civ 1564 at [23].
[137] [2024] EWCA Civ 1564 at [75].
[138] See fn 58 above.
[139] *Vedanta v Lungowe* [2019] UKSC 20 at [11]. Cf. [2024] EWCA Civ 1564 at [59].
[140] [2024] EWCA Civ 1564 at [63].
[141] See fns 56, 57 and 82 above.
[142] Article 4(1) of the retained Rome II.

of action, its characterisation as restitution for a wrong would arguably lead to the application of Article 4(1) of the retained Rome II.[143] Whilst there are substantial similarities between English law and Malaysian law, decisions from Commonwealth countries other than England such as India, Singapore, Hong Kong, Australia, New Zealand and Canada are also persuasive in Malaysian courts.[144] The Malaysian courts have not yet had the opportunity to consider *Vedanta* or *Okpabi*. Additionally, the application of the latter seminal UKSC decisions to supply chain liability cases is a novel issue in both England and Malaysia i.e. whether companies in a corporate group can be held jointly liable for the actions of a third-party supplier. A public policy issue regarding whether extending the scope of the duty of care to this "penumbral" case is fair, just and reasonable will also arise.[145] Under the circumstances, the English court would place itself in the seemingly uncertain and unenviable position of having to predict or second guess the likely (hypothetical) approach of a Malaysian court to the duty of care issue had the matter been brought before it. The Judge had observed that that there were differences between the expert testimony of two Malaysian Chief Justices on whether a Malaysian court would be likely to apply a first principles approach laid down in *Caparo* or an approach favouring the *lex specialis* of *Vedanta* and *Okpabi*.[146] Two differences or potential differences were identified in relation to the claim for unjust enrichment. In English law, a claim for unjust enrichment is substantiated where the defendant has vitiated one or more of the specifically recognised unjust factors. In Malaysian law, the unjustness of the enrichment depends on whether there is an "absence of basis" for the enrichment.[147] There may also be an issue whether the unjust benefit has to flow directly from the claimant to the defendant. The employment laws that the claimants allege have been breached by the companies in the supply chain are Malaysian statutes, and the Malaysian courts are better placed in applying this corpus of law.[148] The Court of Appeal expressed a preference for these issues to be resolved by a Malaysian court but considered the English courts well equipped to apply Malaysian law with expert evidence and the use of English common law skills and experience to determine and apply foreign law.[149]

CONCLUSIONS

Business and human rights litigation against MNCs may have moved past its embryonic stage, but the dust is far from settled. On the one hand, the duty of care in negligence in the law of torts is being stretched to novel relationships involving the supply chain and even the broader value chain.[150] On the other, Brexit offers an ideal opportunity to reexamine a much more relevant plea of *forum non conveniens* within the law on jurisdiction.

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[143] Cf. Article 10 of the retained Rome II.

[144] [2023] EWHC 2592 (KB) at [99].

[145] On "penumbral" and "core" cases, see H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) Essay 2.

[146] [2023] EWHC 2592 (KB) at [100].

[147] *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 (Federal Court of Malaysia).

[148] [2023] EWHC 2592 (KB) at [101].

[149] [2024] EWCA Civ 1564 at [71]-[72] citing Lord Hodge in *Perry v Lopag Trust Reg* [2023] UKPC 16 at [12], [15]; *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45 at [144]-[148] (Lord Leggatt).

[150] A supply chain is a subset of the broader value chain. A supply chain focuses on the flow of goods and services from supplier to customer, while a value chain encompasses all activities that contribute to the creation of value, including those within and outside the supply chain.

Insights may be derived from a comparative analysis of the post-Brexit appellate court decisions in *Campbell* and *Limbu*.[151] This understanding of the state of the law will shed light on the emerging strategic direction of business and human rights litigation against MNCs in the UK. It has been argued that the application of a sist of proceedings on grounds of *forum non conveniens* in *Campbell* was orthodox and prudently tempered by the potential for a revival of Scottish court proceedings. The divergent approach in *Limbu* of a refusal of stay of proceedings on the basis of *forum non conveniens* was arguably an attempt to change the post-Brexit *status quo* where the likelihood of a stay of UK court proceedings increased because the mandatory jurisdiction rules of Brussels Ia no longer applied. The approach in *Limbu* aligns with the spirit, if not the letter, of commentators who have suggested different solutions for a reframed *forum non conveniens* in business and human rights litigation.[152] Additionally, the time, cost, and court resources expended in jurisdictional disputes has been highlighted by the senior judiciary over the years.[153] The approach in *Limbu* might demonstrate a functional equivalence to but is more nuanced than the Australia's less evaluative "clearly inappropriate forum" *forum non conveniens* test.[154] Significantly, *Spiliada* is still applied, albeit with the integration of a second stage factor within the first stage. Moreover, the concept of "equality of arms" indicates a departure from an "exceptional" refusal of a stay where there is a near *absolute* lack of substantial justice in the forum abroad to a more *relative* and *holistic* analysis of the litigation standing of the parties in the competing fora. England's reputation as a forum of choice for business and human rights litigation may benefit from *Limbu* at the cost of increased exposure of MNCs to litigation risk. Both these factors ensure that the dynamics of business and human rights litigation against MNCs identified and analysed in this article will be instrumental as the goalpost shifts in favour of access to justice for aggrieved foreign litigants in appropriate cases.

[151] On 1 May 2025, the UK Supreme Court refused permission to appeal in the case of *Limbu v Dyson* [2024] EWCA Civ 1564.

[152] Ahmed, "Private international law and substantive liability issues in tort litigation" 76-77; Aristova, *Tort Litigation Against Transnational Corporations* 167-168

[153] *Vedanta v Lungowe* [2019] UKSC 20, [6]– [14]; *Okpabi v Shell* [2021] UKSC 3, [107].

[154] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (HC).