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Municipio De Mariana v BHP Group (UK) Ltd (formerly BHP Group Plc) [2022] EWCA Civ 951: An Update to the International Landscape of Environmental Law and Corporate (Parental) Responsibility

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I. Introduction

The Court of Appeal in England and Wales ("the Court") has determined that a group litigation comprising of over 200,000 Brazilian claimants can proceed against a UK-based parent company. This decision, which followed a disastrous dam collapse, is reflective of the modern trend in the English courts where UK-domiciled parent companies are held accountable for the actions of their international subsidiaries.[1]

In November 2020, Mr Justice Turner of the High Court granted the defendants' application to strike out/stay the claim as an abuse of process, holding that trying to manage the claim would be like, "trying to build a house of cards in a wind tunnel".[2] It was this decision which was being appealed.

II. Factual Background

On 5 November 2015, Brazil suffered its worst ever environmental disaster, following the collapse of the Fundão Dam in Southeast Brazil.[3] This event released around 40 million cubic metres of waste from iron ore mining. The collapse and flood killed 19 people, destroyed entire villages, and had a widespread impact on numerous individuals and communities, both locally and up to 400 miles away. The Brazilian public prosecutor estimated the cost of compensation at a minimum of about €29 billion (£25.46 billion).[4]

In this case, 202,600 claimants sought compensation for losses caused by the disaster, against BHP Group (UK) Ltd, which is incorporated in England and Wales

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[1] See for example: *Lungowe v Vedanta Resources Plc* [2019] UKSC 20, [2019] 2 WLR 1051; *Okpabi and Others v Royal Dutch Shell Plc and Another* [2021] UKSC 3, [2021] WLR 1294.

[2] *Municipio de Mariana v BHP Group Plc* [2020] EWHC 2930 (TCC), [2020] 11 WLUK 91 [93].

[3] ibid [1].

[4] ibid.

("BHP England") and from the second respondent which is incorporated in Australia ("BHP Australia").[5] The dam was owned and operated by Samarco Mineração SA ("Samarco") – a Brazilian company jointly owned by two other Brazilian companies: Vale SA ("Vale") and BHP Billiton Brasil Ltda ("BHP Brazil"). BHP Brazil is a subsidiary within the BHP group. Vale and BHP are two of the world's largest mining companies. BHP England and BHP Australia sit at the head of the BHP group. At all material times, BHP England and BHP Australia have operated together as a single economic entity under a dual listed company structure, with boards of directors comprising the same individuals, a unified senior executive management structure, and joint objectives.

Although the corporate structure is such that it is BHP Australia which is the indirect parent of BHP Brazil, the claim was brought jointly and severally against BHP England and BHP Australia. The claimants were all Brazilian and comprised of: (a) over 200,000 individuals, including some members of the indigenous Krenak community who have particular community rights, and for whom the river plays a unique part in their special traditions; (b) 530 businesses, ranging from large companies to sole traders; (c) 15 churches and faith-based institutions; (d) 25 municipalities; and (e) 5 utility companies.[6]

The claims were rejected by the BHP entities on several grounds,[7] which included: (1) BHP Australia applied to stay the claims against it on the grounds that Brazil was clearly and distinctly the more appropriate and available forum ("the *forum non conveniens* application"); (2) BHP England applied to stay the claim pursuant to article 34 of Brussels Recast on the grounds that there were pending proceedings in Brazil giving rise to a risk of irreconcilable judgments;[8] and (3) without prejudice to those applications, both defendants applied to strike out or stay the claims as an abuse of process, or, alternatively, because they were pointless, wasteful, and duplicative of the collective and individual proceedings and/or judgments in Brazil.

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[5] ibid [2].

[6] ibid.

[7] *Municipio De Mariana v BHP Group (UK) Ltd (formerly BHP Group Plc)* [2022] EWCA Civ 951, [2022] 1 WLR 4691 [7].

[8] Article 34(1)(b) of Regulation (EU) 1215/2012, Brussels I (recast) requires that the judgment given by a third state will be capable of recognition, and where applicable, enforcement in the EU Member State in which proceedings have been brought.

II. Procedural History of the Case

A. High Court

Three years after the collapse of the dam, claims were filed in the High Court in England and Wales in 2018. In response, the defendants sought a stay on the applications, arguing that Brazil was the more appropriate, and available, forum. They also claimed a risk of irreconcilable judgments, given that there was already ongoing proceedings and relief schemes in progress in Brazil. On this basis, the defendants sought both a strike out and stay of the claims, citing them as a "pointless, wasteful and duplicative" abuse of process.[9]

In November 2020, the High Court granted BHP's application, and Justice Turner struck out the applications, citing risks of "irreconcilable judgments" and "cross-contamination".[10] The High Court found that the parallel proceedings should not proceed, given the claims ongoing in Brazil, finding that to do so would risk "unmanageability" of the litigation and "chaos".[11] Turner J also stressed that the English proceedings would be futile, given that the claimants could not expect to receive more financially than they could obtain through Brazilian proceedings, or the Renova compensation scheme set up to redress victims of the disaster. Accordingly, the High Court concluded that the English proceedings were an abuse of process and fell foul of the concept of *forum non conveniens*.[12]

B. Court of Appeal

In November 2021, the Court of Appeal granted permission for the decision to be appealed. In July 2022, the Court of Appeal overturned the High Court's decision and unanimously allowed the appeal by the Brazilian claimants.[13] The Court of Appeal dismissed BHP's applications for a stay/strike-out of the proceedings and offered a detailed judgment on the issues of abuse of process, *forum non conveniens*,

[9] *Município de Mariana* (n7) [7(3)].
[10] *Município de Mariana* (n2) [78].
[11] ibid [92].
[12] A Latin term meaning "inconvenient forum". This common law doctrine empowers a court to dismiss a civil action, despite having jurisdiction over the case, where there exists a more convenient and appropriate alternative forum to try the action.
[13] *Municipio de Mariana* (n7).

compensation schemes, the class actions and individual claims which were before the Brazilian courts.

The Court of Appeal emphasised that it was important that the claimants could obtain, "effective access to justice",[14] finding that there were deficiencies in the Brazilian compensation schemes and proceedings. Further, the majority of the claimants had not been pursuing claims in Brazil.[15] Any concerns of parallel proceedings creating "unmanageable" irreconcilable judgements were not found to amount to an abuse of process, as these issues, should they have arisen, could have been dealt with by sensible case management by the English court.[16]

Ultimately, the Court of Appeal found it was a realistic prospect that the English case would result in a real and legitimate advantage to the claimants, which outweighed any potential disadvantages in terms of expense and court resources.[17]

III. Court of Appeal Judgment

A. The English Claims

Four causes of action were pleaded before the English courts, although the fourth was ultimately dropped, leaving three claims for monetary compensation. It was argued, first, that BHP was bound by strict liability as an indirect polluter.[18] Brazilian case law was said to establish liability for environmental damage by another where: (a) it ultimately owns it; or (b) it ultimately controls it; or (c) by reason of failure to supervise the activity which gives rise to the damage; or (d) by reason of funding the activity of others which led to the damage or (e) by reason of benefitting from the activity of others which led to the damage. The claimants relied on all four alternatives in relation to the dam collapse.

The claimants also asserted a fault-based liability under article 186 of the Brazilian Civil Code.[19] The essence of the allegation was that the defendants were aware of the risk of the collapse of the dam and repeatedly disregarded advice and

[14] ibid [91].
[15] ibid [191(6)].
[16] ibid [202].
[17] ibid [234].
[18] ibid [11(1)].
[19] ibid [11(2)].

warnings about it from a number of sources. The claimants additionally relied on fault-based liability under article 116 of the Brazilian Corporate law.[20] This imposes a duty of protection on a controlling shareholder, including a duty not to permit activities involving a significant risk of substantial damage to the community.

In outlining the extent of compensation and damages, the following breakdown was provided:

(a) 17,083 of the claimants claimed that they had to move out of their homes;
(b) 35,503 claimed for physical injuries, for some €5m (£4.39m) in aggregate;
(c) 32,326 claimed for psychological injury, for some €3m (£2.63m) in aggregate;
(d) 5,627 claimed for property damage in an aggregate sum of about €55m (£48.28m);
(e) 73,210 claimed for increased living expenses;
(f) 27,584 claimed to have had their fishing activities affected, of whom 5,582 had loss of earnings claims of some €239m (£209.8m) in aggregate;
(g) 30,784 claimed to have had their ability to earn money affected, other than through fishing, giving rise to loss of earnings claims of some €257m (£225.61m) in aggregate;
(h) 192,651 claimed to have had their water supply affected by permanent or temporary interruption of supply and/or contamination; almost all claimed that the water remains contaminated; the interruption periods for all bar about 10,000 were for periods of between 5 and 100 days;
(i) 14,152 claimed to have had their electricity supply cut off or that it was intermittent;
(j) 123,995 claimed diminution in use and enjoyment of the river;
(k) 9,286 claimed diminution in use and enjoyment of land;
(l) 114,122 claimed that the dam collapse had changed their life in other ways.[21]

Two matters which resulted in material disagreement were: (1) The extent to which some losses which would be recoverable under Brazilian law were excluded; and (2) Whether the victims had a legal right of action against Samarco. On the second point, the Court noted that Samarco has been sued in 67,000 separate lawsuits by these claimants,[22] and the evidence of BHP Brazil's lawyer was that in none of these, or the many other cases in which it had been sued by other victims, has Samarco denied an obligation to make full redress.

[20] ibid [11(3)].
[21] ibid [14].
[22] ibid [50].

B. The Novel System

Of importance to the Court was a consideration of the forms of redress currently available to the Brazilian claimants in Brazil. Here, the Court considered what has become known as "The Novel System", following the judgment of Judge Mario in July 2020.[23] As the name suggests, Judge Mario created a new and legally unprecedented system of redress available to individual victims. The system was described by Judge Mario as one of "rough justice",[24] which involved the court deciding on fixed amounts of compensation for loss of earnings and moral damages, caused by the interruption of water supply in a region known as Baixo Guandu.[25]

The amount of damages was determined by reference to defined categories of claimant, such as washers, fishers, or farmers, resident within defined distances from the river.[26] Victims would be entitled to the amounts provided for in the matrix on the basis of an application online, without the full evidential support which would be required to prove a claim in the local courts. The online platform was only available to lawyers, so applicants had to be represented.

The system was optional and was described by the Court as being "complementary" to civil and other proceedings.[27] If a victim claimed to have suffered greater loss than the simplistic matrix figure, then they were free to pursue the claim in another form. However, if a victim did wish to take advantage of the Novel System, then they had to sign a waiver. Under this waiver, the victim agreed not to pursue any further claim against not only the Brazilian Companies, but also undertook not to pursue claims abroad.

The Court noted that there were several issues relating to the Novel System, which included: (1) it did not apply to some 1,500 of the claimants; (2) it produced "rough justice" in providing for compensation in fixed amounts in accordance with a matrix which would not reflect the full entitlement of particular victims; (3) consequently, it recognised that victims should be free to seek to pursue their claims in court proceedings; (4) it involved participants signing a waiver (in

[23] Judgment of Judge Mario Franco Junior of 1 July 2020 establishing the Novel System, referred to by the Court as "the Baixo Guandu Judgment" – *Municipio de Mariana* (n7) [68].
[24] ibid [68(1)].
[25] ibid.
[26] ibid.
[27] ibid [68(2)].

apparently wide terms) which appeared to extend to foreign proceedings against BHP England and BHP Australia; (5) it was subject to nullification challenges and appeals by Brazilian Companies who sought to exclude water losses from its scope; the prospect of success of those challenges was uncertain; and (6) it did not involve an adjudication of legal rights under Brazilian Law; it created, rather than determined, rights to the compensation for which it provided; it said nothing about "full redress" in the sense of entitlement under Brazilian law.[28]

C. Consideration

It was against the backdrop of this information that the Court considered whether this application was, as BHP had claimed, pointless, wasteful, and an abuse of process. In answering this question, the Court first considered it relevant to consider the timescale involved in this dispute.[29] The Court noted that even if the claims were consolidated, there was real uncertainty as to when it would be resolved, "with a real prospect that it may take more than a decade … if there were no consolidation it would be longer".[30] Whilst delay is normally a stage two factor, the Court found that it was a relevant initial factor, as the relevant foreign proceedings may not conclude in any binding resolution of any of the parties' rights and obligations.[31]

The Court also held that the English proceedings were not oppressive, as the defendants were not parties to any of the Brazilian proceedings, except in a few limited instances.[32] Further, the Court was not discouraging the claimants from engaging with the opportunities for redress offered to them in Brazil but noted that the questions of adequacy surrounding those systems of redress meant that the English proceedings had not become pointless or wasteful.[33]

On the issue of separate foreign proceedings, the Court also rejected the argument that it would be "nonsensical" to have a separate trial of the claims against BHP Australia.[34] Even the risk of separate foreign irreconcilable judgments was held

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[28] ibid [74(6)].
[29] ibid [350].
[30] ibid.
[31] ibid.
[32] ibid [235].
[33] ibid [236].
[34] ibid [370].

to be an entirely irrelevant consideration. The reason for this was that, if the *forum non conveniens* application of BHP Australia were to fail, and the action proceeded against BHP England alone in England, the strong likelihood was that the claimants would not sue BHP Australia in Brazil.[35] Logically, there would be no advantage in the claimants additionally seeking relief against BHP Australia, in Brazil, if identical relief were to the same extent available in proceedings against BHP England, which were already being pursued. The *forum non conveniens* application was dismissed, and the appeal in respect of it allowed, as the Court found that the evidence did not establish that Brazil was clearly and distinctly a more appropriate forum for the case than England.[36]

Further, the Court noted that it had discretion to order a stay to await the outcome of foreign proceedings as part of its case management powers pursuant to section 49(3) Senior Court's Act 1981.[37] It will, however, only exercise this discretion in rare and compelling circumstances.[38] Having rejected the arguments regarding abuse of process, the Court found that, "a stay is not in the interests of justice in this case, which dictate that the claimants should be permitted now to proceed with the claims in the action".[39]

IV. Comment

The Court of Appeal decision highlights that UK-headquartered multinational companies are not immune from the actions of their overseas subsidiaries and joint ventures. Although the merits of the actual claims are yet to be determined, this decision does widen the scope for forum shopping as a means of holding larger multinational accountable. This decision also endorses the recent trend, seen in cases such as *Vedanta Resources PLC v Lungowe* and *Okpabi and others v Royal Dutch Shell Plc* which determined that a parent company could be liable for the actions of its overseas subsidiary.[40] There are five salient points which can be gleamed from the case, in relation to cases involving forum shopping, multiple claimants, and environmental damage, which have been outlined below.

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[35] ibid [358].
[36] ibid [345].
[37] ibid [373].
[38] See: *Reichhold Norway ASA v Goldman Sachs International* [1999] EWCA Civ 1703, [2000] 1 WLR 173, 186C.
[39] *Município de Mariana* (n7) [374].
[40] *Lungowe v Vedanta* (n1); *Okpabi v Royal Dutch Shell* (n1).

A. Unmanageable Claims

The Court of Appeal determined that the High Court had erred in its determination that: "[i]n all the circumstances, I am entirely satisfied that these claims would not be merely challenging but irredeemably unmanageable if allowed to proceed any further in this jurisdiction."[41] The trial court was wrong to determine that unmanageability amounted to an abuse of process *per se*, without providing more compelling information to support this view. The Court of Appeal, however, stressed that unmanageability did not fall within any of the abusive mischiefs identified by authorities, and it did not, "amount to a misuse of the court process in a manner that would be manifestly unfair to the parties, nor would it bring the administration of justice into disrepute among right-thinking people".[42]

The Court found that it would be wrong to conclude that court processes were being abused on the basis of unmanageability alone, whether due to parallel proceedings, or because of the complications implicit in the case itself. The Court noted that if there was unmanageability in the case, then this could be addressed, such as through using the court's case management powers.[43] On this point, Lord Justice Underhill, Lord Justice Popplewell and Lady Justice Carr quoted Lord Briggs in *Mastercard v Merricks* [2020] UKSC 5, [2020] 1 WLR 1033:

> The incompleteness of data and the difficulties of interpreting what survives are frequent problems with which the civil courts and tribunals wrestle on a daily basis. The likely cost and burden of disclosure may well require skilled case-management. But neither justifies the denial of practicable access to justice to a litigant or class of litigants who have a triable cause or action, merely because it will make quantification of their loss very difficult and expensive.[44]

The Court stressed that unmanageability could, in theory, support a claim of abuse, but this would require additional evidence, such as deliberate acts by the claimant which had vexatious consequences.[45] That could amount to a misuse of court process, but no such evidence had been advanced in this case.

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[41] *Município de Mariana* (n2) [104]; *Município de Mariana* (n7) [152].
[42] ibid [184].
[43] ibid [185].
[44] *Mastercard v Merricks* [2020] UKSC 5, [2020] 1 WLR 1033 [74]; *Município de Mariana* (n7) [186].
[45] *Município de Mariana* (n7) [187].

The Court also rejected the reliance by the defendants on *Lloyd v Google LLC* which involved a class representative action.[46] However, the Court stressed that in that case, Lord Leggatt considered opt-in class actions, but never suggested that the use of group litigation for claimants with low-value claims who had opted in was in some way unmanageable, let alone abusive.[47]

Ultimately, the Court found that any risk of unmanageability, or "utter chaos" as the judge put it, due to the existence of proceedings in Brazil, was not clear and obvious.[48] If some individual claims need to be reviewed down the line, these can be addressed individually, or by category of claimant. The potential for such issues arising could not be said to make them abusive on the grounds that the claims were unmanageable.

B. *Forum Non Conveniens*

The Court stressed that *forum non conveniens* factors (such as the risk of inconsistent judgments or language-related difficulties) were, ordinarily, matters to be confined to jurisdictional challenges.[49] Although there may be cases where *forum non conveniens* factors could be used to provide evidential support that proceedings had been brought for the improper collateral purpose of unfair harassment, the case at hand did not make out such an argument.

As far as BHP England was concerned, the risk of irreconcilable judgments and other *forum non conveniens* factors should not have played any part in the trial judge's finding of abuse. This is because those matters did not provide a proper basis for precluding the claimants from pursuing otherwise arguable claims against an English-domiciled defendant. Similarly, for BHP Australia, the appropriateness of BHP Australia being sued in the English courts had to be judged by reference to *Spiliada Maritime Corp* v *Cansulex Ltd* (The Spiliada).[50]

As it was put by the claimants, in the event that England was established as the appropriate forum, it would be nonsensical for the proceedings to be struck out

[46] *Lloyd v Google LLC* [2021] UKSC 50, [2021] 3 WLR 1268.
[47] *Município de Mariana* (n7) [189].
[48] ibid [194].
[49] ibid [196]–[197].
[50] *Spiliada Maritime Corp* v *Cansulex Ltd* (The Spiliada) [1986] UKHL 10, [1987] AC 460.

as being abusive by reference to the same forum considerations.[51]

C. Viable Claims Are Not "Pointless and Wasteful"

The Court accepted that proceedings can be abusive on the basis that, objectively assessed, they are (clearly and obviously) pointless and wasteful.[52] Here, a central contention put forward by the defendants was that the English proceedings were pointless and wasteful, given that the claimants could and would obtain "full redress" in Brazil.[53] They continued this argument by claiming that it was a legitimate exercise for the Judge to compare the benefits of litigation in England with the benefits of litigation (or other compensation schemes) in Brazil.[54]

The Court of Appeal, however, found that in so doing the trial judge's conclusions in relation to the manageability of the litigation affected his assessment of whether the claims were pointless and wasteful. The Court noted: "[i]n the light of our finding on manageability, however, the Judge's route to a finding of abuse, and his resulting conclusion, must fall away. We must therefore consider the issue afresh".[55]

The Court of Appeal noted that conducting a comparative assessment of the relative benefits and disadvantages of litigation/compensation schemes in Brazil, compared to a determination from the English courts, was not suitable for summary determination given the extensive factual and expert issues, many of which were in dispute.[56]

D. Individual Claimants

Finally, the Court considered the position of individual claimants. It stressed that a global approach to assessing abuse of process could not be justified where

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[51] *Municipio De Mariana* (n7) [206].
[52] ibid [175].
[53] ibid [207].
[54] ibid [208].
[55] ibid [209].
[56] Christopher Boyne, Patrick Swain, Julia Caldwell, Tom Cornell, 'Court of Appeal Allows Claimants' Appeal in Municipio de Mariana v BHP Group Plc' (Debevoise & Plimpton, 4 November 2022) <www.debevoise.com/insights/publications/2022/11/court-of-appeal-allows-claimants-appeal> accessed 15 May 2023.

claimants differed in material respects.[57] The Court found that the trial judge erred in adopting such an approach, and was wrong to treat the claimants as a "single indivisible group against whom the application must succeed or fail altogether", rather than treating the application as constituting an application against each claimant, with the position of each claimant or group of claimants being considered individually.[58]

E. Environmental Damage

It should also be noted that throughout the decision, the Court was acutely aware of the fact that this was a case involving environmental disaster, and the effects of harmful corporate actions on civilians and communities.[59] The very nature of the case, involving such a large and difficult to manage group of claimants, was reflective of the very damage suffered. This was part of the reasoning in dismissing the High Court case.[60] The Court of Appeal noted that Group Litigation Orders (GLOs) are common in environmental damage cases.[61] GLOs represent an order available to English courts, which permit a number of claims which give rise to common or related issues to be managed collectively. Given the Renova scheme in place, and the fears of irreconcilable judgments, the trial court found that, even if liability were established, the claimants would be embroiled in a GLO "the management of which would almost certainly be fatally impracticable [...] and which would foul the progress of parallel proceedings in Brazil".[62] This fear of GLOs creating ripples of manageability issues and irreconcilable judgements, is particularly damaging to the potential for success of environmental damage actions, as GLOs are used regularly in environmental cases, as Coulson LJ commented in *Jalla* v *Shell International Trading and Shipping Co Ltd*.[63]

In rejecting these arguments around unmanageability in an action which resulted from mass environmental damage, the Court has also provided footing for potential future GLO actions, which will have to be assessed as individual claimants, rather than merely as an indivisible group. Such group claimants may also be inclined to engage in forum shopping directed at the English courts, despite claims of "adequate"

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[57] *Municipio De Mariana* (n7) [216].
[58] ibid [179(5)].
[59] ibid [1].
[60] *Municipio De Mariana* (n2) [127].
[61] *Municipio De Mariana* (n7) [140].
[62] *Municipio De Mariana* (n2) [135].
[63] *Jalla* v *Shell International Trading and Shipping Co Ltd* [2021] EWCA Civ 63, [2021] 1 WLUK 268 [49].

compensation schemes being established at the situs of the environmental disaster itself.[64]

V. Conclusion

Ultimately, this decision shed further light on to the courts' approach to claims of abuse of process, particularly in relation to class action claims. The practical implications of this guidance include:

> (1) Where a claim is 'properly advanced', the fact that it may be 'unmanageable' for the court does not make it an abuse of the court's process. (2) Forum non conveniens factors do not form part of the court's analysis on abuse of process. (3) A 'properly arguable' claim may be abusive if it is clearly and obviously 'pointless and wasteful'. (4) The 'manageability' of the litigation should not influence the court's assessment of whether a properly arguable claim is pointless or wasteful. (5) In group litigation, the assessment of whether a claim is 'pointless and wasteful' must be made in relation to each individual claimant or group of claimants, not the claimants as an 'indivisible group'.[65]

[64] *Municipio De Mariana* (n7) [8(2)(b)].

[65] Harriet Campbell, 'Court of Appeal gives go ahead for Fundão Dam class action (Municipio de Mariana v BHP Group)', (Stephenson Harwood, 14 July 2022) <www.shlegal.com/news/court-of-appeal-gives-go-ahead-for-fund%C3%A3o-dam-class-action-(municipio-de-mariana-v-bhp-group)> accessed 10 November 2022.