Muncipio de Mariana v BHP Group Plc (formerly BHP Billiton Plc) [2021] EWHC 146 (TCC)

26 February 2021

Turner J refused the claimants' application for permission to appeal his order to strike out their mass tort claims before the English courts. The decision can be found here. The claims were brought by over 202,000 individuals and arose from the collapse of the Fundão Dam in Brazil. Our summary of the decision to strike out the claims as an abuse of process can be found in our *"Civil Litigation Review: 2020"*.

Turner J noted that "*a judge responding to an application for permission to appeal his own judgment must be particularly sensitive to the perception that he is marking his own homework*", but he emphasised that his approach remained, as the parties are fully entitled to expect, entirely objective.

Exceptionally, the judge delivered a 26-page judgment explaining his reasons for refusing permission to appeal. This marked a departure from the usual practice of filling in Form N460 with brief reasons for allowing or refusing permission, which the judge considered appropriate given the complexity of the case.

Although the claimants' draft grounds of appeal are "*many and various*", Turner J held that the point of central importance was that "*these claims would be not merely challenging but irredeemably unmanageable if allowed to proceed any further in this jurisdiction*". Further, he held that it seems impossible to imagine a situation in which the pursuance of such "*irredeemably unmanageable*" proceedings could be categorised as anything other than an abuse of the process of the court. He held that if the claimants are unable to surmount this hurdle then "*they can entertain no reasonable hope to establish that they have either a real prospect of appellate success or that any other compelling reason arises for an appeal to be heard*".

Turner J rejected the specific grounds of appeal for the following reasons (*inter alia*):

- It was both appropriate and convenient to address the issue of abuse of process before considering the Article 34 and forum non conveniens issue. In particular, there would be no point in determining whether the claims should be stayed on

jurisdictional grounds when a full review of the full circumstances meant that the claims should, in any event, be struck out on abuse of process grounds.

- More fundamentally, the judge held, the order in which the issues were addressed was immaterial to the outcome. The claimants lost on all of these issues, as they would have done regardless of the sequence of analysis.

- There is no error of law involved in taking into account the risk of cross-contamination in parallel proceedings in the context of an abuse of process application. The judge held that the assertion that the judgment "proceeded on an incorrect factual footing" is unsupported by a single example of any error of primary fact. He held that the claimants were attempting to re-run the arguments which failed at first instance by way of challenge to the evaluative judgment which was adverse to their case.

- The court is not only entitled but duty bound to consider, where relevant, the impact upon the courts of claims alleged to constitute an abuse of process.

- Throughout his judgment, Turner J emphasised that an appeal court should not be drawn into substituting its own views for those of the first instance judge where the task he or she was undertaking was in the nature of an evaluative assessment. He found that there was no suggestion in any of the draft grounds that the judgment contains any error of primary fact as opposed to secondary inference.

Generally, the judge criticised the claimants' draft grounds of appeal for lack of compliance with PD52C. In particular, the draft grounds of appeal comprised "*no fewer than 70 paragraphs spread out over 39 closely typed pages*", which is "*the very antithesis of the conciseness required by the Practice Direction*", and the document was "*replete with material which is plainly intended to be excluded under para 5(2) of PD52C.*" Moreover, the judge noted that the claimants' approach in this case did not amount to a matter of "*mere procedural non-compliance*" and that their "*bloated draft grounds serve*[d] *only to obfuscate rather than to illuminate what may perceive to be the merits of their challenge*."

Costs. The defendants were awarded their costs, which were over £16 million, subject to detailed assessment. An interim costs order was made requiring the claimants to pay 50% of that sum within 14 days.

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