# Court of Appeal Allows Claimants' Appeal in *Muncipio de Mariana v BHP Group Plc*

**4 November 2022**

The Court of Appeal has allowed the Claimants' appeal in the case of *Município de Mariana (and the claimants identified in the schedules to the claim forms) v BHP Group UK Ltd (formerly BHP Group plc) and BHP Group Ltd* [2022] EWCA Civ 951. Therefore, the Claimants (around 202,600 individuals, corporate and community claimants) will now be able to pursue their group litigation against BHP Group UK Ltd ("BHP UK") and BHP Group Ltd ("BHP Australia") for damages caused by the collapse of the Fundão Dam in Brazil. Our summary of the facts and analysis of the High Court decision to strike out the claims as an abuse of process can be found in our "*Civil Litigation Review: 2020*" here. Our further update on the High Court's refusal to grant permission to appeal that decision can be found here.

The Court of Appeal judgment constitutes a significant departure from Mr Justice Turner's decision at first instance in which he had struck out the group damages claim as an abuse of process. Mr Justice Turner had found that the claims were an abuse of process and that any English action (if allowed to proceed) would be *"irredeemably unmanageable."* He had also concluded that it seemed 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."*

**The Court of Appeal Has Allowed the Claimants' Appeal on the Basis That the Claims Do Not Constitute an Abuse of Process.** The Court of Appeal, in a lengthy judgment of 107 pages, has now issued guidance in respect of the limited circumstances in which a claim may be struck out as an abuse of process due to its size and complexity.

- **Unmanageable Claims Are Not Abusive per Se.** The Court of Appeal made it clear that the High Court had erred in its findings that unmanageability was a sufficient basis for a finding of abuse of process without more. The Court of Appeal explained that unmanageability does not fall within any of the abusive mischiefs identified in the authorities. In particular, it does 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. The fact that the litigation would place a significant burden on the courts could not be an

***independent*** basis for a finding of abuse. Even if the proceedings were unmanageable due to complications arising out of parallel proceedings in Brazil or because of other procedural complexities, it would be wrong to conclude (for that reason alone) that the court process was being misused, whether vexatiously, oppressively or otherwise. The way to address issues of manageability could be addressed through other ways such as a procedural stay as part of an exercise of the court's case management powers. The Court noted that this approach was entirely consistent with the decision in *Mastercard v Merricks* [2020] UKSC 5, [2020] 1 WLR 1033, in the context of collective proceedings and in particular with Lord Briggs' statement in that case that: *"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."*

Although a finding of abuse by reference to unmanageability was not ruled out as a matter of principle, this would need to be supported by further evidence, for example, that the claimant had deliberately made the litigation unmanageable with vexatious consequences for the defendant, thus misusing the court process; there was no such suggestion in the case at hand. The Court also noted that the case of *Lloyd v Google LLC* [2021] UKSC 50; [2021] 3 WLR 1268 (involving a class representative action) did not assist the Defendants in this case. In particular, Lord Leggatt in that case performed a high-level overview of the different methods of redress available in group actions, collective proceedings and representative actions. He further identified that GLO proceedings, which are "opt-in," required quantum of loss to be proved in each individual case. Where the loss in each case was small, eligible individuals might be less likely to opt in, and the litigation might be rendered uneconomic. However, Lord Leggatt did not suggest that the use of group litigation for claimants with low-value claims who had opted in was in some way unmanageable, let alone abusively so.

- ***Forum Non Conveniens* Factors Should Be Confined to Jurisdiction Challenges.** The Court of Appeal explained that factors such as the risk of inconsistent judgments and other difficulties such as language-related difficulties (i.e. where the documents are in a foreign language or the witnesses' first or only language is a foreign one) were, ordinarily, matters to be confined to jurisdictional challenges in the case at hand under *forum non conveniens* factors (so far as BHP Australia was concerned) or the recast Brussels Regulation (so far as BHP UK was concerned). The Court noted that there may be some cases where *forum non conveniens* factors may provide some evidential support for an argument that the proceedings had been brought for the

improper collateral purpose of unfair harassment, but the case at hand was not one of them.

- **Viable Claims Are Not "Pointless and Wasteful".** The Court considered that the Judge's conclusions in relation to the manageability of the litigation affected his assessment of whether the claims were pointless and wasteful. The Court of Appeal also noted that the exercise of conducting a comparative assessment of the relative benefits and disadvantages of litigation/compensation schemes in Brazil compared to what was on offer in the English courts was not suitable for summary determination given the extensive factual and expert issues, many of which are in dispute.

- **Position of Individual Claimants.** Where the position of some claimants differs in material respects to the position of the other claimants, then a global approach is not justified when assessing whether the claims at issue are abusive. The Court of Appeal stated that the Mr Justice Turner had been wrong to adopt a global approach on the facts and 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."* A global approach could not be justified on the facts by placing reliance on *AB v John Wyeth & Brother* (No 4) [1994] PIQR 109, given that, in that case, there were no material distinctions between the positions of the claimants in question (unlike in the case at hand).

Applying the above principles to the facts, the Court of Appeal determined that the claims were not clearly and obviously pointless or wasteful and should not be struck out. There was a *"realistic prospect"* of a trial yielding a *"real and legitimate advantage"* for the Claimants such as to outweigh the disadvantages for the parties in terms of expense and the wider public interest in terms of court resources. In particular, the remedies available to the Claimants in Brazil were *"not so obviously adequate that it [could] be said to be pointless and wasteful to pursue proceedings in [England]."*

The Court concluded that the English proceedings were not oppressive either. In particular, the Defendants were not involved as parties to any of the proceedings in Brazil (save in a few limited instances) and they were not sued there by any of the Claimants. Moreover, the burden on the English courts could not be said to be disproportionate given that the claims at issue were *"arguable claims for significant sums."*

## The Court of Appeal Has Refused the Defendants' Applications to Stay the Proceedings Pending the Outcome of Related Proceedings in Brazil

- **Stay against BHP UK under Recast Brussels Regulation.** The Court of Appeal also held that Mr Justice Turner was wrong to conclude that it would be appropriate to stay the claims against BHP UK pursuant to Article 34 of the recast Brussels Regulations, due to the related proceedings pending in Brazil. A stay under Article 34 is discretionary, but as the Court of Appeal pointed out, five conditions must first be satisfied before a stay is granted. *First*, jurisdiction must be based on Articles 4, 7, 8 or 9. *Second*, there must be pending action before a third state court. *Third*, the two actions must be related. *Fourth*, judgment must be expected from the court of the third state which is capable of recognition (and enforcement if applicable). *Finally*, it must be necessary for the proper administration of justice for the stay to be granted. The Court of Appeal considered afresh the fifth point and ultimately decided that a stay was not necessary as it would serve no useful purpose in circumstances where the claim against BHP Australia would proceed.

- **Stay against BHP Australia at Common Law.** The Court of Appeal also held that Mr Justice Turner was wrong to conclude that it would be appropriate to stay the claims against BHP Australia on *forum non conveniens* grounds. The Court of Appeal applied the well-established two-stage test in *Spiliada* of (1) whether there is another available forum which is clearly and more distinctly more appropriate for the case to be tried; and (2) if there is another available forum, whether there are circumstances which nevertheless require that a stay should not be granted, such as where there is a real risk that the claimant will not obtain justice in the foreign forum.

  The Court considered that the application for a stay at common law must fail at the second stage because the Claimants had established a real risk that they could not obtain substantial justice against the Defendants in the only realistic alternative forum identified by the Defendants. The Court of Appeal accepted that Mr Justice Turner had applied the wrong test at stage two by asking whether the Claimants would not obtain substantial justice, rather than whether there was a real risk of them not doing so. He also erred in taking into account the redress potentially available against other parties in Brazil.

- **Case Management Stay.** Finally, the Court of Appeal held that a case management stay would not be in the interests of justice and would, in any event, be inconsistent with the recast Brussels Regulation. A stay on case management grounds will only be exercised in rare and compelling circumstances (*Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173) and cannot be done in a manner that would be inconsistent with the recast Brussels Regulation.

**Commentary**. The Court of Appeal has concluded that the "inherent unmanageability" of a large and complex group claim is not a ground to strike out a claim as an abuse of process. Nevertheless, the decision leaves the High Court with a challenging role in how

to navigate this enormous case to trial. The parties and the court will need to devise efficient and robust case management solutions to deal with the huge number of claimants, the disparate nature of the claims which they bring, the significant contrasts between Brazilian procedural law and the Civil Procedural Rules, and the complex history of the proceedings in Brazil and the availability of alternative redress in Brazil. The Court of Appeal has suggested group litigation orders, the selection of lead claimants and the trial of preliminary issues as potential case management solutions.

The decision is also a good reminder that UK-headquartered multinational companies may find themselves the subject of litigation in England and Wales due to the activities of their directly and indirectly owned overseas subsidiaries and joint ventures. The recent decisions of *Vedanta Resources PLC v Lungowe* (2019) and *Okpabi and others v Royal Dutch Shell plc and another* (2021) show that it is a difficult exercise to resist these claims at the jurisdictional stage.

* * *

Please do not hesitate to contact us with any questions.

**LONDON**

Christopher Boyne
cboyne@debevoise.com

Patrick Swain
pswain@debevoise.com

Julia Caldwell
jcaldwel@debevoise.com

Tom Cornell
tcornell@debevoise.com

Catalina Diaconeasa
cdiaconeasa@debevoise.com

Luke Duggan
lduggan@debevoise.com