

GROUP LITIGATION STRUCK OUT AS ABUSE OF PROCESS

MUNICÍPIO DE MARIANA & OTHERS v BHP GROUP PLC & ANOTHER [2020] EWHC 2930 (TCC)

In a landmark [judgment](#), the High Court has today struck out as an abuse of process a claim brought by over 200,000 Brazilian claimants against the English and Australian holding companies of a global natural resources group. The judgment provides a detailed analysis of recent case law in a rapidly-developing area and will be of keen interest to multinational corporates.

Background

In November 2015, the Fundão dam in south-eastern Brazil collapsed, causing loss and damage on a large scale. The dam was owned and operated by a Brazilian-incorporated joint venture between Vale SA and a Brazilian subsidiary of the BHP group.

Shortly after the collapse, legal proceedings were started in the Brazilian courts, including what were in essence two very large group actions. In addition, a mechanism has been established to provide redress to affected individuals and communities. Much of the Brazilian litigation remains live.

The claims in the English court were started in 2019 and were governed by Brazilian law. They were brought by individuals, companies, municipalities and institutions who said they suffered loss as a result of the dam collapse. The defendants to the claim were BHP Group plc and BHP Group Ltd, respectively English and Australian companies which sit at the head of the BHP group. BHP Group Ltd is the ultimate owner of the Brazilian company which has a stake in the owner/operator of the dam.

The challenge to the English court's jurisdiction

The defendants denied liability and argued that the claims should be struck out as an abuse of process or, alternatively, stayed on various grounds. The defendants' applications proceeded on the basis that everything about the claims related to Brazil, and that to permit English litigation to proceed alongside existing litigation in Brazil would risk significant delays and complications in both countries with no discernable benefit to the claimants.

In a detailed judgment, Mr Justice Turner found for the defendants on all grounds.

Abuse of process

The Judge struck out the claims as an abuse of process, holding that the claimants' tactical decision to launch claims in England that were closely related to existing proceedings in Brazil was a recipe for expense, confusion and delay. It would create the risk of irreconcilable judgments in the different proceedings and complicate decisions on the key issues. It would bring no obvious advantage to the claimants, many of whom were already parties to the Brazilian litigation and/or had obtained redress there. And it would be manifestly unfair to the defendants too. Were the claims not struck out, their consequences could "*foist upon the English courts the largest white elephant in the history of group action*".

In case he was wrong on abuse of process, the Judge said that he would have ordered stays of the claims against BHP Group plc and BHP Group Ltd on the following distinct bases.

Related claims under the Recast Brussels Regulation

Because BHP Group plc is domiciled in England, the English court's jurisdiction to hear claims against it are determined in accordance with the Recast Brussels Regulation. Article 34 of the Regulation permits a member state court (which includes the English court for these purposes until the end of the Brexit transition period) to order a stay in certain circumstances where a related claim is already on foot in a non member state. The Judge was satisfied that the relevant Brazilian proceedings were related, that there was a "*real and acute*" risk of irreconcilable judgments if the English claims were allowed to proceed and that any Brazilian judgment would be capable of enforcement in England. In the circumstances, he found that a stay would be necessary for the proper administration of justice.

England not the proper forum

Because BHP Group Ltd is domiciled outside the EU, the English court's jurisdiction to hear claims against it is determined according to the common law. On an application of the "forum non conveniens" principle, the Judge found that Brazil, not England, was the natural forum for the dispute: the relevant events took place there, the governing law was that of Brazil, most of the parties and witnesses were there, and the Brazilian court was already well apprised of the issues. The Judge discounted any (theoretical) risk of irreconcilable judgments that might arise from staying the English claims against one defendant only by noting that both defendants had agreed not to contest the jurisdiction of the Brazilian court in the event a relevant claim was brought there. The Judge rejected the claimants' argument that a stay was nonetheless inappropriate because substantial justice would not be done in Brazil. On the suggestion, for instance, that the claimants would face long delays in obtaining redress in Brazil, he noted that the situation was hardly likely to be any better were the claims to proceed in England.

Finally, on the defendants' alternative application for a stay of the claims for case management reasons, the Judge noted that his basis for ordering such a stay would be so closely linked to his findings on the other grounds of the application as to have no independent value. It would stand or fall depending on any appeal court's view of his earlier findings.

Implications of the judgment

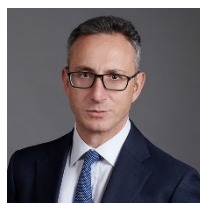
The judgment provides a useful examination of recent case law in this area, including the Supreme Court's important decision in *Vedanta v Lungowe* [2019] UKSC 20. The Judge's detailed analysis and application of those authorities, while necessarily focussed on the particular facts of this case, will make the judgment an essential reference not just for potential defendants but for those advising claimants in what has become an industry in its own right.

Slaughter and May acted for the successful defendants. We are a market-leader in complex commercial litigation. We have particular expertise in large group actions and are instructed in some of the largest proceedings currently before the courts and the Competition Appeal Tribunal.

CONTACT



RICHARD SWALLOW
PARTNER
T: +44 (0)20 7090 4094
E: Richard.Swallow@slaughterandmay.com



EFSTATHIOS MICHAEL
PARTNER
T: +44 (0)20 7090 4313
E: Efstathios.Michael@Slaughterandmay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650

Published to provide general information and not as legal advice. © Slaughter and May, 2020.
For further information, please speak to your usual Slaughter and May contact.

www.slaughterandmay.com

569342367