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Environmental Claims Against UK Parent Companies: Emerging Trends and the Court of Appeal Ruling in the Fundão Dam Class Action

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A number of significant and recent decisions in the English courts highlight the developing trend for environmental claims, or claims engaging a broader range of ESG issues, against UK parent companies on the basis of alleged acts or omissions by overseas subsidiaries. With some exceptions, the English courts have been reluctant to dispose of these claims at an early stage in the proceedings. In particular, following jurisdiction challenges, the Supreme Court has found it at least arguable that UK parent companies owed a common law duty of care and/or a statutory duty to the claimants for environmental damage allegedly caused by overseas subsidiaries.

Most recently, the Court of Appeal ("**CoA**") held that a claim commenced by Municipio de Mariana (a municipal authority in Brazil) and 202,599 other claimants in relation to the 2015 collapse of the Fundão Dam in Brazil (the "**Fundão Claim**") can proceed in the English courts. In particular, the CoA held that it should not be struck out as an abuse of process, or stayed in favour of proceedings already underway in Brazil, thereby overturning the judgment of the High Court ("**HC**").[1] That decision is subject to an application for permission to appeal to the Supreme Court, but in the meantime an eight-week trial of liability issues in the Fundão Claim has been fixed for April 2024, following a hearing in the High Court in December 2022.

In this article we first explore some of the key recent decisions, before discussing the Fundão Claim and its implications in more detail.

Overview of key decisions

The CoA's judgment in the Fundão Claim (the "**Appeal Judgment**") is an important decision in a recent line of cases commenced in the English courts seeking redress for the actions of overseas subsidiaries that allegedly caused environmental damage in developing countries. Such cases generally rely on establishing that a duty of care (generally in tort, but potentially also as a result of statute) is owed by the parent company to the claimants, such that the parent is said to be liable for the damage caused by their subsidiaries.

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[1] *Re Fundão Dam Disaster: Município de Mariana (and the claimants identified in the schedules to the claim forms) v BHP Group UK Ltd (formerly BHP Group plc) and another company* [2022] EWCA Civ 951. The appeal was heard by Lord Justice Underhill (Vice-President of the Court of Appeal (Civil Division)), Lord Justice Popplewell and Lady Justice Carr.

For example, in *Vedanta Resources Plc and anor v Lungowe & Ors*[2] the claimants sought damages from Vedanta (the UK-domiciled parent company) for environmental damage to farmland in Zambia allegedly caused by Vedanta's Zambian subsidiary, KCM. In determining the jurisdiction challenge brought by Vedanta, the Supreme Court decided in 2019 that it was at least arguable that Vedanta owed a common law duty of care to the claimants. The decision proceeded on the basis that, among other things, Vedanta had exercised control over the activities of KCM, publicly stating on a number of occasions its oversight of its subsidiaries and commitment to addressing environmental risks in KCM's mining infrastructure.[3] For similar reasons, the claim for breach of duties owed under Zambian statute was also held to be arguable.[4]

Similar issues came to the fore again in the 2021 Supreme Court decision concerning a jurisdiction challenge in *Okpabi & Ors v Royal Dutch Shell plc & Anr*.[5] In that case, over 40,000 claimants alleged that numerous oil spills had occurred from Shell oil pipelines and associated infrastructure operated in the vicinity of the claimants' communities. It was alleged that these oil spills had caused widespread environmental damage, including serious water and ground contamination. The Supreme Court reaffirmed the guidelines set down in *Vedanta*, holding that there was a serious issue to be tried as to whether the parent company (Royal Dutch Shell plc) owed a duty of care to the claimants because it exercised a high degree of control, direction and oversight of its Nigerian subsidiary's pollution and environmental compliance, as well as the operation of its oil infrastructure.[6]

Both *Vedanta* and *Okpabi* were brought on behalf of a large number of individual claimants who claimed to have suffered loss as a result of the alleged environmental damage. However, in England a true 'class' action, where claimants with certain characteristics are automatically included in the claim and damages are assessed on an aggregated class-wide basis, can only be brought in relation to competition law claims.[7] The importance of this distinction is evident in the Court of Appeal's decision in the case of *Jalla & Anr v Shell International Trading & Anr*[8] in which two individuals attempted to bring a 'representative' action under Civil Procedure Rule ("**CPR**") 19.6(1) on behalf of over 28,000 Nigerian individuals and communities who had allegedly suffered loss as a result of an oil spill. The Court of Appeal held that such an action could not proceed on a representative basis unless all of the claimants had the "same interest" in the claim. In *Jalla*, it was held that the claimants did not have the "same interest" in the claim as they may each have been affected by the oil spill in different ways and the principle of mitigation would likely require an assessment of the individual circumstances of each claimant.[9]

Against this emerging backdrop of ESG-related group litigation, we focus below on the Fundão Claim, which is the most recent example of the English court being prepared to entertain such a claim against a UK parent company. We then offer some views on the implications of the Appeal Judgment and the outlook for this emerging type of group litigation.

Fundão Dam: background to the Claim

When the Fundão Dam in Brazil collapsed on 5 November 2015, it released around 40 million cubic metres of tailings from iron ore mining, killed 19 people, destroyed entire villages, and impacted numerous individuals and communities.[10] The dam was owned and operated by Samarco Mineração SA ("**Samarco**"), a Brazilian joint venture between Vale SA ("**Vale**") and BHP Brasil Ltda ("**BHP Brazil**"). BHP Brazil was

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2 [2019] USKC 20.
3 *Vedanta*, paragraphs 55-62.
4 *Vedanta*, paragraphs 63-65.
5 [2021] UKSC 3.
6 *Okpabi*, paragraphs 29 & 153.
7 In all other types of claims, each individual claimant is required to prove its loss on the balance of probabilities and defendants may raise defences specific to each claimant.
8 [2021] EWCA Civ 1389.
9 This is in contrast to the specific statutory provisions permitting class actions in competition law claims – see Competition Act 1998, Section 47B and our client alerts on the UK Government's reforms of collective redress and on the Supreme Court's decision in *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51.
10 Appeal Judgment, paragraph 1.

itself ultimately owned by two BHP holding companies, BHP Group (UK) Ltd ("**BHP England**", domiciled in England) and BHP Group Ltd ("**BHP Australia**", domiciled in Australia, together "**BHP**").

Following the disaster, a number of claims were commenced in Brazil and a compensation programme was established by Samarco, Vale and BHP Brazil, which was administered by the Renova Foundation.[11] However, the Claimants in these proceedings argue that they were unable to obtain sufficient or timely redress in Brazil for the losses that they have suffered and/or will give credit for any compensation they receive in Brazil.

Unlike other parent company liability claims which have been brought primarily as tort claims pursuant to an alleged duty of care owed under English law,[12] the Fundão Claim was brought against BHP solely on the basis of a breach of statutory duty under Brazilian law.[13]

The Fundão Claim was served on BHP England and BHP Australia in November 2018. Jurisdiction over BHP England arose by virtue of its domicile in England under Regulation (EU) No 1215/2012 ("**Brussels Recast**"); jurisdiction over BHP Australia was established by it carrying on business at offices in England, where the proceedings were served.[14]

Following service of the Fundão Claim, BHP applied:

1. to strike out or stay the Fundão Claims against both BHP entities pursuant to CPR 3.4(2)(b) as an abuse of process, alternatively for them to be stayed on case management grounds pursuant to CPR 3.1(2)(f), in each case because they are pointless, wasteful and duplicative of the collective and individual proceedings and/or judgments in Brazil and/or the work of the Renova Foundation (the "**Abuse Application**" and the "**Case Management Stay Application**", respectively) or, alternatively;
2. to stay the Fundão Claim against BHP England pursuant to Article 34 of Brussels Recast on the grounds that there are pending proceedings in Brazil giving rise to a risk of irreconcilable judgments (the "**Article 34 Application**"); and
3. to stay the Fundão Claim against BHP Australia pursuant to CPR 11(1) on the grounds that Brazil was clearly and distinctly the more appropriate and available forum (the "**FNC Application**").[15]

The Abuse Applications

An English court has the power to strike out a valid claim where there is an abuse of process under CPR 3.4(2)(b). It will usually involve the *"… misuse of [the court's] procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people*".[16]

The categories of abuse of process are varied and not closed. In this case, the CoA identified the most relevant potential category from existing case law as proceedings that are objectively pointless and wasteful, in the sense that the benefits to the claimants from success were likely to be extremely modest and the costs to the defendants in defending the claims wholly disproportionate to that benefit.[17] However, in his judgment of 9 November 2020 (the "**HC Judgment**"), Mr Justice Turner (the "**Judge**") appeared to

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[11] Appeal Judgment, paragraph 6.
[12] See, for example, *AAA v Unilever* and *Okpabi v Shell*.
[13] Appeal Judgment, paragraph 11(1)-(4) and 12.
[14] Appeal Judgment, paragraph 5.
[15] Appeal Judgment, paragraph 7.
[16] Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1981] UKHL 13, [1982] AC 536C, as quoted at Appeal Judgment, paragraph 171.
[17] Appeal Judgment, paragraph 172-175.

find an abuse of process primarily on the basis that proceedings were "*irredeemably unmanageable*" in England.[18] Alternatively, the Judge held that the proceedings would be objectively wasteful.[19]

In reaching this conclusion, the Judge held that there was an "*acute*" risk of duplication and inconsistent judgments between proceedings in England and in Brazil, potentially leading to "*utter chaos*" in the conduct of the litigation in both jurisdictions.[20] He also noted that, although the Claimants had argued that there were difficulties in bringing their claims in Brazil, there were several existing routes for seeking redress in Brazil (including litigation that the Claimants could join and the Renova initiative).[21]

The CoA disagreed with this approach, holding that, even if the proceedings were unmanageable, this would not necessarily mean that the Fundão Claim constituted an abuse of process.[22] The Claimants had brought properly arguable claims against the Defendants as of right and, in line with the Supreme Court's decision in *Merricks*,[23] even if the proceedings were difficult to manage due to complications arising out of parallel proceedings or as a result of procedural complexities, that would not mean that the court process was being misused.[24]

As to the question of irredeemable unmanageability on the facts, the CoA noted that such a conclusion should not be reached at such an early stage.[25] In any event, the Judge identified the complications and the risk of cross-contamination[26] "*in general terms only*"[27] and did not carry out a proper analysis. If he had done, this would have revealed that there was limited overlap with the Brazilian proceedings, as the majority of Claimants were not seeking any remedy in Brazil and none was seeking a remedy against the Defendants in Brazil. The CoA also noted that the Judge had failed to consider each claim individually, noting that it was difficult to see how the claim brought by the 58 larger claimants could be considered unmanageable.[28] The CoA was also critical of the apparent cross-contamination of factors that went to an assessment of *forum non conveniens*, which it held should not have played any part in the Judge's finding of abuse.[29]

Finally, the CoA cautioned against finding that proceedings are objectively pointless or wasteful, unless this is clear and obvious. It accepted that "*the claimants in this case could properly see a legitimate advantage in pursuing the action here for the purposes of improving the chance of a settlement*", and a comparison between the relative merits of proceedings in Brazil and England was not a factor that could render the English proceedings wasteful or which it was possible to consider properly at the summary judgment stage.[30]

The Case Management Stay Application

An English court has 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 and CPR 3.1(2)(f).[31] The Judge held that, if he was wrong to find an abuse of process, it was appropriate to grant a case management

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18 HC Judgment, paragraph 104.
19 HC Judgment, paragraph 105.
20 HC Judgment, paragraphs 79-104.
21 HC Judgment, paragraph 129, and 121-133.
22 Appeal Judgment, paragraph 184.
23 See our client alert on the Supreme Court's judgment in *Merricks*.
24 Appeal Judgment, paragraph 185-186.
25 Appeal Judgment, paragraph 188.
26 The Court of Appeal was notably critical of the Judge's reference to cross-contamination of the Brazilian and English litigation, noting that this was a "*self-coined phrase*" and questioning whether it was "*a legitimate consideration at all*" - Appeal Judgment, paragraphs 150 and 190 respectively.
27 Appeal Judgment, paragraph 190.
28 Appeal Judgment, paragraphs 176, 179(5) and 192-195.
29 "*Such matters do not provide a proper basis for precluding the claimants from pursuing otherwise arguable claims against an English-domiciled defendant*", Appeal Judgment, paragraph 205.
30 Appeal Judgment, paragraph 207-214.
31 Appeal Judgment, paragraph 373.

stay due to the same factors.[32] However, the CoA noted that this discretion should only be exercised in rare and compelling circumstances.[33] In line with its own reasoning, it dismissed the case management stay application, ruling that a stay would not be in the interests of justice in this case and that it would be inconsistent with Articles 4 and 34 of Brussels Recast (as to which, see further below).[34]

The Article 34 Application

For claims, such as this one, commenced prior to the end of the Brexit "transition period"[35] against a UK domiciled defendant (such as BHP England), an English court may stay proceedings pursuant to Article 34 of Brussel Recast where:

1. the claim gives rise to the risk of irreconcilable judgments between the English proceedings and those in another jurisdiction;
2. it is expected that a court in another jurisdiction will give a judgment "*capable of recognition and, where applicable, enforcement*" in England; and
3. granting a stay is necessary for the proper administration of justice.[36]

The Judge held that there was a real risk of irreconcilable judgments due to overlap with the ongoing proceedings in Brazil such that it was appropriate to grant a stay of the Fundão Claim in England.[37] The CoA agreed that there was such a risk, but was not satisfied that a stay of the Fundão Claim was necessary for the proper administration of justice in accordance with Article 34(c). Among other factors, the CoA noted that there was uncertainty in relation to whether the proceedings in Brazil would proceed at all and highlighted the limited overlap between those proceedings and the Fundão Claim.

The FNC Application

Prior to the end of the Brexit "transition period", for claims commenced against a non-UK or EU-domiciled defendant (such as BHP Australia), an English court could stay proceedings on grounds of *forum non conveniens*.[38] This involves a two-part test, considering (a) whether there is another available forum in which it is clearly and distinctly more appropriate for the claim to be heard and, (b) if so, whether there is a real risk that the claimants will not obtain substantial justice in the alternative forum.

In line with his earlier findings, the Judge held that Brazil was clearly an available and more appropriate forum for the Fundão Claim and there was no reason to believe that the Claimants would be unable to obtain justice in Brazil.[39] In contrast, the CoA was critical of the Judge for failing to properly consider whether there was a real risk that the Claimants would be unable to obtain substantial justice in Brazil. The CoA held that the Claimants had established a real risk that a new class action against the Defendants would

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[32] HC Judgment, paragraph 263. The Judge also noted at paragraph 264 that if he was found to have fallen into error in respect of his findings on the other grounds, he "*would expect that [his] conclusion on imposing a case management stay would be unlikely to be sustainable thereafter*".

[33] *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173, 186C, Appeal Judgment, paragraph 373.

[34] A case management stay must not be inconsistent with Brussels Recast, see *Mazur Meda Ltd v Mazur Media GmbH* [2004] EWHC 1566 (Ch), [2004] 1 WLR 2966, Appeal Judgment, paragraphs 203 and 374.

[35] i.e., 31 December 2020.

[36] Article 34, Brussel Recast, as cited at Appeal Judgment, paragraph 239.

[37] HC Judgment, paragraph 234.

[38] Following the end of the Brexit "transition period", the principle of *forum non conveniens* is relevant to a claim against any non-UK domiciled defendant. See Milbank's client alert on English jurisdiction and enforcement post-Brexit.

[39] HC Judgment, paragraphs 247 and 259.

not be available for any of them in Brazil and, therefore, there was a real risk that the Claimants would not be able to obtain justice in Brazil.[40]

Conclusion and outlook

The CoA's judgment makes it clear that the English courts will not be quick to find that claims are an abuse of process simply on the basis of very significant magnitude or complexity. In particular, the CoA went to great lengths to explain that the English courts have extensive case management powers available to manage such claims – including dealing with aspects of a claim by way of preliminary issue and the use of lead cases.[41]

The Appeal Judgment also suggests that the English courts are likely to be receptive to environmental claims brought against UK domiciled parent companies as of right, and will conduct a detailed analysis of the appropriate forum for such claims where it is alleged that they should have been brought in a different jurisdiction (even where those claims are brought under the laws of another jurisdiction).

More broadly, the Appeal Judgment contributes to a growing body of ESG-related decisions where the English courts have rejected attempts by defendants to dispose of such claims at an early stage on a summary basis, or to have them heard elsewhere.

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[40] Appeal Judgment, paragraph 352.
[41] Appeal Judgment, paragraph 134.