Setback for defendants in international environmental group claims

September 20, 2022

Summary

The judgment of the Court of Appeal on 8 July in *Municipio de Mariana v BHP Group (UK) Ltd and BHP Group Limited*[1] [2022] confirms once again the difficulties faced by UK defendants in bringing international environmental tort claims to an early conclusion.

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In previous BCLP blogs - see 'Claims for overseas environmental harm and human rights infringements proceed in England against UK parent companies' and 'Supreme Court affirms in Vedanta a general principles path to hear Zambian environmental claims' - we have highlighted how large environmental group claims against UK registered parent companies relating to incidents and damage suffered elsewhere as a result of their subsidiary operations are becoming more common. Claimant lawyers (who understand the law, the legal process and the funding of these matters in England) are increasingly comfortable with taking on foreign claimants as their clients and running these actions.

Pressure on defendants to settle

Defendants to these actions are in a difficult position. The cases are very complex and require time and resource to defend. Not only that, the claimants (which individually run into hundreds or even thousands) are at little costs risk themselves. These circumstances place pressure on defendants to settle these cases before costs become very significant indeed - even if the defendant might have a credible defence.

A tactic that defendants have employed to bring claims to an end swiftly before costs escalate and settlement pressure builds, has been to try to land a knockout procedural blow at an early stage.

Defendants have met with mixed success. They have often been successful initially, but the claimants have subsequently, through their lawyers, fought back and re-established the claims, thus continuing the uncertainty for the defendants.

Uncertainty for defendants

For example, the cases of *Okapi and others v Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd*[2] and *Lungowe and others v Vedanta Resources Plc and Konkola Copper Mines Plc*[3]were claims brought against the overseas operating company said to have directly caused the harm to overseas claimants and its UK parent company. The defendants challenged jurisdiction for hearing the entire action on the basis that, before the High Court could hear the claims, the relevant civil procedure rules required it to be comfortable that there was a real issue to be tried against the UK parent company. The defendants argued that, whatever the relevant overseas operating subsidiary may or may not have done, no such issue in relation to the UK parent was present.

Ultimately, after a long battle (and indeed after the Court of Appeal had held in favour of the defendants in the *Shell* case), the Supreme Court indicated in both cases the bar is set very high for defendants who wish to challenge jurisdiction on this basis. Essentially, to convince the court that there is no real issue to be tried, the defendant has to show a clear cut case that what is pleaded by the claimants is simply not plausible.

Municipio de Mariana v BHP Group (UK) Ltd and BHP Group Limited

And so to *Municipio de Mariana v BHP Group (UK) Ltd and BHP Group Limited*. This UK case arose out of the collapse of the Fundao Dam in Brazil. BHP Group (UK) Limited is a UK company and BHP Group Limited, an Australian company. They sit at the head of a group that contains Samarco Mineração SA, which owns and operates the Fundao Dam.

The defendants were successful in having the cases struck out at an early stage in the High Court in November 2020 as an abuse of process. The key factor was that because of problems of irreconcilable judgments and cross contamination arising from parallel proceedings in Brazil, the claims would be

“irredeemably unmanageable” in England. It was also held that the proceedings were futile and wasteful because the claimants could not expect to receive any more advantageous redress through pursuing them in England than could be obtained through steps taken in Brazil.

The claimants sought to appeal. Permission to appeal was initially refused by the High Court and also by a single Lord Justice. Leave to appeal was eventually granted by the Court of Appeal.

On 8 July 2022, the Court of Appeal held unanimously that the High Court decision to strike the case out as an abuse of process was flawed in a number of respects and wrong. It proceeded to decide afresh whether the claims should be struck out for abuse of process and in particular whether the defendants had discharged the burden of establishing that the proceedings are clearly and obviously pointless and wasteful.

After due consideration, the Court of Appeal decided that the claims before it were not clearly and obviously pointless and 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.

The Court of Appeal added that, for the sake of completeness, the English claims could not be said to be oppressive. Proceedings arising out of the disaster were ongoing in Brazil, but the defendants were not involved as parties to any of them (save in a few limited instances), and they were not sued there by any of the claimants. Nor could the burden on the English courts be said to be disproportionate in circumstances where these are arguable claims for significant sums.

The Court also concluded that the remedies available in Brazil are not so obviously adequate that it can be said to be pointless and wasteful to pursue proceedings in this country.

The case therefore now continues to a substantive hearing of the issues.

Claimants fighting hard

As has become characteristic of the way these international multi claimant environmental claims are pursued, the claimants have responded to setbacks by fighting hard through their lawyers to get back into contention and maintain the pressure on defendants alluded to earlier.

Challenge for UK registered parent companies

The case serves as a reminder of the tough challenge presented to UK registered parent companies by large environmental group claims relating to incidents and damage suffered elsewhere as a result of their subsidiary operations.

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[1] [2022] EWCA Civ 951

[2] UKSC 2018/0068

[3] [2019] UKSC 20

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