

Insights

ENGLISH HIGH COURT CASTS ITS JURISDICTIONAL NET WIDER IN THE FUNDÃO DAM CLASS ACTION PROCEEDINGS

MUNICÍPIO DE MARIANA V BHP GROUP

Aug 30, 2023

SUMMARY

In the High Court's recent judgment in [Município de Mariana & Ors v BHP Group \(UK\) Limited & Anor](#) the Court found that England was "clearly the appropriate forum" to determine whether Vale SA, a Brazilian company, should share liability with the BHP Group in a class action claim being brought in the English High Court as the result of the 2015 Brazilian Fundão Dam disaster. The claim was brought as a CPR Part 7 High Court action, with a large number of claimants listed on one claim form, and is not a representative action or subject to a Group Litigation Order.

BACKGROUND

More than 732,000 Brazilians are bringing claims in a class action against the BHP Group for damages arising from the collapse of the Fundão Dam in Brazil.

The Fundão Dam was used to store waste produced by the mining operations of Samarco Minderacao SA ("Samarco"), which was the Brazilian vehicle for a joint venture between Brazilian company Vale SA ("Vale") and Anglo-Australian BHP Group ("BHP"). The dam collapsed in 2015, causing significant environmental and property damage, and claiming 19 lives. The Brazilian public prosecutor has estimated the cost of remediation and compensation at a minimum of £25 billion.

Claims for compensation were originally brought in Brazil against Samarco's directors, Samarco, and BHP's Brazilian subsidiary. In 2018 a class action claim was brought by a number of Brazilian individuals and businesses against BHP's publically listed English and Australian parent companies in the English High Court. The claim was brought as a CPR Part 7 High Court action, with a large number of claimants listed on one claim form. In 2020 the English High Court initially rejected jurisdiction over these class action claims, considering they would be "irredeemably unmanageable" and have "a very significantly deleterious impact indeed upon the scarce resources of the English

courts”. However, in 2022, this decision was overturned by the Court of Appeal, who found that there was a realistic prospect of a trial yielding a real and legitimate advantage to the claimants, which outweighed the disadvantages for the parties in terms of expense and the wider public interest in terms of court resources. BHP then unsuccessfully applied for permission to appeal to the Supreme Court.

APPLICATION

In 2022 BHP brought Part 20 claims against Vale, arguing that Vale should share liability for any damages that BHP was ordered by the English High Court to pay to the class action claimants.

Vale challenged the English High Court’s jurisdiction in respect of the Part 20 claims. In particular, Vale argued that Brazil was the natural forum for claims made under Brazilian law, brought against a Brazilian company, in relation to losses sustained in Brazil by Brazilian claimants, due to the collapse of a dam in Brazil, owned and operated by a Brazilian joint venture with two Brazilian shareholders almost a decade ago.

BHP argued that the Part 20 claims almost mirrored the main class action claims against BHP, and that there would be significant factual and legal overlap between the claims. BHP further argued that it would be in the interests of justice, proportionality and efficiency to have the class action claims and the Part 20 claim tried together in the English Court.

JUDGMENT

Mrs Justice O’Farrell found that England was “clearly the appropriate forum” for the trial of Part 20 claim.

The existence of the class action proceedings against BHP, and the significant overlap between those class action proceedings and the Part 20 claim, gave rise to a “real and substantial” connection to the English jurisdiction. Further, the absence of any ongoing proceedings in Brazil that could be used as a vehicle for determining Vale’s liability to BHP demonstrated that “England now offers the only forum in which a single trial of the claims and the Part 20 claims is available”.

The Court noted that although it would be possible for parallel proceedings to be commenced by BHP against Vale in Brazil, “that would give rise to a multiplicity of proceedings and the risk of irreconcilable judgments”.

LOOKING FORWARD

The Fundão Dam proceedings are one of a number of class action claims proceeding through the English High Court that have been brought against English parent companies by non-English claimants relating to environmental disasters in other jurisdictions. Other examples include a class action claim being brought by a number of Zambian individuals and entities against Vedanta

Resources plc in relation to damage caused by its subsidiary's mining operations at the Nchanga Copper Mine in Zambia, and a class action being brought by the Okpabi and the Bille Communities of the Niger Delta against Shell in relation to damage caused by oil spills from its subsidiary's oil pipeline operations in Nigeria.

There is therefore an established precedent of the English High Court asserting its jurisdiction over class action claims brought in relation to environmental disasters that have taken place in other jurisdictions. This recent judgment in the Fundão Dam proceedings appears to set a new high watermark. Not only can English parent companies now face liability in English High Court class action proceedings relating to an environmental disaster in another jurisdiction, but so too can other non-English parties who may have contributed to that disaster. The English High Court's willingness to assert jurisdiction over these class action proceedings, combined with this recent indication that it is willing to extend that jurisdiction to non-English defendants, means that we are likely to see increased numbers of claimant cohort groups (typically backed by English or US funders) bringing environmental class actions proceedings in the English High Court.

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