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High Court strikes out group action as an abuse of process: *Municipo de Mariana v BHP Group PLC* [2020] EWHC 2930 (TCC)

By Freya Foster

The High Court has struck out claims brought by more than 200,000 Brazilian claimants in the English courts against British and Australian holding companies in relation to the collapse of the Fundao Dam in Brazil in 2015. In *Municipo de Mariana v BHP Group PLC* ([2020] EWHC 2930 (TCC)) Turner J found the claims to be an abuse of process and also considered that, in the alternative, the proceedings should be stayed under the Recast Brussels Regulation and on the basis of *forum non conveniens*.

While Turner J emphasised that the factual background of this case was central to his conclusions, his judgment contains a detailed analysis of the relevant caselaw and his consideration of the facts surrounding the claim will no doubt be of interest to parties involved in similar cross-jurisdictional and group actions.

Charles Gibson QC led the Counsel team for the Defendants.

Background

1. The Claimants sought damages from the Defendant holding companies for environmental damage arising from the collapse of the Fundão Dam in Brazil in November 2015. The Claimants sought an estimated £3.8 billion

(US$5 billion) worth of damages against the Defendant companies, BHP Group plc and BHP Group Ltd. BHP Group plc is incorporated in England, while BHP Group Ltd is domiciled in Australia.

2. At the heart of Turner J's decision was the fact that a number of redress mechanisms had been set up in Brazil to compensate those affected by the disaster. Indeed, it transpired that a number of the claimant cohort had already received some form of redress in relation to damage suffered in Brazilian proceedings (§90-91). Additionally as part of those redress mechanisms, a number of matters directly relevant to the alleged liability of the Defendant holding companies were due to be determined by the Brazilian Courts.

3. The Defendants successfully argued that the claims should be struck out or stayed as an abuse of process or, alternatively, stayed under Article 34 of the Recast Brussels Regulation ('the Recast Regulation'), on the grounds of *forum non conveniens* or on case management grounds.

Abuse of Process

4. Turner J found the claims to amount to an abuse of process. Following a detailed analysis of the relevant caselaw and, prefaced with a warning that the conclusions in such cases were necessarily fact sensitive, he summarised at §76 of his decision a "*non-exhaustive*" list of propositions that he considered to be of particular relevance.

5. Against this background Turner J considered a number of features of the case that led to the conclusion that the proceedings in question amounted to an abuse of process. In doing so he noted that where the claims said to be an abuse of process formed part of a group action, procedural practicalities and court resourcing were likely to be particularly important

(§58). Indeed these were key issues in the case in question. Turner J held that if the case was to proceed "*the action in England would involve closely related group claims moving forward in parallel in two different jurisdictions with many of the same claimants in each seeking identical remedies in England and Brazil concurrently*" (at §78). This together with a number of practical factors involved in trying the matters in England, such as translation (§108) and logistical difficulties (§114) would have meant that management of the case would have been "*akin to trying to build a house of cards in a wind tunnel*" (at §93).

Article 34 the Recast Regulation and *Forum Non Conveniens*

6. Turner J went on to consider in the alternative whether the claims should be stayed pending determination of the outstanding proceedings in Brazil.

7. In the context of the English domiciled company, BHP Group plc, Turner J held that the claim should be stayed under Article 34 of the Recast Regulations due to the risk of irreconcilable judgments.

    a. Turner J found that the approach in ***JSC Commercial Bank Privatbank v Kolomoisky* ([2019] EWCA Civ 1708)** constituted binding authority to the effect that, when considering whether it is expedient to hear proceedings together, the question to be asked is not whether they could be heard together, but rather whether the proceedings <u>should</u> be so heard (§194 *et seq*).

    b. Second, Turner J roundly rejected the suggestion that ***Owusu v Jackson* ([2005] QB 801)** meant that it was inappropriate for the court to take into account any factors that might have also been "*theoretically relevant to a* forum non conveniens *argument*" when considering whether a stay was necessary for the proper administration justice (§205 *et seq*).

c. Finally, the decision considers whether the difficulty consolidating the claims brought in England into the Brazilian proceedings militated against awarding a stay. Turner J held that, while the unavailability of consolidation is generally to be treated as "*a very strong factor against*" a stay under Article 34, it was not determinative in all cases – including in the case at hand (§216-18).

8. For the Australian domiciled company, BHP Group Ltd, Turner J, applying the two stage test set out in ***Spiliada Maritime Corp v Cansulex Ltd* ([1987] AC 460),** found that the claim should similarly be stayed under the common law doctrine of *forum non conveniens* (§235 *et seq*). The Claimants having conceded that Brazil was the natural forum (stage 1) (§237-42), Turner J considered whether in all the circumstances justice dictated that the stay should nevertheless not be granted (stage 2).

9. A key consideration in the stage 2 analysis was the Claimants' ability to access justice in Brazil. Turner J, noting that it was not sufficient that proceedings in Brazil would simply be less advantageous than those in England and the desirability of avoiding, where possible, qualitative judgments on the legal systems of other states, found that there was insufficient evidence to support a conclusion that substantial justice could not be done in Brazil (§245-47).

   a. There was no dispute that the Brazilian Courts could try the claims brought by the Claimants in England (§241, 248). However Turner J also held that a consideration of whether, in all the circumstances, justice required a stay to be refused the availability of redress against <u>other</u> defendants in the foreign jurisdiction, not just those defendants involved in English proceedings, could be taken into account. Noting that claimants were generally free to choose their defendant, Turner J warned that this did not offer "*procedural carte blanche in all circumstances*". Here there was no particular reason for the pursuit of the Defendant companies over others in the group's corporate

structure, and, indeed the Claimants did not seek to join the Defendants to Brazilian proceedings.

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