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Court of Appeal overturns Fundão dam abuse of process ruling in significant decision for the treatment of international mass tort claims in England.

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The case of *Município de Mariana & others v BHP Group (UK) Ltd & another* has been closely watched. It is one of the largest ever mass tort claims before the English courts and concerns the collapse of the Fundão dam in Brazil. The case was initially struck out on, amongst others, abuse of process grounds, but the Court of Appeal has now disagreed, opening the way for the case to be heard on its merits. In taking a more forensic approach than the judge, particularly in situations involving concurrent local redress, it paves the way for similar claims before the English courts.

A brief history of the litigation

In 2015 the Fundão dam in Brazil collapsed causing significant environmental damage. This led to a number of class actions (and individual civil suits) being commenced in Brazil, from which certain local redress schemes have emanated (although not without apparent complexities and difficulties in their operation and coverage).

Against that background, the *Mariana* litigation was also commenced in the English courts. This involves a huge number of claimants (over 200,000) and two defendants, an English company (UK Ltd) and an Australian company (Aus Ltd) – being the ultimate parent companies of a multi-national mining group (the dam having been run by a joint venture with another mining company in which Aus Ltd had an ownership share).

The claimants seek compensation under various Brazilian law grounds. The substance of those claims are yet to be heard, instead UK Ltd and Aus Ltd have been challenging the ability of the claimants to bring the proceedings in England.

In 2020, the claims were struck out. Detail is available here, but, in brief, the judge (Turner J) saw the existence of a multitude of local actions and redress schemes in Brazil as giving rise to an "*unremitting*" cut-across with the English proceedings, and also saw serious practical difficulties in hearing a Brazilian law claim involving hundreds of thousands of Brazilian persons and concerning events exclusively in Brazil, meaning that the proceedings

would be unmanageable and therefore should be struck out for abuse of process. In addition, he was also prepared to stay the claims on more specific jurisdictional grounds (in relation to UK Ltd, Article 34 of the Brussels I Recast Regulation, and, in relation to Aus Ltd, *forum non conveniens*).

Permission to appeal against Turner J's decision was initially declined but, last year, was, exceptionally, reopened and granted (click here). Accordingly, the Court of Appeal heard the claimants' appeal against Turner J's judgment. It has now overturned his decision, meaning the case can proceed to trial. Its judgment is long and detailed, but the following summarises its key conclusions (references in square-brackets are to paragraph numbers in its judgment).

Abuse of process: Unmanageability?

Having first considered the scope of abuse of process as established by authority, as well as noting that "*…it is necessary to consider the question of abuse by reference to claims individually (or by relevant claimant category)*" and that "*litigants should not be deprived of their claims without scrupulous examination...*" [170-178], the Court decided that, as a matter of law, "*unmanageability*" of proceedings could not constitute an abuse (unless, for example, a litigant had deliberately brought this about through vexatious conduct). In line with comments made by the UKSC in *Merricks* [2020] UKSC 51, such situations might require case management solutions, but not the denial of practicable access to justice [184-187].

Also, even if that had not been the case, Turner J's finding of unmanageability was, in any event, wrong. First, he made the finding prematurely (a case management conference would have been the appropriate time to consider such issues [188]). Second, he appeared to be significantly focused on generalised risks of cross-contamination instead of conducting "*the scrupulous analysis necessary*" to reach a conclusion that any complications justified such a finding. Instead, a proper analysis of the position of the claimants (as a whole or, as was in fact required, their position on an individual basis) in relation to factors such as the nature of the proceedings in Brazil, who was party to them, and what they would achieve, did not reveal any clear and obvious risk of unmanageability [188-194]. Finally, insofar as Turner J took into account *forum non conveniens* factors such as the risk of inconsistent judgments and the "*challenge of language*" in hearing the claims in England, these should be properly confined to that topic, not questions of abuse [196-206].

Abuse of process: Pointless and wasteful?

It was common ground that litigation being "*pointless and wasteful*" could, unlike "*unmanageability*", be a proper ground for a finding of abuse. However, as to whether this was established, the Court of Appeal found that Turner J, again influenced by his general perception of unmanageability, had not properly engaged with this issue [207-209].

Looking at the matter afresh, it was clear to the Court that the English proceedings were not obviously pointless and wasteful. The Court's analysis is detailed but, again, it essentially looked at the position of the claimants

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relative to the proceedings and redress schemes in Brazil (including issues such as what they might decide, how they might progress, what redress they might provide and for whom) and, in that light, concluded that it could not be said that the claimants would be able to obtain full redress in Brazil [215-236].

It is also notable that the Court approached this analysis against the background of three general contextual points of caution. First, regarding access to justice issues where the claims before the Court were otherwise viable ones against defendants subject to the Court's jurisdiction and not being sued by the claimants in Brazil. Second, that the potential local redress identified by the defendants often consisted of optional, or concurrent, extrajudicial schemes the existence of which would not ordinarily preclude recourse to court. And, finally, that cases on "*pointless*" litigation typically involved matters which could be decided "*at a glance*" [211-214].

Further jurisdictional issues; UK Ltd and Brussels I Recast, Aus Ltd and *forum non conveniens*

As the proceedings in England were commenced before the UK's transition out of the EU came to an end, the jurisdictional rules of the Brussels I Recast still (due to transitional arrangements in the UK/EU Withdrawal Agreement) apply to them (this is not the case in claims commenced in England now, which are generally subject to common law rules on jurisdiction).

As such, under that Regulation, the English court had mandatory jurisdiction over UK Ltd (on the basis of its domicile). Under Article 34 of the Brussels I Regulation, however, it also had a discretion to stay proceedings in the event of pre-existing related actions in a non-EU State, subject to certain other conditions including whether a stay was necessary for the administration of justice. The Court's judgment therefore considers the technical parameters of that article set against a particular class action that was on foot in Brazil [256-290]. Ultimately, however, it decided that a stay in England was not necessary for the administration of justice: its conclusion (below) that the claim against Aus Ltd should proceed would make such a stay against UK Ltd pointless [294-299]. Alternatively, if that were wrong, a stay pending the Brazilian action would likely be very lengthy, there were significant uncertainties as to whether that action would resume and what it would decide, and there was only limited overlap with the claim against UK Ltd [300-311].

As for Aus Ltd, as it was domiciled in a non-EU State, the Brussels I Recast permitted the application of common law rules on jurisdiction against it. This meant that the court could consider a stay on traditional *forum non conveniens* grounds. This involves a two stage assessment. Stage one: whether there is another available forum in which it is clearly and distinctly more appropriate for the case to be heard. Stage two: if that is the case, whether there is a real risk that the claimant will not obtain substantial justice in that forum.

Here, the only realistic alternative forum identified by the defendants for hearing the case was found to be a particular form of class action procedure

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in Brazil. The Court had, however, already analysed evidence as to its features (at [113-122]) and found that there was considerable uncertainty as to whether it would be an available route for the claimants to pursue UK Ltd or Aus Ltd in Brazil. Accordingly, as there was cogent evidence of a real risk that the claimants could not obtain substantial justice via that route, their arguments on stage two prevailed and the stay would not be granted [352] (in addition, in respect of stage one, despite significant, factual, connecting factors with Brazil, the Court also expressed a provisional view that the Brazilian process in issue might not determine matters in such a way that it could be said that the defendants had even met that hurdle [348-351]).

What does this mean for environmental tort litigation in England?

The judgment's importance to mass tort claims in England is, broadly speaking, in grappling with the relevance of related local remedies to the court's management of proceedings. In that regard its departure from the approach of Turner J carries a number of important implications (always assuming that the English court has personal jurisdiction over a defendant in the first place):

First, its judgment significantly narrows the scope of defendants to argue that (absent vexatious conduct by a claimant) the presence of such remedies gives rise to an abuse of process; manageability issues should generally be dealt with through active case management and pointlessness cannot be invoked lightly.

Second, insofar as an assessment of the existence of local remedies is relevant, the English court should not proceed on generalised, impressionistic conclusions about their impact. It will, instead, need to properly assess what the local remedies are and what they may offer to the claimants against the defendants they seek to sue in England. Going forward, particularly given the revocation of EU jurisdiction rules, such issues are perhaps most likely to arise in relation to *forum non conveniens* stays sought by defendants (even against UK domiciled companies); particularly at stage two. In that context, despite authority stressing that, in the interests of comity, cogent evidence is required to reach a finding of a real risk of a claimant not receiving justice in the overseas forum, such an approach is likely to be helpful to claimants in the way in which it facilitates such arguments.

Cumulatively, then, a decision which, alongside other recent case law (such as the UKSC's approach to assessing arguability of parent company liability claims in *Okpabi* [2021] UKSC 3, click here for more), may increase the perception that English courts are increasingly wary about dismissing claimant actions at too early a stage in the environmental tort sphere. Meanwhile, UK Ltd and Aus Ltd have indicated that an appeal to the UKSC is under consideration, so that court may yet be provided with a further opportunity to have a say on these matters.

Click here for the Court of Appeal's judgment.

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