DAMNED IF YOU DO, DAMNED IF YOU DON'T: CULPABILITY FOR ACTIONS OF FOREIGN SUBSIDIARIES

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The Fundão Dam near Mariana, in Brazil was owned and operated by Samarco Mineração SA, and was designed to accommodate waste resulting from the extraction of iron ore. On 6 November 2015, the dam collapsed, triggering the release of more than 40 million cubic metres of mining waste. This slurry travelled 620 km downriver, destroying multiple villages and over 3000 acres of forest, decimating entire fish populations, and killing nineteen people. The polluting waste eventually found its way, through the Doce River, to the Atlantic Ocean over 400 miles away destroying, damaging or contaminating everything in its path. To date, it remains Brazil's worst environmental disaster.

Samarco Mineração SA was owned as a joint venture between mining giants Vale (headquartered in Brazil) and BHP (an Australian company). Given its location, and the global web of corporate ownership, the disaster has resulted in multiple legal actions being brought worldwide, by both impacted individuals and shareholders and investors in Vale and BHP.

UK High court history

In November 2018, dissatisfied with the redress available in Brazil, over 200,000 Brazilian claimants (the Município de Mariana) initiated proceedings in the UK, seeking compensation of £5 billion. The claim was brought against BHP Group PLC, a UK company (who owned BHP's 50% stake in Samarco Mineração SA) and BHP Group Limited, an Australian company linked with BHP Group PLC in a dual listed arrangement.

The Defendants argued that the parallel proceedings in Brazil meant that any concurrent UK action would be "irredeemably unmanageable". Mounting an abuse of process argument, the Defendants applied for strike out, or alternatively a stay of proceedings.

The High Court granted the Defendant's application, finding that many of the Claimants were seeking identical remedies in Brazil, and over 150,000 of them had already received compensation by way of settlement. The High Court stated that managing the large claim, particularly where the first language of many of the Claimants was Portuguese would be like "trying to build a house of cards in a wind tunnel".

The Court of Appeal denied permission to appeal the High Court judgment, but the Claimants applied to reopen the refusal under the rarely used provision set out in CPR 52.30.

UK Court of Appeal involvement

In a "monumental judgment" [1] the Court of Appeal reopened the refusal to grant permission and went on to grant permission to appeal.

CPR 52.30 confirms that a refusal will not be reopened unless:

(i) It is necessary to do so in order to avoid real injustice;

(ii) The circumstances are exceptional and make it appropriate to reopen the appeal; and

(iii) There is no alternative effective remedy.

In its judgment [2] the Court of Appeal determined that in denying permission to appeal at first instance, the court had not adequately grappled with the claimants' essential challenges. Although the test was a stringent one, the Court of Appeal was satisfied that in this case, the parameters had been met.

The Court of Appeal held that the case was of "exceptional importance", and that the "combination of circumstances" was "truly exceptional". Whilst the impact of this decision will not be properly understood until the Court of Appeal decides the substantive appeal, the court's conclusion that there was a "real prospect of success" on appeal is noteworthy.

ESG – an exceptional area?

Between the High Court Fundão Dam judgment of November 2020, and the Court of Appeal's judgment in July 2021, sits the Supreme Court's decision in Okpabi v Royal Dutch Shell. [3] Both cases involve large corporations having to litigate in England, in connection with activities of overseas subsidiaries which resulted in environmental havoc. Could it be that environmental, social and governance ("ESG") disasters are axiomatically "exceptional", resulting in high levels of judicial scrutiny?

In Okpabi, the Supreme Court held that two communities in Nigeria could bring proceedings in the English courts against Royal Dutch Shell and a Nigerian operating subsidiary for negligence, following widespread environmental damage and contaminated water sources from a Nigerian oil spill. The Supreme Court emphasised that the number of circumstances in which a parent company may owe a duty of care towards the victims of a tort perpetrated by overseas subsidiaries are various and should not be limited.

There are many reasons why overseas claimants, such as those in Okpabi and the Município de Mariana may wish to sue an overseas subsidiary and a UK parent in the English courts. To bring such a claim successfully, a claimant will have to establish jurisdiction and argue that there is a real issue to be tried against the UK parents. Following Okpabi, the threshold for establishing this has arguably been lowered, although clearly each case turns on its own facts. Claimants also need to consider the procedural mechanism by which a claim can be brought. In the Fundão Dam case, the inherent "unmanageability" of the UK and Brazilian proceedings operating in parallel remains to be resolved. Further, the Court of Appeal has recently rejected an attempt by the claimants in an environmental remediation claim to bring their claim on a "representative basis" under CPR 19.6. In Jalla & Anr v Shell International Trading & Anr [4], the court concluded that the circa 28,000 claimants in this case did not meet the necessary "same interest" test, a requirement for the court allowing such a claim to be pursued in the name of one or more "representative" claimants on behalf of a group.

The future for ESG claims

The jurisdictional threat to large companies facing overseas ESG issues is not diminishing. Because environmental threats often have global consequences, multinational companies will face difficulties in trying to separate themselves from the actions of foreign subsidiaries. While the English courts are currently grappling with the mechanisms by which such claims can be brought, the indication from judicial decisions to date is that such claims are, in theory at least, viable. Whether or not they succeed will depend on the facts of each particular case, leaving the scope of liability for future, similar claims yet to be clarified.

1 Tom Goodhead, PGMBM Managing Partner, bringing the claim on behalf of the Município de Mariana
2 Município de Mariana and others v BHP Group PLC [2021] EWCA Civ 1156
3 Okpabi and others v Royal Dutch Shell PLC and another [2021] UKSC 3
4 [2021] EWCA Civ 1389