ESG Ruling Sends Out Warning To UK Parent Companies

By **Jonathan Swil, James Matthews and Edward Taylor** (August 15, 2022)

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In a significant development for environmental, social and governance litigation in the U.K., in Municipio de Mariana v. BHP Group (U.K.) Ltd. & BHP Group Ltd.,[1] the U.K. Court of Appeal has allowed a £5 billion ($6.1 billion) damages claim brought by around 200,000 Brazilian claimants to proceed against mining company BHP.

The judgment should sound a warning bell for U.K.-based parent companies with overseas operations. It is a further example of major ESG litigation, specifically mass environmental claims, being brought in the U.K. courts in respect of the operations of foreign subsidiaries.[2]

Case Background

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The claim before the U.K. Court of Appeal concerned the collapse of the Fundão dam in the city of Mariana, Brazil, in 2015. The collapse devastated more than 400 miles of the Rio Doce through to the Atlantic coast.

The claimants had sought to bring damages claims before the U.K. High Court, under Brazilian law, against the English and Australian group parent companies of BHP.

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The High Court struck out the claims as an abuse of process, including on the basis that they were "irredeemably unmanageable." The sheer scale of the litigation, including the number of claimants and the risk of irreconcilable conflicting decisions with decisions made in parallel litigation in Brazil against Brazilian companies were key factors in the court's decision.

The High Court went on to conclude that, even if the claims were not unmanageable, there was nothing to be gained by the claim in the English courts because there were adequate avenues for redress in Brazil, including the existing Brazilian litigation.

Therefore, permitting the claimants to proceed was "pointless and wasteful" and could lead to a disproportionate use of "the scarce resources of the English courts."

On appeal, the Court of Appeal disagreed, finding that the High Court had been wrong to strike out the claims. They were viable and not abusive, as there was a realistic prospect of the claimants succeeding at trial in England, and the remedies available in Brazil were not so obviously adequate that it was pointless and wasteful to pursue proceedings in England.

Additionally, the risk of irreconcilable decisions in Brazil and other "forum non conveniens" factors — a discretionary power that allows courts to dismiss a case where another court, or forum, is much better suited to hear the case — should not have factored into the High Court's decision whether the claims were liable to be struck as an abuse of process.

They did not form part of the relevant test — the question of forum was a separate and logically prior question that the Court of Appeal answered in the claimants' favor.

The Court of Appeal also noted that the claims were not oppressive — the defendants in Brazil were different to the defendants in England and the basis for liability asserted in

England was factually distinct from that of the Brazilian claims.

The Court of Appeal also considered that it would be wrong to deny access to justice to parties on the basis of the supposed unmanageability and burdensome nature of proceedings — that a claim is said to be unmanageable does not make it an abuse.

The claimants had provided the court with "clear illustrations of case management options" and, in any case, the court had "considerable doubts as to whether proceedings can ever truly be said to be 'unmanageable.'"

This is consistent with the U.K. Supreme Court's finding in the Mastercard Inc. v. Merricks competition class action in 2020,[3] to which the Court of Appeal referred, that expense or difficulty of litigation could not deny "practicable access to justice" to a litigant or class of litigants who have a triable cause of action.

BHP has said that it is currently considering whether to seek permission to appeal to the U.K. Supreme Court.

Implications and Comment

What does the Court of Appeal's decision mean? Following the recent Supreme Court rulings in Okpabi v. Royal Dutch Shell PLC in 2021 and Lungowe v. Vedanta Resources PLC in 2019, the BHP case is the latest in a line of cases where large groups of individuals have sought redress against U.K.-based parent companies in the English courts for alleged environmental damage caused by their subsidiaries in developing economies.

These claims have been allowed to proceed by the courts, having been tested by the defendants at a preliminary stage by way of challenges on jurisdictional or case management grounds.

The Supreme Court's rulings in Okpabi and Vedanta focused on whether it was at least arguable that the parent companies in the U.K. owed a duty of care to overseas claimants said to be affected by the activities of the parents' local subsidiaries.

This was done in order to establish, at a preliminary stage, that it was necessary for the local subsidiaries to be party to the claims against the U.K. parent companies, whose involvement was in turn necessary to engage the English court's jurisdiction.

In other words, the claims were challenged on the basis of the alleged tenuousness of the links between the U.K. parents and the subject matter of the claim.

By contrast, however, BHP's local subsidiary was not included as a defendant in the BHP claim. This perhaps reflects a newfound acceptance, in light of Okpabi and Vedanta, that a U.K. parent company's liability for the conduct of its foreign subsidiary is at least arguable and therefore a matter for trial, i.e., not something that is likely to continue to be scrutinized in principle at a preliminary stage.

The focus in BHP was, rather, on whether the claims against the parent companies were an abuse of process, including by reference to the wider fact pattern and parallel litigation in Brazil.

The Court of Appeal's decision therefore covers some new ground in its disinclination to allow the case management difficulties that the vast scale and complexity of such cases create to impede their progress through the English courts.

In so doing, BHP closes off another avenue for preliminary challenge to these types of claim. It remains to be seen whether defendants will in due course find others.

Taking a step back, the contours of mass environmental and, more broadly, ESG claims in the U.K. and elsewhere are still taking shape and remain unclear in important respects.

Indeed, none of the claims in Okpabi, Vedanta or BHP have been tested on their merits in a substantive trial before the English courts. Therefore, the full extent of the ESG-litigation risk that these cases pose will likely not crystalize until at least one of them or a similar case reaches a trial on the merits.[4]

Notwithstanding this, what is now clear is that the English courts are applying a relatively low bar for determining whether mass environmental claims of this nature can proceed to trial.

The decision in BHP, coming close behind Okpabi and Vedanta, may encourage potential claimants affected by environmental damage in countries outside the U.K., as well as claimant-focused law firms and litigation funders with a presence in the U.K., to consider initiating ESG claims against U.K.-based parent companies before the English courts.

Indeed, claimant-focused law firms in the U.K. have already noted the significance of BHP, which they say increases the possibility of ESG litigation in the U.K.

This view appears to be shared by at least some litigation funders, with North Wall Capital announcing a further £100 million ($122 million) funding package for the claimant law firm that acts in BHP to focus on "complex ESG-focused multijurisdictional group litigations."

Subject to any appeal of the BHP decision to the Supreme Court, the English courts appear to be declaring themselves a forum "open for justice" in these types of cases.

U.K.-based parent companies in corporate groups that have extensive overseas activities, particularly in the energy, infrastructure and extractive industries that are therefore at higher risk of environmental claims of this nature, should take note.

Parent companies located in other jurisdictions should also pay close attention to these developments since the potential for mass environmental damages claims is likely only to increase internationally over the coming years, as claimant law firms pursuing faster track liability trials, and settlements en route, seek to direct more of this type of litigation toward the well-equipped and relatively quick courts in the U.K., the U.S. and Europe.

Finally, what is also interesting about BHP, and Okpabi and Vedanta before it, is that they are cases that all relate to the "E" in ESG.

We are yet to see a similar proliferation of cases in the U.K. focusing on the "S" or the "G." That may be because the nature of the harm and the avenues for legal redress in respect of the "S" and the "G" are more limited, or at least less obvious, than those in relation to "E."

It will be interesting to see in the coming years whether claimant firms and litigation funders find a way to change that trend.

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[1] [2022] EWCA Civ 951.

[2] Following, in particular, the UK Supreme Court's recent decisions in the mass environmental claims of Okpabi v Royal Dutch Shell Plc [2021] UKSC 3 and Vedanta Resources PLC v Lungowe [2019] UKSC 20.

[3] [2020] UKSC 51.

[4] Note that Vedanta settled confidentially in 2020 and that Okpabi has yet to come to trial.