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Ministers insist rehabilitation remains core to the latest batch of penal reforms, but history has taught solicitors to be deeply sceptical

Litigation



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Momentum growing on group actions

Two recent legal actions, brought on both sides of the Atlantic, have important ramifications for the future of group actions. Both involved disasters in neighbouring Brazilian dams that resulted in significant loss of life and widespread damage: the Mariana (2015) and the Brumadinho (2019) dam disasters. The Mariana case, *Município de Mariana v BHP*, originally heard in the English High Court, culminated in a Court of Appeal decision last month, while the US Securities and Exchange Commission (SEC) action in the Eastern District of New York was brought against Vale, a Brazilian iron ore mining company.

The Mariana case against BHP, the world's largest mining group, was brought by more than 200,000 people and 500 businesses who were affected by the environmental disaster, described as the worst in Brazil's history. The claimants sought to establish liability on the part of BHP. In November 2020, BHP succeeded in persuading Mr Justice Turner to strike out their claims in the High Court on the basis that the case was 'unmanageable'.

But in July 2022, the Court of Appeal overturned that decision, finding in favour of the claimants in relation to various jurisdictional challenges brought by BHP under Article 34 of Brussels Recast, and on the basis of *forum non conveniens*. The court stated that: 'Where... it is uncertain whether there will be any decision addressing overlapping issues, and the degree of overlap is relatively small, as is the situation in this case, it is of less significance that the foreign court is better placed to decide the contingent and limited area of overlap.'

The court also found that compensation paid in Brazil seemed inadequate. The judgment stated: 'The vast majority of claimants who have recovered damages have only received very modest sums in respect of moral damages for interruption to their water supply... The claimants should be permitted now to proceed with the claims in the action.'

Critically, the Court of Appeal ruled that the group action against BHP for \$5bn can proceed in the High Court, making it the

largest group claim in English legal history. According to the judgment: 'Our conclusion is simply that the remedies available in Brazil are not so obviously adequate that it can be said to be pointless and wasteful to pursue proceedings in this country.' Notably, this acts as a statement of principle as to how English courts should approach large-scale group litigation in the future. BHP continues to defend the action and in a statement said it is reviewing the judgment and considering next steps, which may include an application for an appeal to the Supreme Court.

In expressing concern that the claimants might not achieve justice locally, the court reiterated that the right forum for such claims may be outside the place where the underlying event takes place. Multinational companies' involvement in cross-border activities means that assorted jurisdictions will inevitably be required to adjudicate on their complex international disputes.

In New York, the SEC charged Vale with making false and misleading claims about the safety of the Brumadinho dam and with violating anti-fraud and reporting provisions of federal securities laws. The SEC complaint alleges that Vale manipulated multiple dam safety audits; obtained numerous fraudulent stability certificates; and regularly misled local governments, communities, and investors about the dam's safety through its environmental, social and governance (ESG) disclosures.

The SEC alleges that Vale knowingly used faulty laboratory data and concealed information from auditors to obtain declarations regarding the dam's stability, which were touted to global investors. Such findings would mean that local courts and prosecutors may benefit from contemporary investigations and evidence in the hands of foreign authorities.

In potential claims involving auditor fraud, the SEC alleges that Vale: (1) improperly obtained stability declarations for the dam by knowingly using unreliable laboratory data; (2) concealed material information from its dam safety auditors; (3) disregarded accepted best practices and minimum safety

standards; (4) removed auditors and firms who threatened Vale's ability to obtain dam stability declarations; and (5) made false and misleading statements to investors. Vale's chief financial officer Gustavo Pimenta has said: 'We strongly disagree and will contest SEC allegations.'

These allegations may have great significance internationally, demonstrating that regulators are willing to allege fraud, including by auditors and lawyers, in relation to investigations in other jurisdictions. There are certainly repercussions for Brazil, encouraging or at least reinforcing local claims against various responsible parties.

To the extent that the SEC action adopts the guise of a group action in a court that has jurisdiction, it resonates with other actions in countries with potential jurisdiction, notably England and Wales, where many such projects are financed and leading multinationals operate under English law.

These developments are hugely important for group actions. Although long-established in the US, the *Mariana* case will be of particular interest to the claimants who might consider bringing group actions in London. Notably, the Court of Appeal recognised their validity, dismissing the equivalence of proper manageability in mega cases with an abuse of process – as had been argued at first instance.

Many such potential actions have both a legal and a jurisdictional connection to England and Wales. Given the increased access to justice that arises from developing rights and consumer legislation, combined with access to extensive litigation funding, courts in leading jurisdictions seem increasingly willing to make themselves available to hear claims, irrespective of size.

The SEC's action against Vale, and the Mariana claimants being allowed to proceed thanks to the Court of Appeal ruling, create a momentum for group actions to flourish in multiple jurisdictions representing convergent and divergent groups.

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