*Municipio de Mariana v BHP Group: Implications of the UK High Court's Decision**

Francesca FARRINGTON¶**

Keywords: access to justice, Brexit, duty of care, *forum non conveniens*, jurisdiction

I. Introduction

The High Court of England and Wales in its November 2020 judgment in *Municipio de Mariana v BHP Group*[1] (*BHP*) declined jurisdiction to hear the case initiated by victims of the Fundão Dam collapse in Brazil on the grounds of abuse of process. The decision raises serious questions about the Court's willingness to vindicate the fair trial rights of victims of human rights abuses linked to multinational enterprises (MNEs). In this judgment, Turner J also made *obiter* comments on the possibility of staying the case on application of Article 34 of the Recast Brussels Regulation (Recast Regulation),[2] the doctrine of *forum non conveniens* (FNC), and/or the Court's case management discretion.

This piece first examines the events leading up to these proceedings and the judgment of the Court. Next, this piece considers the impact of Brexit on this decision, finding that in place of European Union (EU) law, the matter would revert to domestic law, making the FNC doctrine available to the English-domiciled defendant. Finally, this piece compares the Court's findings in *BHP* to the decision in *Vedanta Resources plc v Lungowe*[3] (*Vedanta*). Taken together, these judgments provide an Archimedean point from which the post-Brexit landscape of English law may be observed. The *Vedanta* judgment illustrates the Supreme Court's high regard for the FNC doctrine, fuelling suspicions that the FNC doctrine will be revived post-Brexit. However, the Court was also willing to depart from the FNC doctrine when substantial justice is unavailable in the

¶ Conflicts of interest: The author declares none.

* The title of the case has been corrected throughout since original publication. A corrigendum notice detailing this change has also been published (DOI: https://doi.org/10.1017/bhj.2021.31).

** PhD Candidate, Faculty of Law, University of Cambridge, Cambridge, UK.

1 *Municipio de Mariana v BHP Group* [2020] EWHC 2930.

2 Regulation (EU) 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) (12 December 2012).

3 *Vedanta Resources plc v Lungowe* [2019] UKSC 20.

Business and Human Rights Journal, 6 (2021), pp. 392–398
doi:10.1017/bhj.2021.10

forum conveniens. The *BHP* judgment affirms the exceptionality of any such departure from the FNC doctrine. As such, *BHP* provides a cautionary tale for claimants. The decision highlights that there are certain barriers to justice that cannot be surmounted through jurisdictional rules. In conclusion, in the likely event that the FNC doctrine is revived post-Brexit, any exceptions may be narrowly construed. This may limit victims' ability to access justice through the English courts in the future.

II. Background to the *BHP* Case[4]

The case arose after the Fundão Dam operated by Samarco Mineração SA (Samarco), a joint venture of Vale SA and BHP Billiton Brasil LTDA, collapsed in Brazil in 2015. The collapse resulted in water pollution, the deaths of nineteen people, and damage to the lives and property of thousands of others. In Brazil, a group action, known as a conduct adjustment agreement (CPA), was instituted on 30 November 2015. The first of these proceedings (the *20bn CPA*) concluded with a settlement agreement known as the Transaction and Conduct Adjustment Agreement (TTAC). As a requirement of the TTAC, the Renova foundation was created to mitigate environmental consequences and compensate victims.

In March 2016, Samarco agreed to contribute US$6 billion to support the long-term recovery of the affected communities and the environment. However, in May 2016, another CPA (the *155bn CPA*) was taken in Brazil by the Federal Prosecutors Office, alleging that the *20bn CPA* did not provide sufficient funds to properly mitigate the environmental damage caused by the dam's collapse. The *155bn CPA* has been stayed since January 2017 to allow for further negotiations to take place. In the interim, the TTAC was heavily criticised and consequently annulled by the Appellate Court. However, compensation continues to be paid through the Renova foundation under the terms of a second agreement. In October 2020, Brazilian state and federal prosecutors sought to reopen civil proceedings against BHP and Vale for failure to meet their obligations in a timely fashion.[5]

Additionally, actions were taken in Australia and the United Kingdom (UK). The Australian action was taken by shareholders, and is not directly relevant to this piece. The relevant proceedings were filed in the High Court in November 2018 by approximately 202,600 claimants.

III. The Judgment of the Court

The judgment in *BHP* turned on whether the Court had sufficient evidence to accept the claimants' argument that obtaining justice was not possible in Brazil. The proceedings

[4] *Municipio de Mariana v BHP Group*, note 1, paras 15–43. See also Business and Human Rights Resource Centres, BHP and Vale Lawsuit (re Dam Collapse in Brazil, filed in Brazil) (last updated 30 October 2020), https://www.business-humanrights.org/en/latest-news/bhp-vale-lawsuit-re-dam-collapse-in-brazil/ (accessed 10 November 2020).

[5] 'Brazil Seeks to Re-open $27 Billion Lawsuit Against BHP Vale', *Reuters* (1 October 2020), https://www.reuters.com/article/us-brazil-mining-lawsuit/brazil-seeks-to-re-open-27-billion-lawsuit-against-bhp-vale-idUKKBN26M719 (accessed 10 November 2020).

https://doi.org/10.1017/bhj.2021.10 Published online by Cambridge University Press

were taken against BHP Group plc (BHP plc), incorporated in England, and BHP Group Limited (BHP Ltd), incorporated in Australia. BHP Ltd is a separate legal entity from BHP plc but linked through a dual listed company arrangement which provides for a unified management structure. BHP Ltd is the ultimate owner of BHP Brasil. The claimants argued that BHP plc and BHP Ltd are 'indirect' polluters for the purposes of Brazilian law.[6]

The defendants sought to stay the case on the grounds of:

(i) abuse of process;

(ii) Article 34 of the Recast Regulation, under which the court may stay proceedings where there arises a risk of irreconcilable judgments between the courts of a member and a non-member state. This is an exception to the default position in Article 4 of the Recast Regulation which states that individuals should be sued in their member state of domicile;

(iii) the FNC doctrine; and/or

(iv) case management.

On the first ground, Turner J invoked the rule in *Henderson v Henderson*,[7] i.e., that there should be finality in litigation, and that a claimant should bring their whole case in one set of proceedings. Turner J found that the rule also applied when related actions are running in different jurisdictions in sequence or parallel.[8] Turner J considered the practicability of managing the claim in England, the risk of irreconcilable judgments, and cross-contamination. In these proceedings, there was a serious risk of such an eventuality,[9] where over half of the claimants in the case had already received compensation through Renova.[10] An additional 68,000 claimants had taken individual actions, with 20,000 of these concluded by the Brazilian courts.[11] While some of the claimants were not covered by the *155bn CPA* and *20bn CPA*, they were not precluded from bringing a claim in Brazil.

On the other hand, the claimants argued that justice was unavailable in Brazil, due to significant procedural hurdles. Turner J found no merit in this argument as the claimants were successfully suing BHP Brasil in Brazil, and BHP plc and BHP Ltd had both agreed to submit to the jurisdiction of the Brazilian courts. Turner J found that the claimants would face significant hurdles before the English courts, notably accessing witnesses, translation and applying Brazilian law in the English courts. Relatedly, as the Court would be applying Brazilian law on damages, there was no monetary advantage from the English proceedings. Turner J was manifestly aware of the barriers that the victims faced,

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[6] *Municipio de Mariana v BHP Group*, note 1, para 20. See also Édis Milaré et al, 'Environmental Law and Practice in Brazil: Overview', *Thomas Reuters Practical Law* (1 May 2018), https://uk.practicallaw.thomsonreuters.com/w-014-7503?transitionType=Default&contextData=(sc.Default)&firstPage=true (accessed 11 January 2021).

[7] *Henderson v Henderson* (1843) 3 Hare 100.

[8] *Municipio de Mariana v BHP Group*, note 1, paras 53–56.

[9] Ibid, para 86.

[10] Ibid, para 126.

[11] Ibid, para 42.

https://doi.org/10.1017/bhj.2021.10 Published online by Cambridge University Press

but was unconvinced that the English courts provided a remedy.[12] Consequently, Turner J struck out the proceedings on the first ground, as a clear abuse of process.

Having accepted the defendants' first argument, Turner J nonetheless went on to consider the remaining grounds and found that, if his finding on abuse of process was incorrect, the proceedings in England and Brazil were sufficiently related to grant a stay under Article 34 of the Recast Regulation and, in the case of the Australian-domiciled BHP Ltd, through the FNC doctrine, particularly as BHP plc's liability was parasitic upon BHP Brasil's liability, a preliminary issue to be determined by the *155bn CPA*.

IV. The Implications of Brexit for Future Claimants

From 31 December 2020, the Recast Regulation[13] no longer applies to proceedings commenced *after* this date. Instead, jurisdiction and enforcement of judgments are now governed by the Hague Convention on Choice of Court Agreements 2005 (Hague Convention) where there is an exclusive choice of court agreement. Outside these limited circumstances, jurisdictional issues are subject to domestic law.[14]

As Turner J struck out these proceedings as an abuse of process, Brexit would not have altered the final outcome of this case. Whilst the defendants would have been precluded from relying on EU law, they would have been able to engage the FNC doctrine, an avenue which had been blocked by *Owusu v Jackson*[15] (*Owusu*). *Owusu* precludes a stay where jurisdiction is established through Article 4 of the Recast Regulation. Consequently, member states' courts also have to accept jurisdiction over non-EU domiciled defendants in related proceedings, as to do otherwise would produce a risk of irreconcilable judgments. Therefore, the *Owusu* decision effectively eliminated recourse to the FNC doctrine in Article 4 proceedings. Following Brexit, the courts can resurrect the FNC doctrine. As seen in *BHP*, the doctrine is still engaged where the party falls outside the scope of EU law, Turner J having accepted the FNC argument advanced by the Australian domiciled BHP Ltd. As such, it appears that the Court might have extended this finding to the English domiciled BHP plc, if the case were taken after Brexit.

The *Vedanta* Court was highly critical of the *Owusu* effect. The Court accepted that because of *Owusu* a stay is unavailable to the EU-domiciled party. However, the Court considered that this did not preclude the Court from staying proceedings against the non-EU domiciled party, even where there was a risk of irreconcilable judgments. The Court found that, if the defendants had agreed to submit to the jurisdiction of the *forum*

[12] Ibid, para 140.

[13] Ministry of Justice, 'Cross-border Civil and Commercial Legal Cases: Guidance for Legal Professionals' (31 December 2020), https://www.gov.uk/government/publications/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals (accessed 12 January 2020).

[14] The UK has applied to join the 2007 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. However, they have yet to secure the consent of all contracting parties as required by the Convention.

[15] Case C-281/02 *Owusu v Jackson.*

https://doi.org/10.1017/bhj.2021.10 Published online by Cambridge University Press

conveniens and the claimant had decided to reject that offer, then the claimants should bear the burden of that decision rather than the Court. [16] The Court was clearly dissatisfied with the limitations placed on it by *Owusu.* Therefore, I submit that the court will not hesitate to extend the scope of the FNC doctrine post-Brexit. However, *Vedanta* also provides some respite for claimants who can produce sufficient evidence that substantial justice is not available in the *forum conveniens* (the 'substantial justice exception'). Taken together, the *BHP* and *Vedanta* judgments provide some insight into the scope of this exception.

V. The Implications of the Court's Decision

The *Vedanta* judgment illustrates the Supreme Court's high regard for the FNC doctrine: it provides a limited discretion to depart from the doctrine if substantial justice cannot be obtained in the *forum conveniens. BHP* affirms the exceptionality of the substantial justice exception, as the claimants in those proceedings failed to satisfy the court that substantial justice was unavailable in Brazil. Initially, *BHP* may appear to circumscribe the scope of the substantial justice exception. However, the *Vedanta* and *BHP* proceedings' distinct factual matrices justify divergent outcomes. *BHP* highlights not an unwillingness on the Court's behalf to accept jurisdiction against UK-domiciled MNEs; rather, the decision shows that not all barriers to justice can be overcome by broadening the application of jurisdictional rules.

Vedanta concerned water pollution in Zambia from a mine owned and operated by Konkola Copper Mines plc (KCM), a subsidiary of Vedanta Resources plc (Vedanta). The claimants, a group of Zambian citizens, brought proceedings against Vedanta and KCM in England for common law negligence and breach of statutory duty. Vedanta and KCM challenged the English court's jurisdiction, and the case was appealed, by the defendants, through to the Supreme Court. The Supreme Court found that Vedanta had exercised sufficient control over KCM to incur a common law duty of care to the claimants. This duty of care was not established on the basis of direct or indirect ownership, but because Vedanta had assumed responsibility over the activities of KCM by implementing and enforcing standards on environmental controls.[17] Having established that there was a real triable issue against the anchor defendant, Vedanta, and consequently, KCM was a proper party to the proceedings, the Court had to determine whether England was the proper jurisdiction.[18] In the end, jurisdiction was established on the basis that there was a real risk that substantial justice was unobtainable in Zambia due to the unavailability of legal aid and the lack of legal expertise comparable to that available in England.

Of particular interest was the Court's refusal to accept a general principle that group-wide policies and guidelines would never be sufficient to incur a duty of care, and the Court's willingness to accept the substantial justice exception. More recently, in *Okpabi v*

[16] *Vedanta Resources plc v Lungowe*, note 3, paras 38–40.

[17] Ibid, para 61.

[18] Ibid, paras 20–21.

https://doi.org/10.1017/bhj.2021.10 Published online by Cambridge University Press

Royal Dutch Shell plc[19] (*Okpabi*), the Supreme Court had the opportunity to confirm the *Vedanta* decision. The appeal concerned similar issues to those raised in *Vedanta*, in particular whether the claimants had established a real triable issue against the anchor defendant, Royal Dutch Shell plc, such that the subsidiary, The Shell Petroleum Development Company of Nigeria Ltd, could be served out of jurisdiction. The *Okpabi* decision confirms that the test set out in *Caparo Industries plc v Dickman*,[20] whether there was sufficient proximity and whether it would be fair, just and reasonable to impose a duty of care, is no longer applicable. Instead the liability of a parent company for the activities of its subsidiaries must be determined under the general principles of tort law.[21] Following *Vedanta*, the Court has to consider whether 'the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations … of the subsidiary.'[22] The *Okpabi* court also accepted that the promulgation of group-wide policies may in itself be sufficient to give rise to a duty of care.[23]

Despite this welcome clarification on a parent company's liability for its subsidiaries' activities, the *Vedanta* judgment may be a double-edged sword. As considered in the previous section, the decision revived aspects of the FNC doctrine, whilst simultaneously bolstering the substantial justice exception.[24] As such, the judgment should be approached with caution. The *Vedanta* decision highlights that prior to the decision in *Owusu,* the FNC doctrine was often used to reject jurisdiction.[25] It was upon reconsidering the application of *Owusu* and Article 4 of the Recast Regulation that the Court declined to follow the lower courts' reasoning.[26] As *Owusu* and the Recast Regulation no longer apply, we may see a return to a strict application of the FNC doctrine; one that increases the possibility of declining jurisdiction to avoid irreconcilable judgments. Therefore, the *Vedanta* decision may give with one hand, while taking away with the other.

The *BHP* judgment provides some insight into how the substantial justice exception may be interpreted in the future. In *Vedanta*, the Court emphasised that a risk to substantial

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19 *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3.

20 *Caparo Industries plc v Dickman* [1990] 2 AC 605.

21 *Okpabi v Royal Dutch Shell plc*, note 19, para 151.

22 *Vedanta Resources plc v Lungowe*, note 3, para 49.

23 *Okpabi v Royal Dutch Shell plc*, note 19, paras 143–148.

24 Claire Bright, 'Vedanta v Lungowe Symposium: Foreign Direct Liability Cases in England after Vedanta' (26 April 2019), http://opiniojuris.org/2019/04/26/vedanta-v-lungowe-symposium-foreign-direct-liability-cases-in-england-after-vedanta/ (accessed 13 January 2021); Gabrielle Holly, 'Zambian Farmers Can Take Vedanta to Court Over Water Pollution. What are the Legal Implications?' (10 April 2019), https://www.business-humanrights.org/en/zambian-farmers-can-take-vedanta-tocourt-over-water-pollution-what-are-the-legal-implications (accessed 13 January 2021); Gabrielle Holly, 'Vedanta v Lungowe Symposium: A Non Conveniens Revival – The Supreme Court's Approach to Jurisdiction in Vedanta', *Opinio Juris* (24 April 2019), https://opiniojuris.org/2019/04/24/vedanta-v-lungowe-symposium-a-non-conveniens-revival-the-supreme-courts-approach-to-jurisdiction-in-vedanta%EF%BB%BF/ (accessed 13 January 2021); Lucas Roorda, 'Vedanta v Lungowe Symposium: Vedanta v Lungowe and Access to Justice', *Opinio Juris* (25 April 2019), http://opiniojuris.org/2019/04/25/vedanta-v-lungowe-symposium-vedanta-v-lungowe-and-access-to-justice%EF%BB%BF/ (accessed 13 January 2021).

25 *Vedanta Resources plc v Lungowe*, note 3, para 39.

26 Ibid, paras 79–83 and 87.

https://doi.org/10.1017/bhj.2021.10 Published online by Cambridge University Press

justice would only be accepted in exceptional circumstances.[27] *BHP* confirms the exceptionality of the *Vedanta* decision, and suggests that any exception will be narrowly construed. However, *BHP* is a case of substantively different merit to *Vedanta*, such that a different outcome is justified on the facts. Most importantly, in *BHP* there were multiple proceedings both concluded and ongoing in Brazil. Furthermore, the Renova mechanism had already been established to provide compensation for victims of the Fundão Dam's collapse, many of the claimants having already accessed justice through the Renova mechanism and the courts. Additionally, the proceedings against BHP plc were parasitic upon BHP Brasil being found liable in the *155bn CPA* proceedings. Of particular significance is that the Court in *BHP* highlighted that 'legal aid is available in Brazil to support private claims and there are no costs implication of seeking redress through Renova. This is to be contrasted with the position in England in which the majority of claimants will be required to pay 30% of any winnings to their solicitors.'[28] This contrasts with *Vedanta*, which turned on access to legal aid. Consequently, *BHP* highlights that there will be certain access to justice issues that cannot be remedied through jurisdiction.

VI. Conclusion

While the *BHP* ruling may not be welcomed by some in the business and human rights community, the judgment does not represent a substantial shift in English law. The decision in *Vedanta* bolstered substantial justice arguments and extended the scope of a parent company's duty of care. However, *BHP* confirms the exceptional nature of the decision in *Vedanta.* The *BHP* case highlights that there are barriers to justice that cannot always be resolved through jurisdiction. In *BHP*, allowing the case to proceed in England may not have provided a remedy to the procedural hurdles faced by the claimants in Brazil. In this case, the Court considered that accepting jurisdiction would have frustrated, rather than vindicated, the claimants' rights. The *BHP* judgment highlights that if the FNC doctrine is used to fill the lacuna left by EU law – almost an inevitability – any exceptions are likely to be narrowly construed.

[27] Ibid, para 93.

[28] *Municipio de Mariana v BHP Group*, note 1, para 258.

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