CASE NOTES:
Município Mariana v BHP Group Ltd [2026] EWCA Civ 502

COURT OF APPEAL REFUSES PERMISSION TO APPEAL MARIANA DAM CASE

The Court of Appeal's permission to appeal decision in *Mariana* is a reminder of how difficult it is to appeal findings of fact (here, the Judge's foreign law findings) and indicates the appellate courts may be particularly reluctant to overturn such findings in long and technical *"heavy cases"* involving significant expert and fact evidence.

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Background

On 6 May 2026, the Court of Appeal refused permission for the Defendants to the Mariana dam litigation to appeal the High Court's judgment on liability (the "**Judgment**"). The Judgment found that BHP Group (UK) Limited, and BHP Group Limited (the Defendants / appellants, "**BHP**") were liable under Brazilian law for the collapse of the Fundão Dam in Brazil in 2015.

Mrs Justice O'Farrell had ruled that the dam collapse was foreseeable, and the companies were strictly liable under Brazilian law as 'polluters' because they operated as a single economic entity with ultimate ownership and control of the dam operator (Samarco). They were also liable in 'fault' under Brazilian law for their negligence in risk management. On limitation, the Judge ruled that the claims were not time-barred, as prescription (limitation) had been postponed by criminal proceedings.

BHP's Appeal

The Defendants' grounds of appeal concerned three main areas of the Judgment:

1. Ground 1 – liability under the Environmental Law. This was the Judge's decision that BHP were strictly liable as 'polluters'.
2. Ground 2 – fault-based liability under Article 186 of the Civil Code.
3. Grounds 3, 4, and 5 – limitation.

Under each of these grounds, BHP appealed on the basis there had been a serious procedural irregularity in the first instance judgment, due to the Judge's *"failure to engage with BHP's case". BHP's skeleton argument alleged that "something has clearly gone wrong in the judicial process and the [main] Judgment needs to be carefully scrutinised on appeal".*

Under grounds 1, 3, 4 and 5, BHP also alleged the Judge's decision had been wrong. Ground 2 proceeded on the basis of procedural irregularity alone.

The Court's approach to the appeal

Lord Justice Fraser, who gave the Court of Appeal's judgment, was at pains to emphasise from the beginning that *"[t]his litigation is the very definition of a heavy case"*. There had been a 5-month trial, with seven factual witnesses and eight expert witnesses, each of whom gave oral evidence, as well as joint statements from a further three experts. The list of issues ran to 70 different issues over 28 pages, and the Judgment ran to 1,129 paragraphs. The costs of the litigation at the consequentials judgment (post-liability trial) exceeded £300 million. Fraser LJ listed these features to *"[put] the grounds of appeal in this case into context"*.

He also highlighted that the alleged failures of the trial judge properly to engage with BHP's case were all points of fact, as the governing law *"is that of Brazil, and issues arising under the law of a foreign jurisdiction are treated in English law as questions of fact"*.

On BHP's procedural irregularity appeals, LJ Fraser reiterated the case law on the approach of the Court of Appeal to appeals of fact. In short, the approach is very strict. The Court of Appeal is not to *"interfere with findings of fact by trial judges, unless compelled to do so"* (i.e. where it is *"rationally insupportable"*). This is based on the trial judge's expertise in determining the facts and avoiding duplicating the role of the trial judge on appeal. LJ Fraser referred, throughout his judgment, to the following *passage from* Volpi v Volpi *[2022] EWCA Civ 464 that:*

"An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it."

LJ Fraser criticised BHP on several occasions for reversing that

assumption (i.e. assuming that unless the Judge had expressly dealt with a piece of evidence, they had failed to engage with BHP's case).

Ground 1 – Strict Liability Under Environmental Law

LJ Fraser rejected BHP's case that the Judge had not properly engaged with BHP's case. Indeed, he said she set out BHP's case at [387] of her Judgment. In particular, he rejected BHP's argument that the Claimant's expert had 'accepted' or 'conceded' BHP's case, which was a point the Judge had expressly considered, and which LJ Fraser agreed had not happened. In LJ Fraser's words: *"Stating 'concession' repetitively does not make it an accurate description."* In assessing factual issues, he emphasised the dangers of the Court of Appeal looking at *"one tiny puzzle piece"* or *"strands"* of questions and answers in isolation and out of context.

LJ Fraser also dismissed BHP's 'wrong' in law arguments on Ground 1, two of which he found were *"purely challenges to the trial judge's findings of fact on two connected issues"* (§71), and the third – causation – a highly fact-specific area (which was *"not a promising start for BHP"*). The Judge's application of the multifactorial approach was an evaluative exercise based on all the material before her, in respect of which BHP did not come close to showing an error of principle. The Court found that the Judge considered and addressed the relevant material, and warned against focusing on isolated pieces of evidence ('island-hopping') to build an appeal.

Ground 2 – Fault-based liability

This was an alternative case to the strict liability case above. BHP only ran the 'procedural irregularity' case in respect of this ground, including on the basis that the Judge failed to analyse contemporaneous documents of BHP, and there was no evidence BHP had seen or received certain technical documents relied on by the Judge. LJ Fraser again found that the Judge had (carefully) considered BHP's case, and in some respects found for BHP. BHP's 'piecemeal' objections to the Judge's findings were found to be *"a vast distance away from what would be required to justify a claim of serious procedural irregularity"*.

The Court's view on pleading points

BHP raised other complaints under this ground, including the Judge failed to engage with BHP's objections that the allegations on risk management negligence were not pleaded. As to these, LJ Fraser found the Judge had considered them (see [654] of her Judgment). BHP took 11 pleading points in closing, such that the claimants had lodged a table entitled *"Basis in the Pleadings for Cs' Standard and Particulars of Fault"*. This broadly allowed the pleading points to be traced, and also submitted that in any event the Defendants had not been put to any prejudice even if the points were not pleaded. LJ Fraser stated the lack of prejudice is *"effectively a total answer in any event to these two pleading points"*. In his words:

"the suggestion that in closing submissions any party in a case such as this one could produce pleading objections, when evidence on a particular issue had been advanced and tested, is a fanciful one. This approach to pleading objections by BHP has echoes of a bygone age and is not the way that modern commercial litigation is conducted in the Business and Property Courts".

Grounds 3, 4 and 5 – Limitation

The Judge found that limitation did not start to run until 2024, and that the period that applied as the relevant limitation period was 5 years rather than the normal 3 years for civil claims.

Again, the Court found that there was no procedural irregularity, serious or otherwise, in the High Court's judgment (§136):

"She clearly addressed these issues in her judgment, and indeed these issues are not only in the agreed list of issues but are listed in her judgment."

The Court referred to BHP's submission that the Judge did not engage with their arguments as *"baseless"* and cited parts of the judgment where the Judge clearly did consider their arguments (but rejected them). The Court dismissed BHP's contention that the Judge's limitation findings were not very long. It found the consideration of limitation to be *"more detailed than BHP suggests"* but in any event the *"basic blocks were there for BHP to know why their expert evidence on this was not, in overall terms, preferred and why the judge had concluded as she did"*.

BHP described the Judge's limitation findings as 'novel', and said her findings on Article 200 were being relied on in 60 different appeals in Brazil. The Court made short shrift of this argument, noting that there are *"no free-standing points of principle that the judge got even arguably wrong"* and stating in any event *"The TCC in London cannot possibly bind the superior courts in Brazil"*.

Accordingly, the Court dismissed permission on all grounds. However, O'Farrell J had granted appeal on a point of principle concerning an order that BHP pay interest on pre-judgment costs on account of a potential liability to pay a success fee. The Court ordered extradition of this appeal. This was because the Claimants' costs were at £213 million and interest could be a *"sizeable figure in its own right"*, and resolving the point quickly might bring an end to the litigation which had another lengthy trial beginning at the end of 2027.