

## Case Note

## EVALUATING THE ADMINISTRATION OF JUSTICE AND ABUSE OF PROCESS: A CRITICAL ANALYSIS OF THE MARIANA JURISDICTION CHALLENGE [2022] AND THE EUROPEAN SYSTEM OF LAW FOR CIVIL AND COMMERCIAL MATTERS FOR A THIRD STATE

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### ABSTRACT

**Background:** *This research critically analyses the jurisdictional challenges and their implications for the proper administration of justice in the case of Mariana vs. BHP Group [2022] EWCA Civ 951. The legal route taken by the High Court of Appeal is examined, considering both the proceedings in the UK (pre-Brexit) and a third state (Brazil). This text examines the impact of the European legal framework on EU member states and evaluates the approach of UK towards Article 34 of the Brussels Regulation. The analysis examines whether pursuing damages based in civil or commercial liability suffered by victims domiciled in a Third State through European jurisdiction is appropriate.*

**Methods:** *The study employs a case law analysis, supported by doctrinal legal research methodology, to systematically examine the balance of the principle of forum non conveniens and the consistent application of the Brussels Regulation in the Mariana Case. This is a critical review of the UK High Court's decision to overturn Judge Turner's ruling. The review emphasizes the adherence to historical national precedents, European Union Law, and the European Court of Justice's previous rulings against the United Kingdom's strike-out legal technique.*

*The article explores the complexities of administering justice, focusing on the interplay between case management discretion, the principle of proportionality, and the court's responsibility to ensure a fair trial. It analyses the impact of factors such as the court's structure, case complexity, and the time required for resolution within this framework, while also considering the court's duty to administer justice effectively. .*

**Results and conclusions:** *The study's findings enhance comprehension of jurisdiction challenges in transnational litigations within the European Legal System and their implications for the proper administration of justice. The article recommends a balanced approach that upholds the substantial rights of claimants while aligning national practices with EU civil liability standards, promoting judicial harmony in transnational civil and commercial liability cases in the European Union.*

## 1 INTRODUCTION

The case study analyses the implications of the Court of Appeal's decision<sup>1</sup> that ruled against Mr. Justice Turner decision<sup>2</sup> in the matter of the Jurisdiction Challenge in *Município de Mariana and others v BHP Group*. The case involves a group of Brazilian claimants seeking damages for environmental pollution caused by a dam collapse in Brazil. The defendants, a UK based mining company and its Australian subsidiary, challenged the jurisdiction of the English court, arguing that similar claims were already pending in Brazil.

Initially, the court granted the defendants 'application to strike out the claim or stay it as an abuse of process. The main reason for the priori decision was the potential risk of irreconcilable judgments and cross-contamination arising from the parallel proceedings in Brazil, which would render the claim in England "irredeemably unmanageable".<sup>3</sup>

However, the Court of Appeal overturned this decision and rejected the defendants 'application. It held that for the abuse of process to be established, each individual claimant should be considered individually, and a finding of abuse of process does not automatically lead to striking out the claim. The court emphasized that litigants should not be deprived of their claims without a scrupulous examination of all circumstances.

This rejected approach by the Court of Appeal supported by the Civil Procedure Rule 52.30,<sup>4</sup> is a landmark case with significant implications for the doctrine of abuse of process and the extraterritorial reach of English courts. In this paper, we further consider the issue of abuse of process and the Brussels Regulation,<sup>5</sup> particularly the

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1 *Município de Mariana and others v BHP Group (UK) Ltd (formerly BHP Group PLC) and BHP Group Ltd* [2022] EWCA Civ 951 (08 July 2022) <<https://www.judiciary.uk/judgments/municipio-de-mariana-v-bhp-group>> accessed 11 January 2024.

2 *Município de Mariana and others v BHP Group PLC (formerly BHP Billiton PLC) and BHP Group Ltd* [2020] EWHC 2930 (TCC) (09 November 2020) <<http://www.bailii.org/ew/cases/EWHC/TCC/2020/2930.html>> accessed 11 January 2024.

3 *ibid*, paras 104, 265.

4 UK Parliament, Civil Procedure Rules (1998) <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules>> accessed 11 January 2024.

5 Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012] OJ L 351/1 <<https://eur-lex.europa.eu/eli/reg/2012/1215/oj>> accessed 11 January 2024.

framework related to the jurisdiction from an EU member state to decide a claim with parallel implications in a third state.

Crucially, this claim was commenced in 2018, prior to the UK's exit from the European Union (BREXIT), which concluded in December 2020. As a result, all proceedings are being conducted under EU law, the European Court of Justice (ECJ) jurisprudences and UK case law.

The case involves a group of Brazilian claimants, who in 2022 numbered around two hundred thousand people, including 13 large companies, 25 municipalities, 15 churches and religious institutions and 5 public utilities, none of whom had received any monetary redress from any Brazilian decisions relating to compensation.<sup>6</sup>

They decided to bring a claim against a UK-based mining company, seeking damages for environmental pollution caused by a dam collapse in Brazil that affected the Doce River, a huge water body stretching more than 800 kilometers between the Brazilian states of Minas Gerais and Espírito Santo, a distance greater than that from Edinburgh to London.

The claim was proposed against BHP England and BHP Australia, which sit at the head of the BHP Group and indirectly control BHP Brazil as part of the BHP Group. They share 50% ownership of Samarco Mineração SA, a Brazilian company, in a joint venture agreement with Vale SA, the owner of the other 50%. They operate together as a single economic entity under a dual-listed company structure, with the boards of director comprising the same individuals, a unified senior executive management structure, and joint objectives. The mining companies challenged the jurisdiction of the English Court to hear the liability of the defendants, arguing that the plaintiffs had already brought similar claims in Brazil, in particularly the pending action known as the "155bn CPA".<sup>7</sup> Jurisdiction over BHP England is based on its domicile under Regulation (EU) No 1215/2012, and over BHP Australia on the fact that it conducts its business from offices in the United Kingdom, where the claim was processed.

At first instance in Liverpool, on 07 August 2019, the defendants applied to strike out the case on three grounds: "(1) BHP Australia applied to stay the claims against it under CPR 11(1) on the basis that Brazil was clearly and manifestly the more appropriate and available forum ("the *forum non conveniens* application"); (2) BHP England applied to stay the claim under Article 34 of the "Brussels Recast" on the basis that there were pending proceedings in Brazil which gave rise to a risk of irreconcilable judgments ("the Article 34 application"); (3) Notwithstanding these applications, both defendants applied to strike out or stay the claims under CPR 3.4(2)(b) as an abuse of process, alternatively to stay them on case management grounds pursuant to CPR 3.1(2)(f), in each case on the grounds that they are vexatious, wasteful and duplicative of the collective and individual proceedings and/or

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6 *Município de Mariana v BHP Group (UK)* (n 1) paras 2, 42.

7 The English abbreviation for the existing Brazilian lawsuit named "Ação Civil Pública de 155 bilhões".

judgments in Brazil and/or the work of the Renova Foundation ["the Abuse Application" and "the Case Management stay application" respectively].<sup>8</sup>

Mr. Justice Turner in Liverpool, granted the defendants' applications on 9 November 2020, recognizing that all the claims would be struck out or, in the alternative, stayed as an abuse of process on the basis of the proceedings in Brazil and the Renova initiatives. The argument presented was that it may be futile and wasteful for the administration of justice to entertain a claim in the United Kingdom where it cannot be predicted that more favorable remedy will be obtained there compared to the jurisdiction of Brazil.

Alternatively, the claims should be stayed against BHP England pending the conclusion of the 155bn CPA pursuant to article 34 of Brussels Recast, due to numerous issues and a risk of irreconcilable judgments between the Mariana Case and the action in Brazil. It was considered appropriate to stay the case until the conclusion of the 155bn CPA because both actions proceeding in parallel would have the risk of undermining the administration of justice.

There last assertion was that the claims against BHP Australia should involve arguments related to *forum non conveniens* grounds, even if the proceedings against BHP England were granted in the UK, because Brazil would still be the unique forum to trial claims against BHP Australia. It was argued that the claimants had not properly demonstrated the standard rule that the British forum had a better position to obtain substantial justice despite the Brazilian courts and Renova Claim resolution facility.

To counter this argument, the Court of Appeal considered that the first judge's position was incorrect for several reasons. In relation to this research, the focus is on the decision of appeal that considered both the proceedings as a Group Litigation Order (GLO) and the position of all the individual claimants to assess the preliminary abuse of process decision. The Court recognized that the argument of abuse of process affects a material right through a procedural challenge that results in a serious denial of access to justice. In such cases, a decision needs to be deeply considered, taking into account all the parties involved and proportional to the conflict. The court stated the following in its decision:

"Where multiple claims are brought by different claimants who do not stand in materially the same position, it is necessary to consider the question of abuse by reference to claims individually (or by relevant claimant category). Abusive factors applicable only to one claimant do not render another co-claimant's claim abusive. We treat it as axiomatic that a claim brought by one claimant, which is not itself abusive, cannot become abusive merely because other claimants have chosen to bring abusive claims. The claimants should be in no different position, so far as an abuse argument is concerned, from that if each had brought separate proceedings, whether or not other claimants also brought proceedings. An individual approach is required. The court must be satisfied in relation to every claim,

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8 *Município de Mariana v BHP Group (UK)* (n 1) para7.

having regard to any differences between claimants or categories of claimant, that it is abusive and a strike-out or stay appropriate. 177. A finding of abuse of process does not lead automatically to a striking out of the claim. The court then retains a discretion as to the appropriate response, which must always be proportionate (see for example *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015 at paras. [63] and [64]). 178. Finally, but importantly for present purposes, litigants should not be deprived of their claims without scrupulous examination of all the circumstances and unless the abuse has been sufficiently clearly established.”<sup>9</sup>

Dr. Zuckerman opinion sheds light on the importance of the proportionate principle in case management. According to him, which “*a sound civil adjudication system must meet three basic requirements: it must return judgments that are well grounded in law and in fact; it must do so within a reasonable time; and, it must deliver all this by the use of proportionate public and litigant resources*”.<sup>10</sup> This argument will be further elaborated in the subsequent pages, providing a more detailed analysis.

Having duly introduced the context of the facts and arguments related to the first decision, as well as the main debate that overruled it, let’s explore the concept of abuse of process and the preliminary ruling about stay proceedings in cases pending in a Member State and a third State within the context of the European Union Law.

## 2 THE DOCTRINE OF ABUSE OF PROCESS

The concept of abuse of process is crucial to this essay as the defendants rely on Article 34 of Regulation (EU) No 1215/2012, which empowers the court of an EU member state to stay proceedings within their jurisdiction if it is necessary for the proper administration of justice to await the final judgment in a third state. This provision also grants the courts to continue their analysis, such as striking out the action, if it appears that a double judgment would result in irreconcilable outcomes.<sup>11</sup>

The Royal Courts of Justice in the UK, supported by the precedent set in possess inherent jurisdiction to stay proceedings where their continuation would constitute an abuse of process.<sup>12</sup> The underlying principle behind this concept is that any conduct undermining the administration of justice or damaging public confidence in the legal system may be deemed abusive.

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9 *ibid*, paras 176-8.

10 Adrian Zuckerman, ‘The Continuing Management Deficit in the Administration of Civil Justice’ (2015) 34(1) *Civil Justice Quarterly* 1.

11 Regulation (EU) no 1215/2012 (n 5) art 34.

12 *Hunter v Chief Constable of the West Midlands Police & Ors* [1981] UKHL 13 (19 November 1981) <<http://www.bailii.org/uk/cases/UKHL/1981/13.html>> accessed 11 January 2024.

Prof. Rabeea Assy, in his exploration of the three senses of integrity in civil justice, defines abuse of process as the "basic idea [...] that the court may impose sanctions on parties who litigate in an improper or inappropriate manner".<sup>13</sup> In the aforementioned precedent, Lord Diplock invoked the Court's power:

"to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people".<sup>14</sup>

The discretion to determine whether conduct in the proceeding is abusive is vested in the judge, supported by the doctrine of inherent power which has "operated as a valuable weapon in the hands of the court to prevent the clogging or obstruction of the stream of justice".<sup>15</sup> Furthermore, since the implementation of the "CPR", this doctrine must align with the CPR rules, which are also invoked by the defendants in their jurisdiction challenge.

Prof. C. H. van Rhee, in his argument about the model of civil procedure rules in modern Europe, firmly believes that under the case management system, the court bears the primary responsibility of ensuring that the proceedings are proportionate. This entails considering the nature, importance and complexity of the concrete case, as well as the impact of the pending decision in relation to other cases on its docket, to ensure that justice can be administered both in the specific case and in all proceedings in a proportional manner.<sup>16</sup>

This question is addressed in Rule 5 of the Model European Rules of Civil Procedure from the European Law Institute & Unidroit (2021):

"In determining whether a process is proportionate the court must take account of the nature, importance and complexity of the particular case and of the need to give effect to its general management duty in all proceedings with due regard for the proper administration of justice."<sup>17</sup>

This framework underscores the significance of proportionality in the exercise of the courts' discretionary power, particularly when it comes to the power to strike out a claim involving

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13 Rabeea Assy, 'Taking Seriously Affordability, Expedition, and Integrity in Adjudication' in Rabeea Assy and Andrew Higgins (eds), *Principles, Procedure, and Justice: Essays in honour of Adrian Zuckerman* (OUP 2020) 190, doi:10.1093/oso/9780198850410.003.0009.

14 *Hunter v Chief Constable of the West Midlands Police & Ors* (n 12).

15 Stuart Sime, 'Inherent Jurisdiction and the Limits of Civil Procedure' in Rabeea Assy and Andrew Higgins (eds), *Principles, Procedure, and Justice: Essays in honour of Adrian Zuckerman* (OUP 2020) 290, doi:10.1093/oso/9780198850410.003.0014.

16 CH van Rhee, 'Gerenciamento de Casos e Cooperação Na Europa: Uma Abordagem Moderna Sobre a Litigância Cível' (2022) 13(2) *Civil Procedure Review* 162.

17 European Law Institute and UNIDROIT, *ELI - UNIDROIT Model European Rules of Civil Procedure: From Transnational Principles to European Rules of Civil Procedure* (OUP 2021) 34, doi:10.1093/oso/9780198866589.001.0001.

substantial rights of victims of European companies. Precedents related to these rights have significant implications for international commercial litigation, cross-border disputes, and the liability of multinational companies.

Notably, in a common law system, a decision on cross-border disputes, especially when it arises from the largest group litigation order in world history, establishes a strong precedent for future similar cases and becomes a turning point in how companies operate in international market. Therefore, if a controversial decision is made without due consideration or contradicts the traditional position of the Court, the resulting precedent could undermine moral coherence and public confidence in the legal system, potentially favoring large companies disproportionately.

Dr. Zuckerman emphasizes the importance of a civil adjudication system that meets three fundamental requirements, similar to those expected of any other public service. First, “it must return judgments that are well grounded in law and in fact; [Secondly] it must do so within a reasonable time; and, [Lastly] it must deliver all this by the use of proportionate public and litigant resources” striking a “balance [between] the competing demands of correct judgements, timely judgements, and resource constraints”.<sup>18</sup>

Conversely, if the Court were to exercise its inherent power to reconcile extraterritorial legal system with the rules of its own country and the EU legal system, acknowledging that companies operating in international markets must take measures to comply with the European legal system beyond their border to protect the environment and the people affected by their action, It would send a strong message to society that its legal system is robust enough to enforce compliance with rules even when companies operate abroad.

The three requirements aforementioned reflect the need for an efficient and fair civil adjudication system, where the proper administration of justice relies on delivering well-reasoned judgements, respecting reasonable timeframes, and managing resources effectively. The forthcoming pages of his research will delve deeper into the implications of these requirements within the context of the Mariana vs. BHP Group case and its jurisdictional challenges.

Considering the far-reaching consequences, the strike-out application must be approached with proportionally and caution, as it involves principle of access to justice, a fundamental right of the European Union, based on article 47 Charter of Fundamental Rights<sup>19</sup> and on article 6 European Convention on Human Rights,<sup>20</sup> which guarantee a fair trial for everyone

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18 Zuckerman (n 10) 1.

19 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 <[http://data.europa.eu/eli/treaty/char\\_2012/oj](http://data.europa.eu/eli/treaty/char_2012/oj)> accessed 11 January 2024.

20 Convention for the Protection of Human Rights and Fundamental Freedoms [1950] ETS 5 <<https://rm.coe.int/1680063765>> accessed 11 January 2024.

from a member. In the UK, this principle is connected to the principle of natural justice and the right to a day on court.<sup>21</sup>

It is important to note that this plea (strike out application) is not limited to pending actions but can also be made prior to the initiation of a claim. In the UK legal system, such a request falls under the category of an anti-suit injunction, which is also covered by the European Union law. Prof. Remedio Marques points out that these pleas involve "Applications for declarations of condemnation for failing to initiate or continue interim proceedings [...] [and] imply that their substantiation allows the issuance of decisions in which a court orders a party subject to the jurisdiction of that judicial body not to initiate or continue certain requests [author translation]".<sup>22</sup>

He argues that, despite the controversial nature of this remedy, it offers the advantage of reducing costs and fees associated with abusive litigation and preventing irreconcilable decision between different jurisdictions.<sup>23</sup> Referring to *Donohue v. Armco Inc. et al.*, (2001) 294 N.R. 356 (HL) 64, § 24, he draws attention to the standard of inherent power exercised by the UK courts, which includes granting a stay of proceedings, restraining the prosecution of proceedings in a non-contractual forum abroad, or issuing any other appropriate procedural order in the circumstances when a claim falls within the agreement made in another forum.<sup>24</sup>

Thus, the inherent power exercised with proportionality in conflicts involving the fundamental right of access to justice is often governed by "Rules of international courtesy (*courtoisie internationale*) guided by a principle of reciprocity and combined with specific considerations regarding *forum non conveniens* [author translation]" when striking out a case. In conclusion, he argues that the British courts typically rely on the argument of sufficient interest<sup>25</sup> to justify their decisions, taking into account the overall effects of these actions.<sup>26</sup>

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21 *Ridge (AP) v Baldwin and Others* [1963] UKHL J0314-1 (14 March 1963) <<https://vlex.co.uk/vid/ridge-p-v-baldwin-793177273> > accessed 11 January 2024.

22 JP Remédio Marques, 'Tutela Cautelar e Inibitória no Quadro da Propriedade Intelectual - Alguns casos difíceis em matéria de providências cautelares e a adequada tutela de requerentes e requeridos', Coimbra, Gestlegal, 2023.

23 *ibid* 110.

24 *Donohue v Armco Inc and Others* [2001] UKHL 64 (13 December 2001) <<https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd011213/dono-1.htm>> accessed 11 January 2024.

25 *Airbus Industrie GIE v Patel and Others* [1998] UKHL 12 (2 April 1998) <<https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd980402/patel01.htm>> accessed 11 January 2024.

26 Remédio Marques (n 22) 112.



### 3 THE IMPLICATIONS OF ABUSE OF PROCESS ON MARIANA CASE

In light of the aforementioned legal framework, it is crucial to how the High Court's approach was influenced by these implications. The court carefully analyzed the main arguments and precedents presented by Mr. Justice Turner, who considered the case an abuse of process. These precedents included *Hunter v Chief Constable of the West Midlands Police* [1981] UKHL 13, [1982] AC 529 ("Hunter"); *Her Majesty's Attorney General v Barker* [2000] EWHC 453 (Admin), [2000] 1 FLR 759 ("Barker"); *Johnson v Gore Wood & Co* [2000] UKHL 65, [2002] 2 AC 1 ("Johnson") (citing *Henderson v Henderson* [1843] 3 Hare 100 ("Henderson")); *Dexter Ltd v Vlieland-Boddy* [2003] EWCA Civ 14 ("Dexter"); and *AB v John Wyeth & Brother (no 4)* [1994] PIQR 109 ("Wyeth").

Moreover, Mr. Justice Turner asserted that his decision regarding the abuse of process was a matter of case management discretion and that "[...] the factors relevant to the exercise of his discretion in relation to a case management stay did not differ materially from those relevant to the strike out application".<sup>27</sup> However, the High Court held a contrary view, stating that "The Judge's finding that the claims amounted to an abuse of process was not the exercise of a discretion. Rather it was an assessment in respect of which there could only be one correct answer (as to whether there was or was not an abuse of process)."<sup>28</sup>

In cases where a court decision is not made under the inherent power to manage a case through the CPR (Civil Procedure Rules), the decision is considered an attempt to find the correct answer within a larger context and involving multiple factor "[but] the question [on the Mariana case appeal] [...] is whether or not the Judge reached the right answer (see *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748 at para. [16])". In such instances, "[...] an appellate court will be reluctant to interfere with the decision of a judge where the decision rests upon balancing a large number of factors". If so, "The court can interfere if it considers the decision to be wrong by reason of some identifiable flaw in the treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor which undermines the cogency of the conclusion (see for example *Re Sprintroom* [2019] EWCA Civ 932, [2019] BCC 1031 at para. [76])."<sup>29</sup>

According to Prof. Zuckerman, "To enforce rights judgements [the court opinion] need not only be correct in law and in fact but must also be effective as remedies for wrongs". For a remedy to be truly effective, it needs to be administered in a timely manner when it can still make meaningful difference.<sup>30</sup> Therefore, if a strike-out decision is made prematurely without considering the proportionality principle, it raises questions about

27 *Município de Mariana v BHP Group (UK)* (n 1) para 8.

28 *ibid*, para 143.

29 *ibid*.

30 Zuckerman (n 10) 1.

the Court of Appeal's responsibility to oversee the "exercise of case management discretion by the trial courts".<sup>31</sup> The analysis of such decision becomes crucial to ensure that they are made in a secure and consistent manner across the board according to the rule of law and the principle of fairness.

As a matter of principle, in analyzing Judge Turner's decision, the High Court approached the claim as a group order litigation (GLO), which involves multiple claims, brought by different claimants who are not in materially the same position. In such cases, the court must consider the question of abuse in relation to the entire class of claimants and each of their individual claims. Failing to do so would result in a general strike-out decision that does not adequately consider whether should be applied to all claimants. Thus, hypothetically, an abusive factor applicable only to one claimant would not render another co-claimant's claim abusive.<sup>32</sup>

The High Court firmly stated that it is "axiomatic that a claim brought by one claimant, which is not itself abusive, cannot become abusive merely because other claimants have chosen to bring abusive claims. The claimants should be in no different position, so far as an abuse argument is concerned, from that if each had brought separate proceedings, whether or not other claimants also brought proceedings". Thus, in collective cases, an individual approach is required to strike out a large number of claimants. In cases involving GLO or multiple claims a "court must be satisfied in relation to every claim, having regard to any differences between claimants or categories of claimant, that it is abusive and a strike-out or stay appropriate."<sup>33</sup>

Consequently, a strike-out decision must always be proportionate not only to the court's docket but also with the limitations on the substantive rights of the claimants (see for example *Cable v Liverpool Victoria Insurance Co Ltd*).<sup>34</sup>

In a previous case mentioned, the court made it a clear that "Having established that there was an abuse of process, the second step for the court is the usual balancing exercise, in order to identify the proportionate sanction. Striking out the claim is an available option, but as we have seen, it is not the only, or even the primary solution".<sup>35</sup>

This *ratio decedendi* requires the court to consider what a proportionate decision entails, ensuring careful consideration of all circumstances and avoiding the deprivation of a claimant's right to bring an apparently valid claim before the court, particularly when doubts exist regarding one or more claimants. In such cases, the Court must be taken into

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31 *ibid* 3.

32 *Município de Mariana v BHP Group (UK)* (n 1) paras 176-8.

33 *ibid*, para 176.

34 *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015 (31 July 2020) <<https://www.judiciary.uk/judgments/cable-v-liverpool-victoria-insurance/>> accessed 11 January 2024.

35 *ibid*, para 73.

account where a litigant should not be deprived without careful consideration of all the circumstances and where abuse is not clearly established.<sup>36</sup>

In order to follow this statutory route, a strike out order should only be made at first instance where, in the opinion of the court, it is clear and obvious that a proceeding is so abusive and wasteful that it would not serve the ends of justice, and for that reason the court should exercise its discretion, but proportionately. Otherwise, it would be contrary to all the principles of justice, and in particular to the claim of correctness on which all modern legal systems are based, to prevent a claimant from bringing an apparently proper claim to court, especially when there remains a residual doubt about one or more claimants.<sup>37</sup> To repair an erroneous argument, the High Court did so, overturning the first decision and concluding that:

“[...] the Judge’s decision to strike out, alternatively stay, the proceedings for abuse of process was flawed in a number of respects and wrong. In particular: (1) the fact that a claim properly advanced is said to be “unmanageable” does not as such make it an abuse; (2) in any event, the Judge’s conclusion that the proceedings were “irredeemably unmanageable” is not sustainable; (3) the Judge was wrong to rely on *forum non conveniens* factors as part of his analysis on abuse of process; (4) whilst a properly arguable claim may in principle be abusive if it is (clearly and obviously) pointless and wasteful, the Judge’s error in relation to the manageability of the litigation infected his conclusion on whether that was the case here; his reasoning that there was nothing to be gained by the claimants in the English courts was premised fundamentally on his (unjustified) view that their claims here were unmanageable; (5) the Judge failed properly to analyse the position of the 58, and the consequences of their position for other claimants; he treated the claimants as a single indivisible group against whom the application must succeed or fail altogether, rather than treating the application as constituting an application against each claimant, with the position of each claimant or group of claimants being considered individually.”<sup>38</sup>

Furthermore, the High Court’s decision seems to take into consideration the legal framework established by the European Court of Human Rights (ECtHR) regarding to interim measures, specifically strike-out decisions, within the UK. A significant case in this context *Osman v UK*, where the ECtHR found the UK to be in violation of Article 6 of the European Convention on Human Rights.<sup>39</sup> Subsequently, in another case, the

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36 *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ 685, [2015] 1 WLR 4535, para 24; *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, para 22D; *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004, para 48.

37 Cristina Lafont, ‘Correctness and Legitimacy in the Discourse Theory of Law’ in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 291, doi:10.1093/acprof:oso/9780199582068.003.0013.

38 *Municipio de Mariana v BHP Group (UK)* (n 1) para 179.

39 *Osman v the United Kingdom* App no 23452/94 (ECtHR, 28 October 1998) <<https://hudoc.echr.coe.int/fre?i=001-58257>> accessed 11 January 2024.

ECtHR accepted the UK's system of strike-out decisions, but only if the UK court provided in these applications an effective remedy for harm suffered by the claimant. Additionally, the ECtHR emphasizes that a court in a Member State must carefully consider all relevant differences in facts, circumstances and inequalities that impact claimants before deciding to strike out.<sup>40</sup>

To conclude, "Justice can be delivered only according to rules, for without rules there is no justice and no law".<sup>41</sup> From our perspective, this landmark decision, when examined from a technical standpoint, not only aligns with the long historical line of precedents in the UK courts but also aligns with European legislation. This compatibility extends not only to the Brussels Regulation, which will be scrutinized in the next topic, but also to the procedural standards outlined in modern European rules, as previously mentioned in the research's preceding topic regarding Rule 5 of the Model European Rules of Civil Procedure of the European Law Institute and UNIDROIT.

#### 4 THE ARTICLE 34 OF REGULATION (EU) NO 1215/2012 – BRUSSELS REGULATION AND THE FORUM JURISDICTION

Once a summary of the Mariana case, its legal route, and the general approach of the High Court have been provided, it's crucial to conclude this case study by examining the Court's stance on the jurisdictional challenge in relation to Article 34 of the Brussels Regulation and its implications for a pending civil or commercial case in a third state.<sup>42</sup> Article 34 governs how a European Court of Justice deals with civil actions when an application to strike out or stay claims is based on a pending case in a third state, and when the risk of irreconcilable judgments may affect the proper administration of justice.

The arguments presented in the pleadings revolve around whether a European jurisdiction is the appropriate solution for seeking damages based on civil or commercial liability. The Regulation allows the court of a Member State to stay the proceedings and await the judgment in a third State, or to dismiss the proceedings if it does not believe that a third state is handling the case properly and if a future decision could be enforced in its jurisdiction even as a foreign judgment.

In considering the defendants' application and Mr Justice Turner's approach, the High Court stated:

"Under Brussels Recast the courts of a member state have no power to decline jurisdiction over a defendant domiciled and sued in that member state by reference to foreign

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40 *Z and Others v United Kingdom* App no 29392/95 (ECtHR, 10 May 2001) <<https://hudoc.echr.coe.int/?i=001-59455>> accessed 11 January 2024.

41 Zuckerman (n 10) 3.

42 Regulation (EU) no 1215/2012 (n 5) art 34.

proceedings, save in the limited circumstances of *lis pendens* identified in Section 9. Article 34 permits a stay of proceedings in favour of specific related pending proceedings in a non-member state in order to avoid the risk of irreconcilable judgments, in circumstances circumscribed by the conditions it imposes. Where those conditions are not fulfilled, article 4 must be given effect to. To strike out a claim against an English-domiciled defendant as abusive on the ground that the existence of parallel proceedings in a third state would give rise to a risk of irreconcilable judgments infringes the obligation of effectiveness in relation to article 4 and undermines the limited derogation from article 4 for which article 34 provides.<sup>43</sup>

The aforementioned Article 4, which grants jurisdiction to a court of a Member State when a domiciled party is involved, is a rule that has a broad interpretation. According to the High Court, the correct interpretation for Article 34 not only allows the option to strike out pending actions in a third but also requires the court to determine how to properly manage the case brought before its jurisdiction first.

However, the Court did not follow Mr Justice Turner's argument, especially because the *forum non conveniens* approach in the UK has been subject to disruptive changes due to a decision by the European Court (Case C-281/02) not to maintain any exceptions when a Member State applies the Brussels Regulation, even if a common law member has a different approach, in order to ensure a uniform application of the rules of jurisdiction in the European Community.<sup>44</sup>

Relying on the precedent of *MAD Atelier International BV v Manès* [2020] EWHC 1014 (Comm), [2020] QB 971, the High Court concludes that the court's power to stay cannot be used in a manner inconsistent with the Judgments Regulation. This is supported by the argument in *Skype Technologies SA v Joltid Ltd* [2011] I.L.Pr. 8, para 22 (Lewison J), that "A defendant should not be permitted under the guise of case management, [to] achieve by the back door a result against which the ECJ has locked the front door."<sup>45</sup>

The structure and organization of a court, its output, the perceptions of judges, personal approaches to adjudication, different levels or dimensions of litigation in different courts, or even the risk of a long period of time before a decision is reached in a complex dispute brought before its jurisdiction, should not be the sole arguments considered by a court faced with the enforcement of a regulation accepted by a Member State in order to ensure the proper administration of justice. These factors could be not only a matter of judicial

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43 *Municipio de Mariana v BHP Group (UK)* (n 1) para 198.

44 Case C-281/02 *Andrew Owusu v NB Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others* [2005] ECR I-01383 (1 March 2005) <<https://curia.europa.eu/juris/liste.jsf?language=en&num=C-281/02>> accessed 11 January 2024.

45 *Municipio de Mariana v BHP Group (UK)* (n 1) para 203.

discretion but also the result of a balance between the power to manage the case and the substantial rights of the parties.<sup>46</sup>

In fact, Mr Justice Turner's argument that the proceedings would be abusive as pointless and wasteful considered grounds that the claimants could obtain full redress in Brazil (which was not clear at the judge's preliminary level), but also because the proceedings could make the case in the UK court unmanageable<sup>47</sup> due to the complexity of the litigation and the hundreds of issues involved.

However, effective case management should not entail deciding not to manage the facts due to their complexity. If the court lacks the resources and highly trained, experienced staff to exercise its inherent power, proactive case management may face difficulties in resolving a case. These considerations should be addressed through administrative implications rather than arguments that affect the substantial rights brought before the court to be decided.<sup>48</sup>

Otherwise, while "the management of a given case must be tailored to the needs of the particular dispute", At the same time, it must still align with the general standards to ensure consistency in the treatment of similar cases in accordance with the overriding objective and general standards.<sup>49</sup> If the court take a different legal route, the decision should be overruled as a claim correctness.<sup>50</sup>

In fact, the proper administration of justice opposes the restrictive use of administrative powers, imposing consequences that are not related to the merits but restrict the rights of the parties involved. The proposal for a trinational European Rules of Civil Procedure, empathizes this assumption on its preamble, in Rule 5 (2) and 11, recommending that the court, in determining whether a process is proportionate, must take into account the nature, importance and complexity of the particular case. It should consider the consequences of managing a case as part of its duty to ensure proper administration of justice. Before striking out a case, the court order should provide a fair opportunity to present the full framework of the legal case before making a decision.<sup>51</sup>

Consequently, the principle of proportionality serves as hermeneutic approach to give effect to the proper administration of justice conferring management powers restrictively and balancing this principle with the facts presented in the case.

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46 Sharyn Roach Anleu and Kathy Mack, 'Trial Courts and Adjudication' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 547, doi:10.1093/oxfordhb/9780199542475.013.0024.

47 *Município de Mariana v BHP Group (UK)* (n 1) para 208.

48 Robert Turner, "'Actively': The Word That Changed the Civil Courts' in Déirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP 2009) 86, doi:10.1093/acprof:oso/9780199576883.003.0005.

49 Zuckerman (n 10) 2-3.

50 Lafont (n 37).

51 European Law Institute and UNIDROIT (n 17) 34-40.

To illustrate, the Brussels Regulation in recitals (23) and (24) of Articles 33 and 34,<sup>52</sup> confirms the principle of proportionality by explaining that the legislator's intentions with the Regulation was to establish a common basis for jurisdiction in civil and commercial matters. It aims to provide a flexible mechanism for the courts of Member States to apply the regulation, taking into account the enforceability of a judgment in a third State and its impact on the proper administration of justice. This includes considering all the circumstances and the connection between the facts and the parties involved in the proceedings in the Member State.

It also involves assessing whether a judgment in a third State can be expected within a reasonable time, in accordance with the principle of a fair trial (Article 6 of the European Convention on Human Rights), the balance between private and public interest, and the finality of justice.

As a result, the concept of reasonable time entails a prompt rendition of justice and should be considered in procedural rules and court orders as a reasonable claim of correctness (ELI/Unidroit Principle 7). If a third State fails to resolve a dispute in accordance with these standards, Article 4 c/c 34 of the Brussels Regulation should be applied, provided that there is no doubt that the defendant is domiciled in a Member State, as is the case in the particular study.

## 5 CONCLUSION

The recent verdict of the High Court concerning the applicability of abuse of process in *Mariana vs. BHP England* and others raises important considerations. While the court relied on established precedents, the unique circumstances of the group members and the concurrent Brazilian proceedings, which have their distinct scope and involved parties, may have warranted a more nuanced examination before a strike-out decision was made. The use of *forum non conveniens* in this case required a delicate balance between the complexities of cross-border litigation and the fundamental principles of justice.

It could be argued that exercising the inherent power at an early stage, resulting in the case being struck out as unmanageable, may have prevented a thorough assessment of the prospects of a fair trial in the UK. This is especially true when compared to the unique nature of Brazilian collective proceedings. The intersection of the principles of reasonable time, as enshrined in Article 6 of the European Convention on Human Rights, with the defendant's right to a fair trial requires scrutiny.

Concerning Articles 4 and 34 of the Brussels Regulation, it is crucial to have clarity on jurisdiction, particularly given the company's domicile in Europe, including England pre-Brexit. However, this recognition should not prevent the plaintiffs from pursuing

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52 Regulation (EU) no 1215/2012 (n 5).

enforceable claims within the UK jurisdiction. The issue of whether BHP Australia or any other foreign joint venture company can be subject to legal proceedings in English courts requires evaluation based on established principles, as articulated by Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd*.<sup>53</sup>

The High Court's decision to overturn the first judgment reflects a commitment to align with historical UK precedents and the broader contours of European Union law, including the Brussels Regulation. The UK's legal conformity with prevailing European norms in civil and commercial liability matters is reaffirmed by the consideration in the UK legal system of relevant rulings from the European Court of Justice, highlighting the alignment with EU standards.

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53 *Spiliada Maritime Corp v Cansulex Ltd* [1986] UKHL 10 (19 November 1986) <<https://www.bailii.org/uk/cases/UKHL/1986/10.html>> accessed 11 January 2024.



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