

Foreign Investor Securities Claims Stay Safe in Australia



A recent court ruling in Australia may have important implications on shareholder litigation in 2023 and beyond. To alert customers on this issue, Battea is publishing the edited text of a recent Q&A discussion between its outside counsel, David Abel, Managing Attorney of USMA Law Group, and Phi Finney McDonald's Brett Spiegel and Cameron Myers--two Australian attorneys whose firm's achieved the recent victory in the High Court of Australia.



In November 2015, the Fundão dam in Brazil, owned by a joint venture between BHP Billiton and Vale, ruptured, resulting in the Mariana dam disaster.

Introduction

USMA: On October 12, 2022, the law firm Phi Finney McDonald (PFM) received a significant victory for shareholders in Australia's highest court. The matter, BHP Group Limited v Impiombato [2022] HCA 33 (BHP), had significant implications for whether group members outside of Australia could participate in the country's federal class action regime. To learn more about the universally positive outcome for all group members, including investors in Australian securities, I am speaking with Brett Spiegel, Principal Lawyer and Cameron Myers, Special Counsel at PFM for a Q&A session on the BHP case.

Good day Brett and Cameron. We congratulate Phi Finney McDonald on the outcome in the BHP case. It was of great interest to Battea, as it provides claim filing services for hundreds of clients participating in Australian securities litigation. For its clients, Australia ranks second behind the

US in terms of the country with the greatest number of annual securities class actions for them to consider each year. We know you're busy and appreciate you taking the time to speak with us today. So if we may, let's jump into the recent events in the BHP securities litigation.

Q&A

USMA Q: Can you set the stage for what the BHP Group Limited (BHP) securities action is about and how it ended up in the High Court of Australia (High Court)?

PFM A: The class action on behalf of BHP shareholders seeks to recover losses suffered following the catastrophic collapse of the Fundão tailings dam at BHP joint venture iron ore mine in Brazil. On November 5, 2015 the Fundão dam collapsed, releasing approximately 60 million cubic meters of wastewater and killing 19 people. It is considered the greatest environmental disaster in Brazilian history. Following the

dam collapse, BHP's combined market capitalisation fell by more than \$25 billion as the stock price plunged across all markets, falling 22% in Sydney and 23% in London and Johannesburg between November 5, 2015, and November 30, 2015.

The claim alleges that between August 2012 and November 2015, BHP failed to disclose serious risks relating to the Fundão Dam in violation of Australian continuous disclosure laws. The class action also alleges that BHP engaged in misleading or deceptive conduct in making false safety representations to the ASX.

The issue on appeal to the High Court was whether non-Australian residents can participate in Australian class actions. The High Court unanimously rejected BHP's argument and confirmed that all impacted group members can participate in Australian class actions, regardless of place of residence.

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USMA Q: What was at stake for foreign investors if the court ruled in favor of BHP's arguments?

PFM A: A BHP victory in the High Court would have barred foreign investors from participating in Australian shareholder class actions. It effectively would have created one set of rules for Australian investors and one set of rules for foreign investors.

USMA Q: We understand that ruling involved issues of both whether a foreign investor could be a representative party or a group member. What were the issues there the difference between the two?

PFM A: The sole issue before the High Court was whether foreign investors could be group members in Australia's federal class action regime. It was not in dispute that a foreign investor can be a representative applicant. The High Court's recognized the logical issues posed by this dichotomy and noted that "If a person in the pool [of group members] can become a representative party irrespective of their place of residence, as BHP accepts, why can a person in the pool become a group member only if resident in Australia?"

USMA Q: Several years ago, a major case in the US, Morrison v. National Australia Bank, 661 U.S. 247 (2010) had significant implications for foreign investors claims and foreign companies' liability in America. How does the BHP case compare in significance for Australian securities cases?

PFM A: The High Court decision is a significant victory for access to justice in Australian Courts. In confirming foreign investors can be group members, the decision confirms Australia's federal class action regime as one of the most flexible and efficient

mechanisms for resolving common issues between claimants, wherever they reside. We believe the decision will also benefit defendants who wish to resolve their liabilities, instead of cynically seeking to disenfranchise claimants.

USMA Q: Since we're on the subject of US cases, which many of Battea's clients might be most familiar with, should clients have any different expectations generally for how Australian cases proceed versus US class actions?

PFM A: Whilst US and Australian shareholder class actions often share the common feature that class members are automatically part of the lawsuit unless they affirmatively opt, there are some unique features of Australian class actions that Battea's clients ought be aware of. In particular, unlike US class actions which are often commenced without engagement and support from investors, many shareholder class actions in Australia only commence once sufficient support is garnered from affected investors. Further in Australian class actions commenced on behalf of an open class, court-ordered registrations processes often impose short deadlines for the formal steps to be taken by investors to be eligible to receive compensation in the event of a settlement.

For these reasons, we recommend that all group members, wherever located, at least informally register their interests by providing their trading data and allowing losses to be calculated. This provides investors with a sense of what might be at stake in the litigation. It also allows the case team to better prepare for mediation. Advance receipt of client loss data prior to mediation ensures that those losses can be considered as part of the alleged loss for consideration in negotiation of any settlement.

This in turn facilitates increased returns to group members and lessens the prospect of returns from any settlement pool being diluted by late registrants.

It is also possible to formally retain Phi Finney McDonald and to execute a litigation funding agreement. There are benefits to this, which include the fact that retained clients receive legally privileged matter updates as the case progresses. Our clients are relieved of the need to monitor and go through formal court process to ensure effective registration of their claim as we effect registration on their behalf ensuring our clients verified loss data complies with the format required by the court. Further, we have typically been able to ensure that confidentiality and privilege is preserved over the identity of retained clients. This is much harder to ensure for non-client unfunded group members who register through a later formal Court process. Many institutional investors regard this as a considerable benefit.

USMA Q: Does the High Court ruling in the BHP matter change anything for foreign investors participating in future Australian securities actions?

PFM A: Thankfully not. The High Court's decision is a clear and resounding victory, not only for our action; it also strengthens the landscape for shareholder and other class actions in Australia more broadly by confirming that all prospective group members, wherever located, may continue to seek redress through our federal class action regime.

USMA: Brett and Cameron, thank you again for the discussion. It was informative and we appreciate the work PFM is doing for investors participating in Australian class actions. Best of luck on the BHP case going forward.



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