Neutral Citation Number: [2023] EWHC 2030 (TCC)

Case No: HT-2022-000304
Case No: HT-2023-000058

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**TECHNOLOGY AND CONSTRUCTION COURT (KBD)**

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 07/08/2023

**Before** :

**MRS JUSTICE O'FARRELL DBE**

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**Between :**

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| **MUNICÍPIO DE MARIANA**<br>**(and the Claimants identified in the Schedules to the Claim Forms)** | **Claimants** |
| **- and –** | |
| **(1) BHP GROUP (UK) LIMITED**<br>**(formerly BHP GROUP PLC)**<br>**(2) BHP GROUP LIMITED** | **Defendants** |
| **- and –** | |
| **VALE SA** | **Third Party** |

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**Shaheed Fatima KC, Victoria Windle KC, Nicholas Sloboda** and **Veena Srirangam** (instructed by **Slaughter and May**) for the **Defendants**
**Simon Salzedo KC**, **Richard Eschwege KC, Michael Bolding** and **Crawford Jamieson** (instructed by **White & Case LLP**) for the **Third Party**

Hearing dates: 12th and 13th July 2023

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# Approved Judgment

This judgment was handed down remotely at
10.30am on Monday 7th August 2023 by circulation
to the parties or their representatives by e-mail and by
release to the National Archives

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MRS JUSTICE O'FARRELL DBE

## Mrs Justice O'Farrell:

1. The matter before the court concerns two applications by the Part 20 defendant ("Vale") challenging the court's jurisdiction in respect of two Part 20 claims that the defendants ("BHP") have brought against Vale.

2. Vale's case is that there is no serious issue to be tried in respect of the Part 20 claims:

    i) Brazilian law does not recognise the right to contribution unless and until BHP are found liable to the claimants and make a payment to them; BHP have not made any payment and therefore they do not currently have a right to a contribution from Vale;

    ii) the claims were time-barred before the Part 20 claims were issued;

    iii) some of the claims have been extinguished as a result of settlement agreements containing releases in favour of Vale, or judgments issued in favour of Vale in Brazil.

3. Further, Vale submits that this jurisdiction is not the appropriate forum for the Part 20 claims:

    i) Brazil is the natural forum in that the claims are made under Brazilian law, brought against a Brazilian company, in relation to losses sustained in Brazil by Brazilian claimants, due to the collapse of a dam in Brazil, owned and operated by a Brazilian joint venture with two Brazilian shareholders almost a decade ago; Vale is amenable to being sued in Brazil or in an arbitration seated in Brazil if required;

    ii) Vale is party to litigation in Brazil concerning the same events and losses (and at least some of the same claimants) where Vale's alleged liability in respect of losses caused by the collapse of the dam will be determined; if this court accepts jurisdiction over the Part 20 claims there is an unavoidable risk of irreconcilable decisions in light of the ongoing Brazilian proceedings;

    iii) there is no factor that demonstrates that BHP cannot obtain justice in the natural forum; BHP overstate the extent of the overlap with the English proceedings and the court cannot assume that the Part 20 claims are capable of being determined in England together with the claimants' claims against BHP.

4. BHP oppose the applications. Their position is that there is a serious issue to be tried as to whether, if BHP are liable to the claimants, Vale is jointly and severally liable on the same or similar grounds and therefore liable to contribute to any damages payable:

    i) the claims and the additional claims are governed by Brazilian law, the Brazilian law issues involved are unsuitable for summary determination and BHP's expert evidence is clear and credible, demonstrating that BHP have a good claim; at the very least, it shows that there is a serious issue to be tried as to whether BHP are entitled to the relief they seek;

    ii) limitation as a defence to the Part 20 claims is also a defence in the claims against BHP and included in the agreed list of issues for trial;

iii) similarly, Vale's assertion that some of the claims have been compromised shows the overlapping issues between BHP's defence to the claims and Vale's potential defence to the additional claims.

5. BHP submit that this jurisdiction is the appropriate forum to hear the additional claims:

i) the additional claims almost mirror the legal and factual issues that arise in the main claims, many of which will be considered at the forthcoming threshold liability trial; BHP have pleaded that Vale is liable to the claimants on the same basis as BHP; therefore, on any view there will be very significant factual and legal overlap between the claims regardless of whether Vale relies on identical defences to BHP;

ii) it is in the interests of justice, proportionality and efficiency to have the issues raised by the claims and the additional claims tried together in a single forum; now that the English court has finally determined that the claims will proceed here, the only available single forum for trial of these issues is England.

*Background*

6. On 5 November 2015 Brazil suffered its worst ever environmental disaster when the Fundão Dam in South East Brazil collapsed, releasing around 40 million cubic metres of tailings from iron ore mining. The collapse and flood killed 19 people, destroyed entire villages, and had a widespread impact on numerous individuals and communities, not just locally but as a result of the damage to the River Doce system over its entire course to the sea some 400 miles away. The Brazilian public prosecutor has estimated the cost of remediation and compensation at a minimum of R$155 billion, about £25 billion at today's exchange rates.

7. The area affected by the dam collapse fell within two states, Minas Gerais, where the dam was situated, and Espírito Santo, in which the River Doce reaches the Atlantic ocean. The local government authority with responsibility for the area which included the dam itself, and the nearby villages which were destroyed, is the municipality of Mariana.

8. The dam was owned and operated by Samarco Mineração SA ("Samarco"), a Brazilian company jointly owned, in 50% shares pursuant to a joint venture agreement, by Vale and BHP Brasil Ltda ("BHP Brasil"). The BHP defendants operated together as a single economic entity under a dual listed company structure and the second defendant is the ultimate parent company of BHP Brasil.

9. Following the disaster, there were criminal proceedings against various defendants in the Brazilian courts. There were also civil proceedings at federal and state level, comprising individual claims and class actions ("CPAs"), including CPAs referred to as "the ADIC CPA", "the 20bn CPA" and "the 155bn CPA".

10. On 17 November 2015 the ADIC CPA was filed against Samarco by the Association for the Defence of Collective Interests ("ADIC") in the Federal Court, alleging violation of diffuse, collective and homogenous individual rights of all those impacted by the collapse in the States of Minas Gerais and Espírito Santo.

11. On 30 November 2015, the 20bn CPA was filed against Samarco, Vale and BHP Brasil by the Federal Government, the states of Minas Gerais and Espírito Santo, and nine government entities. The 20bn CPA sought orders that the named defendants should present plans to address the environmental and economic consequences of the dam collapse, take measures to ensure that the specific matters in those plans were dealt with, and fund the implementation of those plans through a private foundation in a minimum amount of R$20 billion, the then estimated quantum of damage caused by the disaster.

12. On 2 March 2016, the parties to the 20bn CPA agreed to settle the proceedings, without any admission of fault or liability, by entering into a transaction and conduct adjustment term ("the TTAC"), an agreement governed by Brazilian law. Under the TTAC, the Brazilian defendant companies, including Vale, agreed to provide full redress to all persons, sole traders, communities and the environment in the areas affected by the collapse of the dam, through 42 programmes.

13. On 5 July 2016 a Brazilian private foundation, Fundação Renova ("Renova"), was established by Samarco, Vale and BHP Brasil as the vehicle through which they would carry out the programmes of remediation and compensation. The programmes implemented by Renova include the 'Novel System', a judicially supervised compensation scheme

14. In May 2016, the Federal Public Prosecutor filed the 155bn CPA against Samarco, Vale, BHP Brasil, the Federal Government and others, challenging the sufficiency of the relief provided for in the TTAC and demanding better relief for the victims of the collapse, estimating the damage caused at a minimum of R$155 billion.

15. On 25 June 2018, the parties reached an interim settlement agreement in the form of the Governance and Conduct Adjustment Agreement ("GTAC"). The GTAC was signed by all parties to the 20bn CPA and the 155bn CPA. It provided a framework by which the parties would undertake negotiations towards a final settlement of the 155bn CPA. Pending such final settlement, the 155bn CPA proceedings were stayed. There is a dispute as to whether the stay remains formally in place, as the Federal Court continues to resolve any disputes that arise regarding the interpretation and effect of the TTAC, GTAC and reparation programmes through the Priority Axes. However, it is accepted by all parties to the GTAC that no decision on the merits of the original claims brought in the proceedings will be rendered before a final settlement has been achieved. The current status of the proceedings is that there is an ongoing mediation in respect of the renegotiation of the GTAC and TTAC.

*Proceedings*

16. On 2 and 5 November 2018, the claimants issued proceedings against the first defendant in this jurisdiction and on 3 May 2019, a further claim form was issued against both BHP defendants. On 24 February 2023 a new claim form was issued against BHP, increasing the total number of claimants to approximately 732,000. There are public statements from the Claimants' solicitors estimating the value of the claims as £36 billion.

17. The claims, seeking compensation for losses caused by the dam collapse, are brought jointly and severally against the BHP defendants. The claimants are all Brazilian and

comprise (i) over 720,000 individuals; (ii) over 1,600 businesses; (iii) 78 churches and faith-based institutions; (iv) 46 municipalities; (v) 7 utility companies; and (vi) over 9,500 members of the indigenous and Quilombola communities.

18. On 7 August 2019 BHP applied for the claims to be struck out as an abuse of process; alternatively for the claims to be stayed on *forum non conveniens* grounds, pursuant to article 34 of Brussels Recast or the court's case management powers. The claims were struck out by Turner J, on the basis set out in his judgment dated 9 November 2020 at [2020] EWHC 2930 (TCC). The appeal against that judgment was successful, as set out in the Court of Appeal's judgment dated 8 July 2022 at [2022] EWCA Civ 951, and BHP's applications were dismissed. On 1 June 2023 the Supreme Court refused permission to appeal against the order of the Court of Appeal.

19. The claims are advanced under Brazilian law and include the following pleaded allegations in the Re-Amended Master Particulars of Claim ("the RAMPOC"):

    i) Articles 3(IV) and 14 of the Environmental Law and/or Articles 927 and 942 of the Civil Code impose strict liability on BHP for loss and damage caused by the environmental disaster by reason of their: (a) ownership and/or control of the entity responsible for the damage; (b) failure to supervise the activity giving rise to the damage; (c) funding the activity of others which led to the damage; and/or (d) benefiting from the activity of others which led to the damage.

    ii) BHP are liable under Articles 186, 927, 932 and 942 of the Civil Code for the loss and damage suffered by the claimants by reason of their voluntary act or omission, negligence or imprudence in: (a) disregarding advice and warnings as to the risks of collapse and/or (b) failing to take satisfactory action to address such risks.

    iii) BHP are liable under Articles 116 and 117 of the Corporate Law, as controlling shareholders, for the loss and damage suffered by the claimants, by permitting activities involving a significant risk of substantial damage to the community.

20. The loss and damage suffered by the claimants is pleaded in general terms for each category of claimant in the body of the RAMPOC and can be summarised as follows:

    i) The individuals claim compensation for physical and psychological injury, property damage, the need to move home, increased living expenses, loss of earnings, interference with fishing activities, loss of water and electricity supplies, and interference with their use and enjoyment of the river and land.

    ii) The business claimants claim compensation for property damage, loss of profits, loss of income or increased costs, loss of business opportunities, loss of value and damage to reputation.

    iii) The churches and faith-based institutions claim compensation for property damage, destruction or damage to artefacts of spiritual, artistic, historical and/or social significance, costs of property security and storage, loss of income, loss of water supply and loss of spiritual ties with the congregation.

iv) The municipalities claim compensation for damage to property, the environment, cultural heritage, tourism and quality of life, costs of remediation, lost income and investment, loss of reputation and costs of settling claims arising out of the collapse.

v) The utilities claim compensation for costs of repair, remediation and testing of the water treatment plants, the water supply system and associated equipment, loss of revenue and loss of reputation.

vi) The indigenous groups and the Quilombola claimants claim compensation for environmental damage to their lands, damage to their practices, traditions and cultural heritage, psychological harm, loss of drinking water supply and property damage.

21. The Amended Defence contains a denial of any liability on the part of BHP and includes the following defences to the claims:

i) BHP were not polluters within the meaning of Article 3(IV) of the Environmental Law so as to attract strict liability for the loss and damage caused by the dam collapse. They carried out no polluting activity, nor did they cause environmental degradation through any relevant omission.

ii) The allegations of fault-based liability are denied. BHP met the expected standard of conduct of parties in their positions and breached no legal duty.

iii) There is no liability under the Corporate Law. BHP were not controlling shareholders of Samarco and/or owed no controlling shareholder duties and/or did not breach any such duties by act or omission.

iv) It is denied that there was any causal link between any activity or omission on the part of BHP and the dam collapse and/or the claimants' alleged losses.

v) BHP plead that all the claims are time-barred under Brazilian law.

vi) Certain claimants have accepted compensation, pursuant to settlement agreements with Renova, Samarco, BHP Brasil, Vale and/or through the Novel System compensation scheme, and the terms of the release or waiver clauses in such settlements preclude the claimants from pursuing the claims in these proceedings.

22. On 2 December 2022, BHP served a Part 20 claim against Vale, seeking declaratory relief and a contribution to any sums that BHP might be found liable to pay to the claimants.

23. On 20 December 2022, Vale filed its acknowledgement of service, indicating that it intended to contest the court's jurisdiction.

24. On 13 April 2023 BHP issued a new Part 20 claim against Vale, on the same basis and in the same form as the first Part 20 claim, but in respect of any liability arising out of the new claim form issued by the claimants.

25. The Part 20 claims include the following allegations:

"12. If, contrary to some or all of BHP's defence, BHP are held to be liable to any of the Claimants, then BHP will seek contribution from Vale since Vale would also be liable to the Claimants on the same or similar factual and the same or similar legal bases.

13. Further, in seeking such contribution, BHP will rely on the facts and matters alleged in the AMPOC and the further facts and matters set out herein, in particular but without limitation:

(1) From 2001 to 2015 (and to date) Vale was, with BHP Brasil, a shareholder of Samarco, directly held 50% of the share capital of Samarco, appointed 4 members of Samarco's Board of Directors (2 full and 2 alternate members) and also appointed others … These appointees included Vale's Executive Officers in charge of the Ferrous Minerals (or Bulk Materials) division and other senior Vale executives, as further pleaded below …

(2) Between 2008 and 2015 (and insofar as this is to be regarded as an appropriate period for considering the claims in the AMPOC), Vale's Board of Directors appointed Executive Officers to Vale's Executive Board, including a Chief Executive Officer. Between 2008 and 2015, Vale reported on its businesses in its Annual Reports and Forms 20-F under several 'lines of business'. Samarco's activities fell under Vale's *"Ferrous Minerals"* or *"Bulk Materials"* lines of business, within the *"Iron Ore"* sub-division.

(3) Therefore the allegations in the AMPOC against BHP (arising out of BHP Brasil's role in relation to Samarco) - regarding control of Samarco, knowledge of alleged risks relating to the Dam, and alleged failures to take sufficient action to address the alleged risks - would also apply to Vale.

(4) If, by reason of these and other allegations in the AMPOC, BHP are held to be liable to the Claimants, then Vale will also be liable with BHP under Brazilian law (a) as polluters under the Environmental Law; (b) for acts and/or omissions pursuant to the Civil Code and/or the Constitution; and/or (c) for acts and/or omissions regarding the 'controlling shareholder' claim…

14. Accordingly, if BHP are held to be liable to the Claimants, then Vale would be liable to contribute to 50% or more of any sums payable to the Claimants by BHP under Brazilian law or, alternatively, English law."

26. Thus, the allegations by BHP against Vale substantially mirror the allegations made against BHP on the basis that Vale was (with BHP Brasil) a direct shareholder of Samarco on a 50-50% basis and with the same position within Samarco's governance structure. As such, the allegations made by the claimants regarding ownership of, benefit from, and control of Samarco, knowledge of alleged risks relating to the dam, and alleged failures to take sufficient action to address the alleged risks are said to apply to Vale in the same way and to at least the same extent that they apply to BHP. If, and to the extent that, those allegations establish that BHP are liable to the claimants, then BHP will rely on the same, or very similar allegations, to establish Vale's liability to the claimants and its liability to make a contribution to BHP.

27. The remedies sought against Vale are pleaded as follows:

> "93. In the premises, BHP would be entitled to contribution of 50% or more from Vale of any sums that BHP would be liable to pay to the Claimants, pursuant to Articles 275, 283 and 942 of the Civil Code (under Brazilian law), or alternatively pursuant to section 1(1) of the 1978 Act (under English law).
>
> 94. Accordingly, if, contrary to BHP's Amended Defence, BHP are found to be liable to the Claimants, then BHP seek as against Vale:
>
> (1) A declaration that (i) Vale would also be liable with BHP pursuant to Articles 265, 275, 283 and 942 of the Civil Code and liable to contribute to 50% or more of any sums that BHP would be liable to pay to the Claimants; alternatively, (ii) BHP would be entitled to seek contribution from Vale of 50% or more of any sums payable by BHP to the Claimants under section 1(1) of the 1978 Act.
>
> (2) Contribution from Vale of 50% or more of any sums payable by BHP to the Claimants, including any sums paid in relation to the Claimants' costs of the proceedings, pursuant to Articles 265, 275, 283 and 942 of the Civil Code, or alternatively pursuant to sections 1(1) and 1(4) of the 1978 Act.
>
> (3) Contribution from Vale to BHP's costs occasioned by the Claimants' claims (excluding the costs incurred by BHP in the claim for contribution against Vale) pursuant to sections 51(1) and (3) of the Senior Courts Act 1981."

28. Following a CMC in March/April 2023, I handed down judgment on 12 May 2023, reported at [2023] EWHC 1134 (TCC), giving directions to a trial on threshold liability issues to be heard on 7 October 2024 with an estimate of 11 weeks, to include one week of judicial reading. The threshold liability issues include:

i) whether BHP are strictly liable as "polluters" in respect of damage caused by the collapse pursuant to Articles 3(IV) and 14 of the Environmental Law;

ii) whether BHP are liable based on fault in respect of damage caused by the collapse, pursuant to Articles 186, 927, 932 and 942 of the Civil Code and/or Article 225 of the Constitution and/or Article 116 of the Corporate Law;

iii) whether BHP are liable as controlling shareholders of Samarco in respect of damage caused by the collapse, pursuant to Article 116 and/or 117 of the Corporate Law and/or Article 927 of the Civil Code;

iv) various limitation issues, including whether environmental damage claims are subject to prescription, whether time runs from the date of knowledge of damage, and circumstances in which protests or service of proceedings give rise to an interruption of the limitation period;

v) whether any of the claims (or categories of claim) are precluded by reason of settlement agreements entered into with Renova, Samarco, BHP Brasil, Vale and/or through the Novel System;

vi) whether the municipalities have standing and/or capacity to bring their claims in these proceedings.

*The applications*

29. On 28 February 2023 Vale issued an application, seeking an order pursuant to CPR 11(1) that the court has no jurisdiction to hear the Part 20 claim; alternatively that the court should not exercise any jurisdiction that it may have and the proceedings against Vale are stayed. Further, Vale seeks an order that the Part 20 claim form should be set aside, and the purported service of the Part 20 claim form and particulars of the Part 20 claim should be set aside.

30. Following service of the new Part 20 claim, on 2 May 2023 Vale issued a jurisdiction challenge application in respect of that claim. The parties have agreed that the applications should be heard together.

31. Witness statements have been filed on behalf of Vale by Mr Lawson Caisley, solicitor and partner in White & Case LLP (second statement dated 28 February 2023, third statement dated 2 May 2023 and fourth statement dated 19 June 2023). Evidence has also been adduced from Mr Alexandre D'Ambrosio, Executive Vice President of Corporate and External Affairs at Vale (first statement dated 28 February 2023 and second statement dated 19 June 2023).

32. Witness statements have been filed on behalf of BHP from Mr Efstathios Michael, solicitor and partner in Slaughter and May (eighteenth statement dated 10 May 2023 and nineteenth statement dated 19 May 2023).

33. The court has the benefit of expert reports in relation to issues of Brazilian law. Vale relies on the expert evidence of Professor Georges Abboud, who produced a report dated 28 February 2023 and a supplemental report dated 19 June 2023. BHP relies on

the expert evidence of Professor Anderson Schreiber, who produced a report dated 10 May 2023.

*Requirements of CPR 11*

34. CPR 11(1) provides that a defendant who wishes to (a) dispute the court's jurisdiction to try the claim; or (b) argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

35. CPR 11(6) provides that an order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including (a) setting aside the claim form; (b) setting aside service of the claim form; (c) discharging any order made before the claim was commenced or before the claim form was served; and (d) staying the proceedings.

36. The applicable legal principles are not in dispute and are summarised in the speech of Lord Collins of Mapesbury JSC in *Altimo Holdings v Kyrgyz Mobil Tel Limited* [2011] UK PC 7 at [71]:

    i) The claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, that is, a substantial question of fact or law or both.

    ii) The claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given, in this case, one of the gateways set out in CPR PD6B paragraph 3.1.

    iii) The claimant must satisfy the court that in all the circumstances this jurisdiction is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

37. For the purpose of these applications, it is common ground that the Part 20 claims should be treated as having been served outside the jurisdiction pursuant to an application without notice and that Vale now seeks to set aside the notional permission. The relevant gateway relied on by BHP is paragraph 3.1(4) of CPR PD6B, namely, the claims are additional claims under Part 20 and the person to be served is a necessary or proper party to the claims or additional claims.

38. It is conceded by Vale that if it were to fail on limbs (i) - serious issue to be tried, and (iii) - appropriate forum, it would not succeed on limb (ii) - gateway. On that basis, the court does not have to determine any issue as to limb (ii).

*Serious issue to be tried*

39. It is agreed that the test is broadly the summary judgment test, although the burden is on BHP to demonstrate that there is a serious issue to be tried on the merits.

40. The principles to be applied can be summarised as follows:

i) The court must consider whether BHP have a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91.

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]. There must be a plausible evidential basis for the claim: *Brownlie v Four Seasons Holding Inc* [2017] UKSC 80 per Lord Sumption at [7].

iii) The court must not conduct a "mini-trial": *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at [95]; *Lungowe v Vedanta* [2019] UKSC 20 at [9]-[14]; *Okpabi v Royal Dutch Shell* [2021] UKSC 3 at [21], [110].

iv) The court should hesitate about making a final decision without a trial and must take into account not only the evidence actually placed before it at the application stage, but also any reasonable grounds identified for believing that a fuller investigation into the facts of the case would add to or alter the evidence relevant to the issue: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550; *Okpabi* at [127]-[128].

v) If the court is satisfied that it has before it all the evidence necessary for the proper determination of a short point of law or construction and the parties have had an adequate opportunity to address the question in argument, it should grasp the nettle and decide it: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 at [11]-[14]; *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].

vi) However, the court should be cautious about deciding an issue of foreign law on a summary basis because it is a question of fact which the trial judge is required to determine on the basis of expert evidence deployed by the parties: *Byers v Saudi National Bank* [2022] EWCA Civ 43 at [103].

41. Ms Fatima KC, leading counsel for BHP, submits that there is, at the very least, a serious issue to be tried in respect of BHP's pleaded case namely, to the extent that they are liable to the claimants, they are entitled to a declaration that Vale is jointly and severally liable with BHP and, as a consequence, Vale would be liable to make a contribution to any sums payable by BHP to the claimants.

42. Mr Salzedo KC, leading counsel for Vale, submits that BHP's claim for contribution is fundamentally flawed on the grounds that: (i) under Brazilian law there is no accrued liability on the part of Vale to pay a contribution to BHP; and (ii) Vale is not liable for the same loss or damage because the claimants' claims are time-barred and/or have been settled.

*Joint and several liability to the Claimants*

43. BHP rely on Article 942 of the Brazilian Civil Code, which provides:

> "The property of the person responsible for the offense or violation of another's right is subject to compensation for the

> damage caused; and, if there is more than one offender, all shall be jointly and severally liable for the compensation."

44. Professor Schreiber's evidence is that joint and several liability exists where imposed by express provision of law or agreed by the parties. The express provisions which impose joint and several liability include Article 942, which provides that where more than one person causes damage by violating another's right, all wrongdoers shall be jointly and severally liable for the damage caused. The court will determine whether or not two or more parties are jointly and severally liable for another's loss in the same way as it determines any other issue of civil liability, subject to the same burden and standard of proof, on the basis of evidence before it.

45. It is the view of Professor Schreiber that the joint and several liability between the co-authors of a civil wrong pre-exists any condemnatory judicial decision. Such liability accrues at the time of the wrongdoing; the role of the court is to recognise the joint and several liability that exists, rather than to create such liability.

46. Professor Schreiber explains that in every case of joint and several liability, two different sets of relationships will co-exist: (a) an external relationship between the wrongdoers and the claimant, where each wrongdoer is liable for the total amount of the damages due to the claimant; and (b) an internal relationship between the wrongdoers, where each wrongdoer answers to the others only for its part of the damages. A claimant is entitled to choose whether to enforce its rights against one or all of the joint wrongdoers. If one of the wrongdoers satisfies the total amount of the debt, the debt is extinguished under the external relationship between all wrongdoers and the claimant. In such circumstances, the wrongdoer who has satisfied the debt will retain the legal right to seek reimbursement against the other wrongdoers, in accordance with Article 283 of the Brazilian Civil Code. As between the wrongdoers, the debt is limited to the portion for which each wrongdoer is responsible, although there is a rebuttable presumption that they are liable in equal shares.

47. It is acknowledged by Professor Schreiber that the wrongdoers will not be ordered to pay damages for the civil wrong before their culpability has been established; the extent of the damage incurred has been proved; and causation attributable to the wrongdoers has been proved. However, his evidence is that under Brazilian law it is not necessary for a wrongdoer to be held liable in a previous lawsuit and pay the relevant amounts, before seeking the assistance of the court, to recognise that another is jointly and severally liable, and to protect the wrongdoer's right to require that other to share the burden of the debt jointly and severally owed. A defendant may dispute its own liability and at the same time seek to establish that, if it is liable, another is jointly and severally liable. However, such defendant must have satisfied the debt owed to the claimant before it can obtain reimbursement *("ação de regresso")* from a jointly and severally liable wrongdoer for its share of the satisfied debt.

48. Brazilian procedural mechanisms are identified by Professor Schreiber that could be used prior to a claim for reimbursement. Firstly, it would be open to a defendant to bring another wrongdoer into the proceedings as a co-defendant, by a call to process *("chamamento ao processo")* under Articles 130 and 131 of the Brazilian Civil Procedure Code. Secondly, it would be open to a defendant to bring a declaratory action against another wrongdoer, to establish joint and several liability *("ação declaratória")* under Articles 19 and 20 of the Brazilian Civil Procedure Code.

49. Professor Abboud's evidence is that Article 942 of the Brazilian Civil Code provides for joint and several liability but it cannot be applied automatically. It is subject to proof as to (i) the occurrence of the damage, (ii) its extent, (iii) the identity of the perpetrator of the wrongful act that caused the damage and (iv) the existence or otherwise of a nexus of causation between the damage and the acts of those who are supposedly jointly and severally liable for it.

50. Professor Abboud states that Article 942 can only be applied if a court order recognises the existence of joint and several liability in any particular case. Prior to such recognition, it is not possible to state that joint and several liability exists and has been established. A lawsuit that seeks recognition of the existence of joint and several liability must, of necessity, involve the third party who supposedly perpetrated the wrongful act and to whom the claimant seeks to attribute the status of joint and several liability. The third party must be entitled to contest the proceedings, both procedurally and on the merits.

51. Article 283 of the Brazilian Civil Code provides that:

> "A debtor who has settled the debt in full is entitled to demand his or her share from each of the co-debtors, with the share of the insolvent debtor, if any, divided equally among all of them."

52. Professor Abboud explains that under Brazilian law it is only after payment has been made that a co-debtor who made the payment is entitled to collect from the others their share of the entire debt paid. Accordingly, his view is that it is necessary for there to be a final court order establishing joint and several liability, and for payment to have been made by the jointly liable wrongdoer before that wrongdoer is entitled to exercise any right to reimbursement against the other jointly liable wrongdoers.

53. In his supplemental report Professor Abboud accepts that in theory it would be possible for BHP to bring a declaratory action against Vale in Brazil, requesting a declaration that Vale is a debtor held jointly and severally liable together with BHP. However, BHP would have to admit that they were liable for the loss caused to the claimants in the English proceedings; it would not be possible for BHP to seek a conditional declaration that Vale would be liable if BHP were held liable in respect of the claimants and at the same time contest BHP's liability in respect of the claims.

54. The issue for this court is whether there is a real prospect of success for BHP in establishing joint and several liability of Vale to the claimants (if, and to the extent that, the claimants prove their case against BHP), and a right to seek a contribution/reimbursement in respect of any damages awarded against them. The experts are agreed that, as a matter of principle under Brazilian law, BHP and Vale could be found joint and severally liable to the claimants and, if such liability were to be established by a court, BHP could seek payment from Vale in respect of an appropriate share of any damages paid to the claimants. The experts are also agreed that under Brazilian law, BHP are not entitled to any reimbursement from Vale in respect of any joint and several liability unless and until BHP have made payment to the claimants.

55. The procedural arguments as to when and how BHP might establish or enforce any claim for contribution in the Brazilian courts are not directly relevant to this limb of the

test (although they are relevant to the question of proper forum). In respect of limb (i), the court is not concerned with potential proceedings that might be brought in Brazil. The question is whether there is a serious issue to be tried raised by these proceedings in this jurisdiction, applying Brazilian legal principles.

56. The essence of the dispute between the legal experts is whether any cause of action can arise, giving BHP a right to seek a declaration and/or reimbursement against Vale, prior to such liability being established by a court order and payment being made by BHP to the claimants. Both legal experts have set out their interpretation of the relevant provisions of the Brazilian Civil Code, articulating the basis upon which they have reached their differing conclusions. The clear dispute between them is not one that is suitable for determination on a summary basis. Professor Schreiber's explanation is coherent and plausible, albeit contested by Professor Abboud. The competing arguments should be subject to scrutiny and challenge through cross-examination and submissions at trial.

*Alternative contribution case*

57. Although BHP have pleaded an alternative case based on the Civil Liability (Contribution) Act 1978, both parties agree that the claims are governed by Brazilian law.

58. Mr Salzedo submits that BHP's alternative case is not arguable, having regard to the decision of the Supreme Court in *Soldiers, Sailors, Airmen and Families Association ('SSAFA') v Allgemeines Krankenhaus Viersen GmbH* [2022] UKSC 29. In that case, the Supreme Court considered whether the Civil Liability (Contribution) Act 1978 has mandatory or overriding effect so as to apply to all contribution claims brought in England and Wales, or whether it applies only when domestic choice of law rules indicate that the contribution claim in question is governed by the law of England and Wales. The court held that the 1978 Act does not have overriding or mandatory effect; it does not apply automatically to all proceedings for contribution brought in England and Wales, without reference to any choice of law rules.

59. Lord Lloyd-Jones JSC, delivering the judgment of the court, stated:

> "[80] The ordinary and natural meaning of the provisions of the 1978 Act and the scheme of the legislation provide little assistance on the issue as to whether it is intended to have overriding effect. The Act contains no express provision that it applies regardless of the law otherwise applicable to the contribution claim. Furthermore, the provisions are neutral as to whether overriding effect is to be implied. They are equally consistent with the 1978 Act applying only where the applicable law of the contribution claim is English law. They cast no light on the prior question whether the 1978 Act has any application at all. Furthermore, I have been able to find no assistance on this point in the legislative history of the Act.
>
> [81] Nevertheless, I am persuaded that the 1978 Act was not intended to have overriding effect so as to displace conventional choice of law rules…

…

> [83] … it would seem contrary to principle for the court to apply English law if the contribution claim were most closely connected to the foreign law… Furthermore, this would be inconsistent with giving effect to the reasonable and legitimate expectations of the parties which is a fundamental objective of the conflict of laws (Dicey, Morris & Collins on the Conflict of Laws, 16th ed (2022), para 1-006 …"

60. BHP have not sought to persuade the court that there is a serious triable issue in respect of any claim under the 1978 Act as part of this jurisdictional challenge but they seek to preserve their right to rely upon their alternative case in due course. Ms Fatima contends that the absence of an automatic application of the 1978 Act where foreign law governs the underlying claims does not necessarily preclude its application in all circumstances. Mr Salzedo urges the court to decide this issue now on the basis that it is clear that this alternative case is misconceived and bound to fail.

61. It is not necessary for the court to determine this issue as part of the jurisdictional challenge. If BHP establish that there is a serious issue to be tried on the contribution claims under Brazilian law, it is immaterial that they might fail on their alternative case under the 1978 Act because they will have satisfied limb i) of the test. Equally, if BHP fail to establish any serious issue to be tried on the contribution claims under Brazilian law, they will have failed on limb i) of the test and this court will not accept jurisdiction; in the absence of jurisdiction, there would be no question of any application of the 1978 Act. In either scenario, this point is not determinative of the jurisdictional challenge before the court.

*Limitation*

62. BHP's claim for a contribution against Vale is predicated on the claimants establishing BHP's liability to them (which liability is denied, including a defence that the claims are time-barred), and BHP establishing Vale's joint and several liability to the claimants.

63. Mr Eschwege KC, leading counsel for Vale, submits that any claims that could have been brought by the claimants against Vale were time-barred before the Part 20 claims were issued. It is said that: (i) all claims against Vale under the original Part 20 claim would have been time-barred as at the date of issue on 2 December 2022; and (ii) all claims against BHP and Vale by the claimants would have been time-barred long before the new Part 20 claim was issued on 13 April 2023.

64. As to Vale's first point, regarding claims against it under the original Part 20 claim, BHP and Vale agree that any cause of action by the claimants against Vale accrued at the time of the collapse of the dam on 5 November 2015 and the limitation period started running from that date pursuant to Article 189 of the Brazilian Civil Code. It is also common ground that the relevant limitation period under Brazilian law for claims for compensation for loss by private individuals is three years pursuant to Article 206 of the Brazilian Civil Code. Therefore, it is said by Vale that all claims that are the subject of the original Part 20 claim would have become time-barred as against Vale by around 5 November 2018, more than four years before the original Part 20 claim was issued.

65. BHP rely on a defence that the claimants' claims against them are time-barred. However, if and to the extent that the claimants succeed in establishing a later date for accrual of the cause of action, or interruption of the limitation period, so as to render their claims in time, BHP seek to rely on such later date of accrual or the same interruption of the limitation period as against Vale.

66. Professor Schreiber explains that the limitation period runs consistently against all those who are jointly and severally liable, in that it starts running at the same time, it is interrupted by the same events, it re-starts running at the same time, and it ceases to run at the same time. The issue of proceedings against any jointly and severally liable person interrupts the running of the limitation period against all persons jointly and severally liable. If Vale is jointly and severally liable with BHP, and if the claimants' claims against BHP are not time-barred, then the claimants' claims against Vale will also not be time-barred.

67. Article 202 of the Brazilian Civil Code provides:

> "The interruption of the statute of limitations, which can only occur once, will occur:
>
> I - by order of the judge, even if lacking jurisdiction, who orders the summons, if the interested party promotes it within the time limit and according to procedural law;
>
> II – by protest, under the conditions of the previous item;
>
> …
>
> Sole paragraph. The interrupted statute of limitations shall resume from the date of the act that interrupted it, or from the last act of the process to interrupt it."

68. As explained by Professor Schreiber, if the interrupting event is a single complete event, such as the acknowledgment of the right by the debtor, the limitation period will start running again from the date of acknowledgement. However, if the interrupting event is the issue of proceedings, the limitation period will only re-start from the last act in such proceedings, the date when its final decision becomes unappealable *(res judicata)*.

69. Professor Schreiber and Professor Abboud agree that Article 204 of the Brazilian Civil Code provides that if there is joint and several liability, then the interruption of the limitation period against one of the co-debtors will automatically interrupt the limitation period, at the same time, against all the other co-debtors who are jointly and severally liable for the debt. However, there is a dispute as to the implications of such provision in this case.

70. Professor Schreiber's view is that, if the claimants' claims against BHP were within time when the proceedings were issued, so as to interrupt the limitation period, and Vale were jointly and severally liable with BHP to the claimants, then the limitation period would be interrupted equally in respect of the claims against Vale.

71. Professor Abboud disagrees with that proposition. Firstly, his view is, as set out above, that when the claims against BHP were issued in November 2018, there was no recognition of any joint and several liability on the part of Vale, which was not joined to the proceedings or the subject of separate proceedings. Therefore, the interruption of any limitation period in respect of the claims against BHP did not apply to Vale. Secondly, he disagrees with Professor Schreiber's view that the limitation period always runs consistently in relation to jointly and severally liable co-debtors. Even if the Sole paragraph of Article 202 did apply to interrupt the limitation period in respect of the claims against Vale, the suspensive effect would cease to apply when the intervening limitation period elapsed pursuant to Article 206A, that is, when the claimants, or BHP, failed to progress the proceedings for a long period of time.

72. As to Professor Abboud's first objection, this turns on his view that there could be no joint and several liability on the part of Vale prior to judicial recognition of the same or joinder as a co-defendant. For the reasons set out above, that gives rise to a serious issue for trial.

73. As to his second objection, it raises a dispute on the expert evidence, together with a material issue of fact, namely, whether the claimants or BHP failed to progress the proceedings, including any Part 20 proceedings, within a reasonable period. The causes and reasonableness of any delay in the proceedings are contentious, particularly having regard to the period during which the proceedings were struck out following BHP's jurisdictional challenge. They are matters that are not suitable for summary disposal but should be determined on full evidence at trial.

74. BHP have further arguments, namely, that a limitation defence would not apply to their claim for declaratory relief; further, that any limitation period in respect of a claim for reimbursement would not start to run until such right arose, when BHP made payment to the claimants. Vale's response is that the court would be unlikely to grant declaratory relief if of no use, such as where the underlying claims were time-barred; further, it disputes that BHP has any accrued right to seek reimbursement. It is not necessary for the court to determine those points, in the light of my finding that there is a serious issue to be tried in respect of BHP's case that any interruption to the limitation period would be consistent as between BHP and Vale as jointly and severally liable wrongdoers.

75. As to Vale's second point, regarding claims against it under the new Part 20 claim, Vale's position is that although the new Part 20 claim was brought against it within two months of the new claims being filed by the claimants against BHP, the new claims were not issued against BHP until 24 February 2023, by which time the three-year limitation period for those claims and any claims that the claimants could have had against Vale, had long since expired.

76. BHP's position is that any limitation defence available to Vale stands or falls with BHP's own limitation defence to the new claims set out in the pleadings.

77. The claimants' case on limitation is multi-faceted and raises a number of issues of fact and law. The claimants assert that the commencement of the ADIC CPA against Samarco on 17 November 2015 in the Brazilian federal courts interrupted prescription in respect of all individual claims arising out of the collapse of the dam, not just against Samarco but also, by virtue of Article 204 of the Brazilian Civil Code, against any others jointly and/or severally liable for damage caused by the collapse. There are also

a number of permutations to consider, in respect of the date of accrual of a cause of action and application of prescription rules, relating to different categories of claimants, date of knowledge, type of damage, and the indigenous claims. The court has ordered a number of limitation issues arising between the claimants and BHP to be determined at the threshold liability trial in October 2024. The court does not have before it the evidence that would be necessary to resolve the factual issues identified in the pleadings; in any event, they are not suitable for summary disposal. On that basis it is clear that there is a serious issue to be tried.

*Settlement and release*

78. Vale's case is that 33 of the 46 municipalities that are pursuing claims against BHP in these proceedings have concluded settlement agreements, pursuant to which they have agreed to release Vale and others from any claims. Around 427,000 other individuals and companies have also concluded such settlement agreements, although Vale is not currently in a position to identify how many of the claimants in these proceedings are included within that number.

79. BHP accept that such settlement agreements and/or releases potentially provide Vale with a relevant defence against the affected claimants. Indeed, BHP also rely on settlement agreements and signed releases in their defence to the claimants' claims.

80. The court has seen examples of some of the settlement agreement terms and releases. The validity and interpretation of the agreements is a matter of dispute as between the claimants and BHP, some of which will be determined at the threshold liability trial in October 2024. The court does not have before it full evidence as to the identity of each and every claimant affected, the terms of each settlement, or whether the validity of such settlements has been determined by the Brazilian courts. It appears to be accepted by Vale and BHP that not all claimants would be affected by these issues. They are not suitable for summary disposal, requiring substantial evidence of fact and law. On that basis, it is clear that there is a serious issue to be tried.

*Conclusion on limb (i)*

81. For the reasons set out above, I am satisfied that BHP have established that there is a serious issue to be tried on the merits against Vale.

*Proper forum*

82. It is common ground that BHP must satisfy the court that England is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

83. The relevant test is set out in *Spiliada Maritime Corporation v Cansulex Limited* [1987] AC 460 per Lord Goff at p.480G-481E:

> "It seems to me inevitable that the question … must be … to identify the forum in which the case can be suitably tried for the interests of all parties and for the ends of justice… As Lord Wilberforce indicated, in the Order 11 cases the burden of proof

> rests on the plaintiff … the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service on the defendant outside the jurisdiction. Statutory authority has specified the particular circumstances in which that power may be exercised, but leaves it to the court to decide whether to exercise its discretionary power in a particular case, while providing that leave shall not be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction… it is at this point that special regard must be had for the fact stressed by Lord Diplock in the *Amin Rasheed* case [1984] AC 50, 65, that the jurisdiction exercise under Order 11 may be "exorbitant" … The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so."

84. The applicable principles for the purpose of the applications before the court can be summarised as follows:

i) The burden of proof is on BHP to establish that this jurisdiction is clearly or distinctly the appropriate forum for the trial of the dispute: *Spiliada* (above).

ii) The court is concerned to identify the forum in which the case could most suitably be tried for the interests of all parties and for the ends of justice: *Spiliada* (above).

iii) The court must consider what is the natural forum for the claim against Vale, that is, the forum with which it has the most real and substantial connection, but in the wider context of the whole case, including the interests of all other parties: *Lungowe v Vedanta* (above) at [68].

iv) A powerful and often decisive factor is the avoidance of a multiplicity of proceedings and the risk of irreconcilable judgments, favouring resolution of all related claims against all defendants in the jurisdiction in which such a trial is possible: *Lungowe v Vedanta* (above) at [74].

85. Ms Fatima submits that England is the proper forum for the Part 20 claims:

i) The existence of the claims against BHP, which are continuing in England, provides a countervailing and stronger connection to this jurisdiction than any connection to Brazil. BHP did not choose to have the claims against them decided in England; on the contrary, they sought to have the claims heard in Brazil but failed. In light of the disposal of BHP's own jurisdiction challenge, England now offers the only forum in which a single trial of the claims and the Part 20 claims is possible.

ii) The significant overlap between the claims and the Part 20 claims is a strong factor indicating that they should be heard together, to avoid the waste and duplication which will result from there being two trials of substantially the same issues, and the significant risk of inconsistent judgments, which would prejudice BHP.

86. Mr Salzedo submits that England is not the appropriate forum for the Part 20 claims:

    i) Brazil is the natural forum for the determination of BHP's claims against Vale and it is common ground that a Brazilian court would have jurisdiction to hear the claims: Vale is a Brazilian company; the claims relate to events that occurred in Brazil; the Part 20 claims are governed by Brazilian law; all losses for which compensation is claimed were sustained in Brazil by Brazilian claimants; the likely witnesses are in Brazil and their main language is Brazilian Portuguese; and many of the relevant documents are in Brazilian Portuguese.

    ii) There are multiple ongoing proceedings in Brazil, to which Vale is a party, in which issues concerning Vale's alleged liability for specific loss caused by the collapse of the dam will be determined. These include active CPAs and thousands of individual claims. If this court accepts jurisdiction over the Part 20 claims, there is an unavoidable risk of irreconcilable decisions in light of the ongoing Brazilian proceedings.

    iii) It is accepted that there is overlap between the issues raised by the claimants' claims against BHP and the Part 20 claims but the common issues arise in a different way, and on different facts as between Vale and BHP. Further, there are a number of additional issues that would arise in the Part 20 claims, such as the right to contribution, limitation and settlement issues (discussed above), and whether the corporate veil can be pierced under Brazilian law in the circumstances of this case. Moreover, unlike many 'necessary or proper party' claims, the court cannot assume that the Part 20 claims are capable of being determined in England together with the claimants' claims against BHP.

87. If BHP's claims against Vale were standalone proceedings, the natural forum in which those claims should be determined would be Brazil, for the reasons articulated by Mr Salzedo and summarised above. However, they are not standalone proceedings; they are additional claims within substantial proceedings brought by 732,000 claimants against BHP, in respect of which it has been determined that this jurisdiction is the appropriate forum. It is in that context that the court must consider the forum in which the claims against Vale could most suitably be tried for the interests of all parties and for the ends of justice.

88. A powerful factor in favour of this jurisdiction being the appropriate forum to determine the claims is the existence of the claims against BHP in these proceedings, which raise issues as between the claimants and BHP that significantly overlap with the issues as between BHP and Vale, and which form the basis on which BHP seek declaratory relief/contribution against Vale.

89. The significant overlap between the claims against BHP and the additional claims against Vale can be seen from a comparison between the pleadings. The foundation of the claims against BHP is their alleged interest in and control over Samarco, the owner and operator of the dam, through BHP Brasil. BHP's Part 20 claims against Vale have the same foundation, based on the 50:50 ownership of Samarco by BHP Brasil and Vale. The key allegations against BHP are that they are strictly liable as polluters under the Environmental Law; they are liable by reason of their disregard of, or failure to manage, risks posed by the dam; and they are liable as controlling shareholders of Samarco. These key allegations are repeated by BHP against Vale in the Part 20 claims.

It is recognised that the factual allegations are not identical and some of the legal defences may differ, but the constitutional and regulatory framework is the same. Further, the legal and factual issues relied on in respect of the allegations of control and knowledge are the same or similar as against BHP and Vale.

90. Mr Caisley and Mr D'Ambrosio identify in their witness statements a number of additional issues that would arise in the Part 20 claims (but not in the claims against BHP). As identified above, there are legal arguments that affect any right BHP might have against Vale for declaratory relief or reimbursement but they are relatively narrow matters of Brazilian law that have already been defined. Mr D'Ambrosio asserts that in order for the claimants to establish claims against Vale as a shareholder of Samarco, it would be necessary for them to show that the assets of Samarco were not sufficient to cover the reparation required to compensate for the environmental damage, the 'disregard doctrine'. It is said that the claimants are only permitted to pierce the corporate veil of Samarco and access the assets of its shareholders, Vale and/or BHP Brasil, if they can establish this. Again, this is a relatively narrow issue, primarily of law, and the material on which any findings of fact are required is likely to be limited to factual background and documentary financial evidence.

91. Vale has indicated that it relies on issues of limitation and settlement that are not identical to those raised by BHP in their defence against the claimants. I accept that the matters identified by Vale raise substantial issues of fact and law. However, although they are different, there is significant overlap between the matters relied upon by Vale and those relied upon by BHP. Significantly, the underlying principles of Brazilian law, the proper construction of the settlements and the validation of signed releases by the Brazilian courts, are the same in each case.

92. Vale prays in aid the ongoing proceedings in Brazil, to which Vale is a party, in which issues concerning Vale's alleged liability for specific loss caused by the collapse of the dam will be determined. It is said with some force that this distinguishes the position of Vale from that of the BHP defendants, which are not parties to any proceedings in Brazil. Mr Salzedo submits that if this court accepts jurisdiction over the Part 20 claims, it will give rise to an unavoidable risk of irreconcilable decisions.

93. This risk is highlighted by Mr Caisley in his third witness statement by reference to the decision of the Federal Court on 30 March 2023, in which the court ordered Vale and BHP Brasil to deposit R$10.34 billion against the compensation schemes, and stated:

> "Although the ongoing lawsuit in the foreign jurisdiction is not unknown, as well as the great interest and attention that this matter has generated in the media, it is necessary to be clear and objective in the sense that any economic benefit earned abroad will return to the national judiciary in any scenario, considering that after the appreciation promoted by the Superior Court of Justice (STJ), the 4th Vara Civel e Agrária da SSJ de Belo Horizonte, as the universal judgment of the disaster, will resolve on the use of the amounts. Any composition made abroad must be compatible, for execution in this Court, with what has already been decided and what will be decided, including based on the instruments of agreement already made.

> …In the event that funds from the foreign jurisdiction are made available for the purpose of repairing and compensating for damages resulting from the environmental disaster, the court will ensure that all cash strictly observes the primary public interest, with pari passu control mechanisms in order to guarantee that the amounts are implemented upon proof of specific destination and dedicated to the full implementation of the rights of those affected by the rupture of the dam."

94. I do not accept that this indicates a significant risk of irreconcilable decisions. The observations of the Federal Court were not part of the decision and did not suggest that findings of liability or awards of damages in foreign proceedings would be disregarded. The claimants have pleaded that they will give credit for any compensation received through Brazilian proceedings or compensation schemes so as to avoid double recovery. The focus of the above decision was on the distribution of funds that might become available through legal proceedings or otherwise and brought into account for the purpose of the compensation schemes in Brazil. That does not create any risk of conflict between the decisions on liability and/or damages made in England and Brazil.

95. In its Judgment dismissing BHP's applications for a stay or strike out of the claimants' proceedings at [2022] EWCA Civ 951, the Court of Appeal identified a number of relevant features of the Novel compensation scheme that may not provide full compensation for the claimants. In particular, it was noted that it does not apply to all the claimants; it produces "rough justice" in providing for compensation in fixed amounts in accordance with a matrix which will not reflect the full entitlement of particular victims; it does not preclude individuals pursuing claims (as evidenced by the thousands of individual claims identified by Vale); and it does not involve an adjudication of legal rights under Brazilian Law; it creates, rather than determines, rights to the compensation for which it provides, as opposed to determining the claims under Brazilian law. The Court of Appeal found on the evidence before it that the large business claimants, and most of the other institution claimants, could not benefit from the 155bn CPA, nor from the Renova or other schemes pursuant to TTAC/GTAC, although some of the municipalities' claims were arguably within the scope of a 155bn CPA generic sentence.

96. Mr Caisley has attached to his fourth witness statement an updated schedule of Brazilian collective legal proceedings brought by public authorities against Vale as at 19 June 2023. It is of great significance that most of these 'active' CPAs have been stayed or suspended, or concern the interpretation or application of the GTAC and TTAC (Priority Axis cases). Mr D'Ambrosio states that the 155bn CPA has not progressed beyond the pleadings stage because of the settlement negotiations. Likewise, although there have been thousands of individual claims against Vale, most have been settled, leaving only c.5,000 ongoing.

97. What is striking is that Vale has not identified any ongoing proceedings in Brazil that will determine liability in respect of the dam collapse and any entitlement to damages for a significant proportion of the 732,000 claimants seeking redress in the proceedings in this court.

98. Furthermore, Vale has not identified any ongoing proceedings in Brazil to which BHP could be made a party, thus avoiding a multiplicity of proceedings. If this court does

not accept jurisdiction for the Part 20 claims, BHP will be forced to issue fresh proceedings against Vale in Brazil. As explained by Professor Schreiber, there are procedural mechanisms through which BHP could pursue their contribution / reimbursement claims against Vale in Brazil. Vale has referred to the possibility of arbitration in Brazil although there is no application before the court for a stay on that ground. Any such proceedings, whether litigation or arbitration, would have to be issued and pursued with alacrity given the potential limitation issues that have been identified by the parties. Regardless of the nature of such claims, forcing BHP to pursue parallel proceedings against Vale in Brazil at the same time as they have to defend proceedings brought by the claimants in England would give rise to wasted costs and duplication, and a real risk of inconsistent findings, causing them significant prejudice.

99. Mr Salzedo submits that the court cannot assume that the Part 20 claims are capable of being determined in England together with the claimants' claims against BHP. I reject that submission. The threshold liability trial has been fixed for hearing in October 2024, allowing sufficient time for Vale to prepare its case and participate in the common issues. The issues to be determined at the trial include the key allegations that BHP are liable for the damage caused by the collapse of the dam based on the Environmental Law, fault-based liability and as a controlling shareholder. Those allegations are essentially repeated by BHP against Vale as identified in the Part 20 particulars of claim and the list of issues. Further, it is likely that there will be common issues of limitation and settlement that could be determined at the threshold liability trial as between the claimants and BHP, and as between BHP and Vale.

*Conclusion on limb (iii)*

100. For the reasons set out above, England is clearly the appropriate forum for the trial of the dispute between BHP and Vale. The existence of the proceedings brought by the claimants against BHP, and the significant overlap between those proceedings and the issues raised by BHP in the Part 20 proceedings against Vale, give rise to a real and substantial connection to this jurisdiction. The absence of any ongoing proceedings in Brazil that could be used as a vehicle for determination of Vale's liability to BHP, demonstrates that England now offers the only forum in which a single trial of the claims and the Part 20 claims is available. Although it would be possible for parallel proceedings to be commenced by BHP against Vale in Brazil, that would give rise to a multiplicity of proceedings and the risk of irreconcilable judgments. It follows that the forum in which the Part 20 claims can most suitably be tried for the interests of all parties and for the ends of justice is this jurisdiction.

*Conclusion on jurisdiction challenge*

101. In conclusion, for the reasons set out above, I dismiss the applications by Vale challenging jurisdiction in respect of the Part 20 claims.

*Directions for the Part 20 claims*

102. Vale will require a period of time in which to catch up with the main proceedings. However it does not start from a standing position. Vale was involved in the investigation that took place in the immediate aftermath of the dam collapse. It was one of the entities that commissioned the Panel Report on the cause of the collapse, published in August 2016. It has been involved in a number of proceedings started in

Brazil, including the 20bn CPA and the 155bn CPA. Although they did not proceed beyond the pleading stage, they must have afforded Vale an opportunity to identify its potential defences. More significantly, Vale has had the benefit of the pleaded defence by BHP since December 2022. Given that BHP seek to pass on to Vale the allegations made by the claimants to the extent that the same succeed, it is likely that Vale will adopt most, if not all, of BHP's pleaded defence, subject to additional factual and legal arguments pertinent to Vale's position.

103. In those circumstances, I consider that a period of three months is adequate for it to prepare and file its defence and order that Vale should file and serve its defence to the Part 20 particulars of claim by 4pm on 10 November 2023.

104. In addition, I order Vale to comply with the following directions made in the main proceedings, namely:

i) The parties shall identify the issues on which they seek to adduce expert evidence and the identity of the expert(s) (and/or expert discipline(s)) by 27 October 2023. If agreed, a consent order should be submitted to the court for approval; if not agreed, by 31 October 2023 the parties should set out short, written submissions for the court to determine the dispute on paper.

ii) By 24 November 2023 the experts of like discipline (Brazilian law and any other experts) should commence discussions and agree the expert issues which each expert will cover, together with an agenda for subsequent discussions.

iii) By 19 January 2024 the experts of like discipline shall meet for the purpose of identifying the issues on which they are agreed and those on which they disagree, narrowing the issues between them and, where possible, reaching an agreed opinion on those issues.

105. Following hand down of this judgment by electronic circulation, the hand down hearing will be adjourned to a date on which the court will hear the parties on all consequential matters arising out of this judgment, including any applications for permission to appeal and further submissions on any additional directions required.

**Neutral Citation [2023] EWHC 2607 (TCC)**

Case No: HT-2022-000304
Case No: HT-2023-000058

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**TECHNOLOGY AND CONSTRUCTION COURT (KBD)**

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 19 October 2023

**Before** :

**MRS JUSTICE O'FARRELL DBE**

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**Between :**

| | |
|---|---|
| **MUNICÍPIO DE MARIANA**<br>**(and the Claimants identified in the Schedules to the Claim Forms)** | **Claimants** |
| **- and –** | |
| **(1) BHP GROUP (UK) LIMITED**<br>**(formerly BHP GROUP PLC)**<br>**(2) BHP GROUP LIMITED** | **Defendants** |
| **- and –** | |
| **VALE SA** | **Third Party** |

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**Alain Choo-Choy KC** and **Russell Hopkins** (instructed by **Pogust Goodhead**, a trading name of PGMBM Law Ltd) for the **Claimants**
**Shaheed Fatima KC, Victoria Windle KC, Nicholas Sloboda** and **Veena Srirangam** (instructed by **Slaughter and May**) for the **Defendants**
**Simon Salzedo KC**, **Richard Eschwege KC** and **Michael Bolding** (instructed by **White & Case LLP**) for the **Third Party**

Hearing dates: 10th & 12th October 2023

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# Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 19th October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## Mrs Justice O'Farrell:

1. This hearing concerns consequential matters arising out of the court's judgment dated 7 August 2023, reported at [2023] EWHC 2030, pursuant to which the court dismissed Vale's two applications challenging jurisdiction.

2. The court delivered oral rulings in respect of an application by BHP to amend the Part 20 claims and an application by Vale for permission to appeal. The matters dealt with in this judgment are:

    i) Vale's application for an extension of time to file replacement acknowledgments of service;

    ii) Vale's application for a stay of the Part 20 claims pending final determination of Vale's appeal;

    iii) Vale's application to rely on expert evidence of Brazilian arbitration law in support of its application for a stay of the Part 20 claims under section 9 of the Arbitration Act 1996, and directions for that application;

    iv) directions for the Part 20 claims, without prejudice to Vale's appeal and the above applications.

*Extension of time for AOS and Stay*

3. Vale seeks an order under CPR 11(7)(b) extending the time for it to file further acknowledgements of service until 14 days after the final determination of Vale's appeal against the judgment on jurisdiction, and that it should not be required to take any other step in these proceedings until the final determination of its appeal.

4. BHP's position is that Vale should file replacement acknowledgements of service by 17 October 2023 and the defence as currently ordered by 10 November 2023, and that further directions should be given in the Part 20 proceedings.

5. The relevant provisions of CPR 11 are:

> "(1) A defendant who wishes to—(a) dispute the court's jurisdiction to try the claim; or (b) argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
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> (2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.
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> (3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

> (4) An application under this rule must—(a) be made within 14 days after filing an acknowledgment of service; and (b) be supported by evidence.
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> (5) If the defendant— (a) files an acknowledgment of service; and (b) does not make such an application within the period specified in paragraph (4), he is to be treated as having accepted that the court has jurisdiction to try the claim.
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> (6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including—(a) setting aside the claim form; (b) setting aside service of the claim form; (c) discharging any order made before the claim was commenced or before the claim form was served; and (d) staying the proceedings.
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> (7) If on an application under this rule the court does not make a declaration— (a) the acknowledgment of service shall cease to have effect; (b) the defendant may file a further acknowledgment of service within 14 days or such other period as the court may direct; and (c) the court shall give directions as to the filing and service of the defence in a claim under Part 7 … in the event that a further acknowledgment of service is filed.
>
> (8) If the defendant files a further acknowledgment of service in accordance with paragraph (7)(b) he shall be treated as having accepted that the court has jurisdiction to try the claim."

6. Mr Salzedo KC, leading counsel for Vale, submits that Vale should not be required to file replacement acknowledgments of service before the final determination of its appeal on jurisdiction because doing so would be regarded as submission to the jurisdiction of the English court and thus defeat the purpose of any appeal.

7. Reliance is placed on the decision of Floyd LJ in *Deutsche Bank AG v Petromena ASA* [2015] 1 WLR 4225 at [35], rejecting the suggestion that an implied exception (where there is an application for permission or outstanding appeal) could be read into 11(8) as for 11(5):

> "The language of CPR r 11(8) is clear, and it is unlikely in the extreme that the draftsman intended the words in paragraphs (5) and (8) to have different meanings. The correct course for a defendant who has failed in a jurisdiction challenge and who wishes to appeal is to ask for an extension of time for filing the acknowledgement of service sufficient to enable his application for permission to appeal, or his appeal, to be determined. It is quite unrealistic to suppose that a sensible claimant, or if not the court, would refuse such an extension when the effect of such a refusal would be to render the appeal nugatory."

8. This was echoed by Longmore LJ at [52]:

> "The course to be followed by a defendant, who wishes to appeal from a judge's decision that the English court has jurisdiction to try a claim and does not wish a judgment in default to be entered while it is appealing, is to ask the judge to extend the time for acknowledgement of service pending an appeal or (if she refuses permission to appeal) pending an application for permission to this court and thereafter, if permission is given, the appeal."

9. Further, it is submitted that if it would be wrong in principle to order a defendant to file a new acknowledgement of service prior to the final determination of a jurisdiction appeal, then it follows that it would be equally wrong for the court to use its case management powers to require a defendant to file a defence prior to that stage.

10. Mr Salzedo KC submits that CPR 11 envisages that, following an unsuccessful jurisdiction challenge, the appropriate procedure to be adopted would be for the defendant to file a second acknowledgement of service (after the final determination of any appeal on jurisdiction) and then to file a defence to the claim. CPR 11(7)(a) makes it clear that an acknowledgment of service filed by a defendant before a valid jurisdiction challenge ceases to have any effect once that challenge has been dismissed. A defendant will therefore need to file a further acknowledgement of service after the conclusion of any jurisdiction appeal and the second acknowledgement of service will be treated as a submission to the jurisdiction of the English court pursuant to CPR 11(8). CPR 11(7)(c) provides for directions to be given for filing a defence in the event that a further acknowledgement of service is filed. It is said that such provision is inconsistent with any suggestion that the court might make directions for filing a defence prior to that stage.

11. Vale does not agree that the undertakings offered by BHP including an undertaking, not to contend that any steps taken by Vale to prepare a defence constitute submission to the jurisdiction, would adequately address the dilemma. In *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2012] EWCA Civ 169, Kitchen LJ considered this issue:

> "[38] … the non-domiciled defendants say, an order requiring them to file a further acknowledgement of service and defence before this court has considered the substantive appeal would deprive them of the very essence of the jurisdictional challenge.
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> [39] The claimants seek to meet this concern by offering an undertaking that they will not contend that, by filing fresh acknowledgements of service and defences, the non-domiciled defendants have submitted to the jurisdiction. They have also offered, and remain willing, to consent to an order that such further steps by the non-domiciled defendants are subject to and without prejudice to their appeal.
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> [40] The non-domiciled defendants respond that, whatever may have been the position before CPR Part 11, the position now is clear. Both under the Brussels Convention and CPR Part 11, once a challenge to jurisdiction has been considered and rejected by the court, the original acknowledgement of service lapses and the defendant has a further period in which to choose whether to

> file a fresh one. If he does so then, under CPR 11.8, he is to be treated as having accepted that the court has jurisdiction to try the claim. That is the end of the matter and the claimants' proposed undertaking is therefore worthless.
>
> [41] I am satisfied that there is, at the least, a very real risk that the concerns of the non-domiciled defendants are well founded. In my judgment they have established solid grounds for a stay in the form of irremediable harm if a stay is not granted. Moreover, I am satisfied that a stay would not cause any material prejudice to the claimants. I recognise that they are concerned that the litigation should be progressed as expeditiously as possible. However, I must also have regard to the fact that they waited almost six years from the date of the Commission decision before issuing proceedings."

12. Mr Salzedo further submits that even if the court has power to order a defendant to file a defence pending an extant jurisdiction appeal, it would not be appropriate to do so in this case and a stay should be ordered.

    i) The pleading exercise is a very substantial task. BHP were permitted five months to file a defence in the main proceedings after the Court of Appeal dismissed its jurisdiction appeal on 8 July 2022, based on BHP's explanation that the claims involve complex and serious allegations of fact stretching back many years, and propositions of Brazilian law (a number of which are novel and/or controversial) which require detailed input from Brazilian lawyers. In his sixth witness statement dated 25 September 2023, Mr Caisley's estimate is that Vale needs until the end of December 2023 to complete the Part 20 defence.

    ii) BHP intend to make amendments to its defence in the main proceedings in relation to the causes of the dam collapse.

    iii) Attempting to shoehorn the Part 20 claims into the October 2024 trial would create a near certainty of disruption to the existing timetable.

    iv) A further reason the Part 20 claims should be stayed pending Vale's appeal is that Vale is unable to file and serve the BHP Brasil claim until Vale has filed replacement acknowledgements of service.

13. It is said that Vale would suffer irremediable harm if no stay is granted pending the outcome of its appeal.

    i) There are thousands of claims against Vale ongoing in Brazil relating to the collapse of the dam; Vale has a relatively small in-house legal team and a limited pool of external Brazilian lawyers working on these matters.

    ii) If Vale is required to file a defence prior to the final determination of its appeal, any confidential information contained in that document will immediately become available to the public pursuant to CPR 5.4C(1)(a). That would be profoundly unfair if the Court of Appeal later concluded that the English court has no jurisdiction over the Part 20 claims.

iii) Such unfairness would apply equally if Vale is required to disclose hundreds of thousands of documents, many of which are likely to contain confidential information, pending its jurisdiction challenge.

iv) Vale would be at risk of incurring irrecoverable costs if it were required immediately to prepare a defence to the Part 20 claims and otherwise engage with the merits of those claims pending its appeal.

14. Ms Fatima KC, leading counsel for BHP, submits that Vale should be required to file the replacement acknowledgements of service by 17 October 2023. It is not accepted that Vale's intention to seek permission to appeal from the Court of Appeal amounts to a good objection.

15. BHP further submit that there is no risk to Vale that filing acknowledgments of service would prejudice any jurisdiction appeal. As explained in Mr Michael's twenty-first statement dated 2 October 2023, BHP offered undertakings by letter dated 31 August 2023 in the following terms:

> "The Defendants and BHP Brasil … confirm that, for the purposes of any appeal Vale may bring against the Judgment of Mrs Justice O'Farrell dated 7 August 2023, they will not contend that any step that Vale takes in the proceedings constitutes a submission to the jurisdiction of the English Courts…
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> Further, the Defendants and BHP Brasil confirm that they will not contend that in taking steps in the Proceedings, Vale is taking a step to answer the substantive claim for the purposes of section 9 of the Arbitration Act 1996…
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> … the Defendants are willing to (and do) undertake to indemnify Vale in respect of its reasonable and proportionate costs of participating in the Proceedings in the event that it seeks permission to appeal, which is granted, and its Appeal then succeeds…"

The undertakings were sought by Vale on 24 August 2023 and provided by BHP on 31 August 2023. Similar undertakings were offered earlier by BHP as set out by Mr Michael in his fifteenth witness statement dated 6 February 2023.

16. BHP's position is that such undertakings provide effective protection for Vale pending any appeal. In *Goldman Sachs International v Novo Banco SA* [2016] EWHC 346 (Comm.), following dismissal of the defendant's jurisdiction challenge, the Court of Appeal granted permission to appeal but remitted to the Commercial Court for determination the issues: (a) where a party to an application to dispute jurisdiction has permission to appeal against a decision dismissing its jurisdictional challenge, whether the English court has jurisdiction to make case management directions to take effect pending such appeal; and (b) if so, whether that power should be exercised in this case and in what way. The matter came back before Blair J, where it was agreed that the court had jurisdiction to make an order for directions but the defendants submitted that in principle it was wrong to do so where there was a pending appeal as to jurisdiction. The court rejected that submission and ordered procedural steps up to the close of

pleadings pending the appeal, so as to minimise delay should the appeal be unsuccessful:

> "[17] Often, perhaps usually, there will be no question of requiring the parties to do anything in the proceedings until the permission question or the jurisdiction appeal itself is disposed of. It may be a waste of time and money. But the appeal stage inevitably takes time, and there will be some commercial cases where it makes sense that the action does not (to use the phrase used by the claimants) "go into stasis".
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> …
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> [21] There are two important caveats. One is that nothing should prejudice the defendant's position if the appeal is successful. The other is that the defendant should not have to bear costs that will have been wasted on the pleadings stage if the appeal is successful.
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> …
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> [23] … it would be entirely reasonable in my view for a party challenging jurisdiction to insist on the inclusion of a term in the order to the effect that the steps in question are not to be taken as a submission to the jurisdiction, together with an undertaking by the claimants not to take any such point …
>
> [24] As to wasted costs should the appeal be successful, the order can specify that the claimants/respondents must indemnify the appellant against these costs …"

17. A similar approach was taken in *Conversant Wireless Licencing SARL v Huawei Technologies Co Ltd (No.2)* [2018] EWHC 1216 655 (Ch) by Henry Carr J:

> "[29] In my view, the structure of the rules is that the first acknowledgment of service does not constitute a submission to the jurisdiction, but once the court has rejected a jurisdictional challenge and the defendant chooses to file a second acknowledgment of service, that second acknowledgment of service does constitute a submission to the jurisdiction. The purpose of r. 11(8) is to give the second acknowledgment of service its normal effect in the absence of a jurisdictional challenge. It is not necessary to imply that the rule is intended to have the consequence that all other steps in the proceedings must be stayed.
>
> [30] Secondly, if [the defendants'] arguments were correct, then once permission to appeal was granted, there would be no choice but to grant a stay, even if that would lead to injustice. For example, in a case where the respondent would be irreparably prejudiced by a grant of a stay and the balance of justice would

> indicate that a stay should be refused, nonetheless the mere existence of an appeal on jurisdiction would mean the claim would have to be frozen. I would be reluctant to reach that conclusion, and I do not accept that I am required to do so.
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> [31] Thirdly, Blair J. addressed a very similar question to that argued before me. He was, of course, a very experienced judge of the Commercial Court. He expressly addressed his mind to the question of whether the appeal in the case before him would be rendered nugatory, if further steps in the action (in the absence of an acknowledgment of service) were ordered, and decided this would not be the case. I agree."

18. BHP note that, in the face of BHP's similar application for a stay, following its unsuccessful jurisdiction challenge and with similar undertakings offered by the claimants, the Court of Appeal refused to grant BHP an extension of time to file a replacement acknowledgement of service or its defence, notwithstanding that their jurisdiction challenges had not been finally determined.

19. In response to Vale's submission that it would be improper for the court to order it to serve its defence pending the outcome of its jurisdiction appeal, Ms Fatima responds as follows.

    i) In the judgment handed down on 7 August 2023, the court gave directions for Vale to progress the Part 20 claims, including by filing and serving a defence, and invited submissions on additional directions. Insofar as the timetable is demanding on Vale, it is the author of its own misfortune. Vale did not seek the undertakings from BHP until 24 August 2023, or start work on its defence until after 31 August 2023. Vale did not engage with any directions until it served its application for a stay on 25 September 2023. Vale is not in the same position as BHP. Since December 2022, it has had BHP's defence and key documents, and it has been aware of the allegations made in these proceedings for many years.

    ii) The proposed amendments to BHP's defence in the main proceedings are that, whereas previously it reserved its position, now it will not dispute the key conclusions of the Panel Report as to the immediate causes of the collapse but will set out its case as to what the court can and cannot properly deduce or infer from such report.

    iii) The directions in BHP's draft order are realistic and should be adopted. Vale has had BHP's indicative timetable since July 2023 and the draft judgment since 2 August 2023.

    iv) It is not accepted that Vale is unable to make any claim against BHP Brasil pending the outcome of its jurisdiction appeal. BHP were in a similar position but issued the Part 20 claims against Vale.

20. It is said by BHP that, if a stay were granted, they would suffer irremediable prejudice in that, even if the appeal failed, it might be decided too late for Vale to participate in the October 2024 trial. In contrast, Vale would suffer no irremediable prejudice if a stay were not granted pending the outcome of its jurisdiction appeal.

i) The diversion of time and resources away from its existing Brazilian proceedings are no more than a temporary inconvenience that any appellant is bound to face. Vale is a well-resourced party and has been involved in litigation arising out of the dam collapse since 2015 in different jurisdictions, including Brazil and the US. There is no reason why it cannot allocate additional resources to its legal teams to ensure that it can comply with directions made by the court.

ii) Any legitimate concerns by Vale about the confidentiality of its pleading could be addressed by an order under CPR 5.4C(4) to restrict access to its defence, at least unless and until its avenues of appeal against the judgment have been exhausted.

iii) Vale has not explained the documents or classes of documents that it says would be prejudicial if referred to in open court, whether they have been disclosed by BHP or in the US proceedings, or why such documents would not be disclosable in Brazil if BHP brought the Part 20 claims there.

iv) The costs of taking procedural steps in these proceedings would not be wasted because even if Vale's appeal or section 9 challenge were successful, BHP would pursue its claim against Vale in whatever jurisdiction was appropriate.

21. In considering these applications I start with the potential difficulty presented by CPR 11(8). On its face the words are clear that the filing of a replacement acknowledgement of service would amount to a submission on the part of Vale to the jurisdiction of the English court. Certainly, this is the way in which the words were interpreted in *Deutsche Bank* and *Toshiba*.

22. In many cases this presents no practical difficulty because the claim can simply be stayed pending the outcome of the jurisdiction appeal. The tension arises in this case because it is common ground that a stay of the Part 20 proceedings pending the outcome of any appeal would adversely affect the feasibility of the October 2024 trial. A sensible and pragmatic solution appears to have been adopted in other cases, including BHP's jurisdiction challenge, by undertakings on the part of the claimant not to contend that such filing amounts to submission to the jurisdiction. In this case, the risk to Vale is remote in circumstances where clear undertakings have been offered by BHP and a suitable term to that effect can be incorporated into the court's order.

23. However, I note that there is no direct authority in which the efficacy of such undertakings has been tested. In those circumstances, it would not be right for this court to force Vale to risk submitting to the jurisdiction and thus defeating any jurisdiction appeal before it could be considered by the Court of Appeal, at least on the application for permission to appeal.

24. Therefore, the court will extend time for Vale to serve any replacement acknowledgements of service until 1 December 2023, giving it time to make an application to the Court of Appeal for permission to appeal. Subject to the outcome of such application, appropriate undertakings and orders can then be considered by the Court of Appeal.

25. I do not consider that the same risk attaches to other directions in the Part 20 proceedings. There is no similar provision to CPR 11(8) which would automatically

regard Vale as having submitted to the court's jurisdiction by filing a defence. Although CPR 11(7) contemplates that a defence will be filed after the replacement acknowledgement of service, there is no stipulation to such effect. In those circumstances, provided that Vale has issued an application for permission to appeal on jurisdiction and BHP have given the undertakings offered, there is no real risk that steps taken in compliance with directions given by the court will be treated as submission to the jurisdiction.

26. I reject Vale's contention that it would be wrong in principle for the court to order it to file its defence and take other steps in the proceedings pending the outcome of its application for permission or determination of its appeal. A number of authorities have been cited to the court in which different approaches have been taken: *Moloobhoy v Kanani* [2013] EWCA Civ 600 at [14], [17], [16], [17]; *Arcadia v Bosworth* [2016] EWHC 2527 at [9] – [14]; *Conversant* (above) at [29] – [31]. What emerges from those authorities is that the decision is not one of principle but depends on the circumstances in each case; including the stage at which the proceedings have reached, the nature and extent of the procedural steps yet to be undertaken, the imperative of making immediate progress in the case, and the interests of justice for all parties to the proceedings, pending final determination of any appeal.

27. The starting point is that this court has heard and determined Vale's jurisdiction challenge. It has refused permission to appeal. Of course Vale has a right to go to the Court of Appeal and seek permission to appeal but in the meantime Vale's jurisdiction challenge has been dismissed and the court has jurisdiction over the Part 20 claims. The effect of CPR 52.16 is that, unless the court orders otherwise, neither the commencement of an appeal nor the grant of permission to appeal shall operate as a stay of any order or decision of the lower court.

28. The court has a discretion to order a stay pending appeal. In *Hammond Suddards Solicitors v Agrichem International Holdings Ltd* [2001] EWCH Civ 2065 Clarke LJ stated at [22]:

> "Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay."

29. The grounds on which a stay pending appeal might be granted were considered by Sullivan LJ in *DEFRA v Downs* [2009] EWCA Civ 257:

> "[8] … solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.
>
> [9] It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the

> kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal."

30. I reject Vale's argument that a stay should be granted on case management grounds. Whilst it is accepted that the pleading exercise is a very substantial task, Vale is not in the same position as BHP regarding the length of time required to prepare its defence, for the reasons set out in the court's jurisdiction judgment at [102]. Vale was involved in the investigation that took place in the immediate aftermath of the dam collapse. It was one of the entities that commissioned the Panel Report on the cause of the collapse, published in August 2016. Since 2015, it has been involved in proceedings concerning Vale's responsibility for the dam collapse, in Brazil and the US, some of which are ongoing. Vale has had the benefit of the pleaded defence by BHP since December 2022. Given that BHP seek to pass on to Vale the allegations made by the claimants to the extent that the same succeed, it is likely that Vale will adopt most, if not all, of BHP's pleaded defence, subject to additional factual and legal arguments pertinent to Vale's position. BHP offered Vale initial disclosure on 8 June 2023, which was refused, but has since provided Vale with disclosure in tranches on 7 and 22 September 2023.

31. In recent correspondence, BHP have indicated that, for the purpose of the current proceedings, they do not intend to dispute the key conclusions of the Panel Report as to the immediate cause(s) of the collapse. It is accepted that Vale will need to see and consider BHP's proposed amendments to its defence and/or Part 20 claims, and have an opportunity to plead in response. Until the detailed pleadings are available, it would be futile for the court to speculate as to the impact, if any, on the timetable.

32. Vale's characterisation of the October 2024 trial as an expedited trial that would be disrupted by the inclusion of the Part 20 claims is rejected. The scale and complexity of these proceedings is not underestimated. It is for that reason that at the trial in October 2024 the court will not determine liability of the defendants to any named claimants; rather the court will determine the threshold liability issues as defined, including selected limitation and settlement defences. The revised date and increased estimate for the trial set at the March/April 2023 CMC were fixed, in part, to enable Vale to prepare for and participate in the hearing. Vale will have 22 months from the issue of the Part 20 proceedings, and 14 months from the judgment on jurisdiction, to prepare for trial. That is a demanding but achievable (and not expedited) timetable.

33. As for the potential claim by Vale against BHP Brasil, it is a matter for Vale whether and, if so, when it chooses to issue proceedings against BHP Brasil. Although the court will grant an extension of time as indicated above, it is open to Vale to file replacement acknowledgements of service and issue Part 20 claims now, relying on the undertakings offered by BHP and BHP Brasil. This is the procedure that was adopted by BHP when issuing its Part 20 claims against Vale. Alternatively, it can wait until the outcome of its application for permission to appeal and any appeal, before issuing any additional claims (if necessary and subject to permission of the court) in this jurisdiction or elsewhere.

34. That brings the court to consider the arguments on either side relating to irremediable harm and the interests of justice.

35. It is not accepted that Vale is overwhelmed by the Brazilian proceedings, or that it will suffer irremediable harm if forced to divert time and resources away from those proceedings. Vale is a very substantial global organisation, it managed to resource substantial litigation in the US at the same time as it faced proceedings in Brazil and there is no solid evidence that it is unable to allocate additional resources to this litigation.

36. Issues of confidentiality regarding pleadings can be dealt with by restricting access to the court file. CPR 5.4C(1) contains the general rule that a person who is not a party to proceedings may obtain from the court records a copy of a statement of case (but not any documents filed with or attached to the statement of case). CPR 5.4C(3) does not permit such access until the acknowledgement of service has been filed, or the claim listed for hearing. CPR 5.4C(4) empowers the court to restrict such access, requiring a non-party to make a formal application to the court, and to make such order as it thinks fit. Therefore, the court could make an order pursuant to CPR 5.4C(4), restricting non-party access to the defence, at least pending the outcome of any appeal.

37. Issues of confidentiality regarding disclosure can be dealt with by a confidentiality ring, restricting certain categories of confidential or commercially sensitive information to named individuals, subject to confidentiality undertakings.

38. BHP have offered an undertaking to indemnify Vale in respect of its reasonable and proportionate costs should Vale's application to the Court of Appeal meet with success. Although the undertaking does not amount to an unlimited indemnity, it is in accordance with the basis on which most orders for costs are made in litigation. It would be open to Vale to argue before the Court of Appeal that the circumstances of this case required an alternative, bespoke costs order.

39. Naturally, Vale has focused on the harm that it would suffer if forced to comply with procedural directions but succeed in its jurisdiction challenge on appeal. However, that must be balanced against the harm that would be suffered by BHP, and potentially the claimants, if proceedings were disrupted and delayed pending the hearing of an ultimately unsuccessful appeal. In particular, BHP would suffer severe prejudice if the Part 20 claims were tried separately from the main claims, potentially forcing it to re-litigate issues already determined between the claimants and BHP with the attendant duplication of costs, inefficiencies and stress of the proceedings for all participants.

40. Balancing all of those factors, the court considers that the appropriate course to adopt in this case is as follows:

    i) The time for Vale to file replacement acknowledgements of service is extended until 1 December 2023, to allow time for determination by the Court of Appeal of its application for permission to appeal. If permission is granted, the Court of Appeal can consider whether to grant any further extension of time pending any appeal regarding the jurisdiction challenge.

    ii) Vale's application for a stay of the Part 20 proceedings is dismissed.

*Section 9 stay application*

41. On 18 September 2023, Vale issued an application for an order pursuant to section 9 of the Arbitration Act 1996 that all further proceedings in the Part 20 claims be stayed. I observe that section 9(3) of the 1996 Act precludes any application for a stay prior to acknowledgement of the proceedings or after any step in the proceedings to answer the substantive claim. Both could be addressed by undertakings and suitable words in the court's order.

42. Vale's position is the Part 20 claims fall within the scope of an arbitration agreement contained in clause 11.1 of a shareholders' agreement dated 29 June 2000. Parties to the shareholders' agreement include Samarco, Vale and BHP Brasil but not the BHP defendants. The shareholders' agreement is governed by Brazilian law and was amended in March 2016 to include matters relating to the establishment of the Renova foundation following the collapse of the dam. Vale's case is that if, as alleged in the Part 20 claims, BHP and Vale participated actively in the performance of Samarco, as a matter of Brazilian law, BHP are bound by the arbitration agreement.

43. On 18 September 2023, Vale issued an application for an order pursuant to CPR 35.4 asking for permission to rely on Brazilian law expert evidence in support of the section 9 stay application. The application is supported by the fifth witness statement of Mr Caisley dated 18 September 2023.

44. Vale seeks to rely on an expert report from a new expert, Professor Joao Bosco Lee, on the following questions:

    i) What principles of Brazilian law are relevant to interpreting the scope of an arbitration clause?

    ii) Under Brazilian law, can an arbitration clause in a written contract signed by two companies bind non-signatory companies related to the direct signatories? If so, under what circumstances?

    iii) Would the circumstances alleged in the Part 20 Claims, RAMPOC and Amended Reply be sufficient under Brazilian law to bind BHP Group (UK) Ltd ("BHP UK") and BHP Group Ltd ("BHP Australia") (together, "BHP") to the arbitration clause contained in Clause 11 of Samarco's Shareholders' Agreement (the "Shareholders' Agreement")?

    iv) Under what circumstances would the Part 20 Claims fall within the scope of Clause 11.1 of the Shareholders' Agreement under Brazilian law? In particular: a. Are the Part 20 Claims "any dispute, controversy or claim regarding …breach" of the Shareholders' Agreement? Based on the matters alleged in the Part 20 Claims, what would be the breaches of the Shareholders' Agreement? b. Are the Part 20 Claims a "dispute, controversy or claim" relating to the technical matters mentioned in Clause 9.3.4?

45. Vale no longer seeks permission to adduce expert evidence in respect of question 4 but pursues its application in respect of the other three questions to be addressed by Professor Lee.

46. Mr Eschwege KC, leading counsel for Vale, acknowledges that Vale has already adduced expert evidence from Professor Abboud on questions 1 and 2 but he submits

that such evidence was permitted solely for the purpose of the jurisdiction challenge hearing. Therefore, Vale is required and entitled to seek permission to adduce fresh expert evidence for the purpose of its section 9 application. There is nothing objectionable about a party using an alternative expert if that is done in a transparent manner and there is no question of expert shopping. In this case both expert reports have been disclosed and Professor Abboud's opinions are consistent with those of Professor Lee. Vale wishes to rely upon Professor Lee's report because Professor Lee is an expert in Brazilian arbitration law whereas Professor Abboud is an expert in Brazilian civil procedure law.

47. Mr Eschwege submits that BHP are wrong to suggest that question 3 raises a question of contractual interpretation; rather, it relates to the circumstances in which a non-party can be bound by an arbitration agreement pursuant to rules of Brazilian law: *Lifestyle Equities CV v Hornby Street (MCR) Ltd* [2022] Bus.LR 619 per Snowden LJ at [35]-[38]:

> "Interpretation is the ascertainment of the meaning of a contract or other document. Identifying what the terms of an agreement mean is (of course) important, but the process of interpretation cannot, of itself, answer the question of whether that agreement has any e□ect on someone who is not a party to the contract."

And Lewison LJ at [111]:

> "I agree with Snowden LJ that this question is not properly characterised as the interpretation of the arbitration agreement. The rule as stated in Dicey, Morris & Collins is not a statute, and it would be wrong to apply it as if it were. But if it were necessary to shoehorn this question into the rule as stated in Dicey, Morris & Collins, I would prefer to characterise it as an aspect of the scope of the agreement. "

48. Mr Eschwege submits that the court's task is to predict how a court or tribunal in Brazil, applying Brazilian law, would determine that question. There is nothing inappropriate in Professor Lee providing his expert opinion on that question, based on an assumed set of facts (assuming that the allegations made by the Claimants against BHP are true).

49. The application is opposed by BHP on the ground that questions 1 and 2 simply replicate questions for which permission was given by the court's order dated 8 March 2023 in the context of the jurisdiction challenge:

    i) What principles of law inform a Brazilian Court in interpreting an agreement to arbitrate within a shareholders' agreement?

    ii) In what circumstances may an arbitration agreement bind a non-party? In particular, where an arbitration agreement is signed by one company, will it also bind other companies in the same economic group?

50. Ms Fatima submits that Professor Abboud has already answered these questions, as has Professor Schreiber, in their reports before the court for the jurisdiction challenge hearing. Pursuant to CPR 35.1, the Court has a duty to restrict expert evidence to that

which is reasonably required to resolve the proceedings. There is no need for the parties now to adduce fresh expert evidence on questions 1 and 2. The attempt to adduce expert evidence on the same topics is wasteful and adds unnecessary complexity to the proceedings. Although Vale now claims that Professor Lee is an arbitration specialist with greater expertise that Professor Abboud, it put forward Professor Abboud as an expert on these arbitration questions and relied on his expert reports.

51. BHP object to question 3 as seeking to adduce inadmissible and irrelevant expert evidence. Whilst evidence as to the content of foreign law is admissible, it is not the role of foreign law experts to opine on the meaning of a contract, because that is, impermissibly, to apply the relevant law to the facts, which is a matter for the court: *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2019] 1 CLC 822 per Hamblen LJ:

> "[45] The role of foreign law experts in relation to issues of contractual interpretation is a limited one. It is confined to identifying what the rules of interpretation are.
>
> [46] It is not the role of such experts to express opinions as to what the contract means. That is the task of the English court, having regard to the foreign law rules of interpretation."

52. I start by considering whether permission should be given for Vale to rely on the expert evidence of Professor Lee.

53. The court has a general discretion to permit a party to change the identity of the expert on which it relies, pursuant to its specific power to control the use of expert evidence under CPR 35.4 or as part of its general case management powers under CPR 3.1(2). Such general discretion should be exercised having regard to all the material circumstances of the case and in accordance with the overriding objective.

54. The usual rule is that the court should not refuse a party permission to rely on a new expert in substitution for an existing expert: *Edwards-Tubb v JD Wetherspoon plc* [2011] EWCA Civ 136 per Hughes LJ at [30]:

> "I certainly accept that there may be perfectly good reasons for a party to wish to instruct a second expert. Those reasons may not always be that the report of the first expert is disappointingly favourable to the other side, and even when that is the reason the first expert is not necessarily right. That means that it will often, perhaps normally, be proper to allow a party the option, at his own expense, of seeking a second opinion. It would not usually be right simply to deny him permission to rely on expert B and thus force him to rely on expert A, in whom he has, for whatever reason, lost confidence."

55. For whatever reason, in this case, Vale has lost confidence in Professor Abboud on these issues of arbitration law and wishes to rely on the evidence of a second expert, Professor Lee. Having regard to the size and value of the claims, and the importance attached to the application for a stay, I consider that it would be appropriate to allow Vale to adduce expert evidence on questions 1 and 2 from Professor Lee.

56. I turn to the application to adduce expert evidence on question 3. It is accepted that the section 9 stay application raises questions, not just as to interpretation of the arbitration agreement (including whether it covers the scope of the dispute), but also as to whether, under Brazilian law, BHP's activities regarding Samarco had the effect that BHP, non-signatories, are bound by the arbitration agreement. The function of the Brazilian law experts is to explain to the court the Brazilian rules of construction of arbitration agreements and the Brazilian law principles governing the circumstances in which a non-party can be bound by an arbitration agreement. It is not the function of the Brazilian law experts to apply those principles to the facts of this case; that is the task of the court.

57. To the extent that the expert evidence is said to relate to the circumstances in which a non-party can be bound by an arbitration agreement pursuant to rules of Brazilian law, that is already covered by the second part of question 2. To the extent that it seeks to go further and provide the court with Professor Lee's view as to the application of the Brazilian law principles to the facts in this case, it trespasses on the function of the court.

58. For those reasons, the court does not give permission for any party to adduce expert evidence on question 3.

59. In terms of directions for determination of the section 9 application, the court orders as follows:

    i) Vale has permission to rely on the expert report of Professor Lee dated 18 September 2023 on questions 1 and 2 (but not 3 or 4).

    ii) BHP have permission to file and rely on expert evidence from Professor Schreiber in response by 4pm on 6 November 2023.

    iii) Vale has permission to file and rely on expert evidence from Professor Lee in reply by 4pm on 17 November 2023.

    iv) There is already provision for the experts to commence discussions by 24 November 2023. Any agreements reached should be set out in a joint statement and filed by 4pm on 1 December 2023.

    v) Vale shall file an agreed bundle of documents with the court by 4pm on 5 December 2023.

    vi) BHP and Vale shall file and serve skeleton arguments by 4pm on 7 December 2023.

    vii) The hearing of the section 9 application is fixed for 12 and 13 December 2023 with an estimate of two days (plus a reading day on 11 December 2023).

*Further Directions*

*Pleadings*

60. In the jurisdiction judgment, the court ordered Vale to file and serve its Part 20 defence by 10 November 2023. Vale's position is that it could not be ready to file a complete

defence until the end of December 2023. For the reasons set out above, it is not accepted that Vale needs the same amount of time as BHP needed a year ago. However, having considered Mr Caisley's evidence, the court is prepared to extend time for Vale to file and serve its Part 20 defence to 4pm on 1 December 2023.

61. In consequence, BHP shall file any reply to the Part 20 defence by 22 December 2023.

*Issues*

62. Vale's defence will identify the matters relied on that are said to give rise to defences of limitation or settlement and release. The court orders that by 4pm on 15 December 2023, Vale shall provide to the claimants and BHP any comments on the agreed set of hypothetical scenarios (for the purposes of Issue 13) and the agreed set of sample settlement agreements (for the purposes of Issue 15) previously agreed between the claimants and BHP pursuant to paragraph 33 of the CMC Order.

63. BHP have already identified the issues said to arise on the Part 20 claims that overlap with the issues ordered to be tried at the first stage trial. Following service of BHP's reply on 22 December 2023, it will be possible for the parties to discuss and finalise the list of issues as between BHP and Vale for the first stage trial. The court orders that by 4pm on 12 January 2024, Vale and BHP shall seek to agree additions to the current list of issues for the first stage trial to include such issues arising on the additional claim as the parties consider should be determined at that trial.

*Disclosure*

64. By 4pm on 15 December 2023, Vale is to provide a draft Disclosure Review Document to BHP prepared in accordance with Practice Direction 57AD including any response to BHP's draft Section 1a DRD for the Additional Claim (as provided by BHP to Vale on 25 September 2023).

65. If agreed, the DRD may be approved by the court on the papers. If not agreed, the DRD (and any disputes on the same) will be considered by the court at the next CMC.

66. By 4pm on 12 January 2024, Vale shall give to the parties disclosure of documents referred to in Alexandre D'Ambrosio's Second Witness Statement in paragraphs 18-21, which were produced in securities class actions against Vale in the United States.

67. Further disclosure from Vale will be given in tranches, on dates to be agreed by the parties or determined by the court at the next CMC.

*Experts*

68. The court has already ordered the parties to identify expert issues and commence expert discussions as set out in paragraph [104] of the jurisdiction judgment. Vale's factual and expert evidence filed in the jurisdiction challenge identified issues of Brazilian law that were said to arise in the Part 20 claims. Indeed, the Brazilian law experts have already produced reports on key issues of joint and several liability and remedies available under Brazilian law. Mr D'Ambrosio has identified additional issues related to Vale's position as a shareholder in Samarco, including the 'disregard doctrine', corporate governance and antitrust laws, together with limitation and settlement

defences. On that basis, Vale must be in a position to comply with the limited directions for early engagement between the parties and their experts, where appointed, to identify and define the scope of the expert issues.

*Further CMC*

69. All parties should liaise to fix a further CMC to be listed on the first available date after 15 January 2024 with a time estimate of 2 days, at which any dispute as to the issues, disclosure or further directions are to be determined by the court.