Neutral Citation Number: [2020] EWHC 928 (TCC)

Case No: EV50LV008, E50LV010, and HT-2019-LIV-00000

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Liverpool, Civil & Family Courts
35 Vernon Street,
Liverpool, L2 2BX.

Date: 20th April 2020

Before :

HIS HONOUR JUDGE EYRE QC

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Between :

MUNCIPIO DE MARIANA & OTHERS	**Claimants**
- and -	
1) BHP GROUP PLC (formerly BHP BILLITON)	**Defendants**
~~**(2) BHP BILLITON BRASIL LTDA**~~	
~~**(3) SAMARCO MINERAÇÃO SA**~~	
~~**(4) BHP INTERNATIONAL FINANCE CORP**~~	
~~**(5) BHP MINERALS INTERNATIONAL LLC**~~	
~~**(6) MARCONA INTL, SA**~~	
(7) BHP GROUP LTD	

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Nicholas Harrison and Jonathan McDonagh (instructed by **SPG Law**) for the **Claimants**
Charles Gibson QC, Nicholas Sloboda, and Veena Srirangam (instructed by **Slaughter and May**) for the **Defendants**

Hearing date: 17th April 2020

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HH Judge Eyre QC:

1. The First and Seventh Defendants have applied to stay these proceedings on jurisdictional grounds. That application is currently listed to be heard for seven days beginning on 8th June 2020. The timetable for the service of evidence provides for the Defendants to serve their evidence in reply to the Claimants' evidence by 1st May 2020. The Defendants apply for an extension of that deadline to 19th June 2020 in light of the difficulties said to have been caused by the Covid-19 pandemic and by the measures put in place to address it. The consequence of such an extension would be the vacation of the hearing currently listed for 8th June. The Defendants invite the court to list the matter instead for a hearing either in July 2020 or in the Michaelmas term of this year with their "strong preference" being for the latter. The Claimants accept that a very modest extension of time is appropriate but resist an extension of the period sought by the Defendants and the consequent vacation of the June hearing. If the hearing is vacated they resist the proposal of a hearing in the Autumn contending that the case should be relisted for hearing in July.

2. The hearing of the application for an extension of time was conducted remotely by way of Skype and in private pursuant to CPR PD51Y with the concurrence and cooperation of the parties. As I explained at the start of the hearing I was satisfied that a remote hearing was necessary if the application was to be determined swiftly and that it was in the interests of justice for there to be such swift determination. It was not possible to broadcast the hearing in a court room and it was necessary for the hearing to be in private to secure the proper administration of justice. I am grateful for the positive engagement by counsel and solicitors on both sides in the steps necessary to conduct the hearing in that way.

The Nature of the Proceedings.

3. The proceedings arise out of the collapse of the Fundão Dam in Brazil on 5th November 2015. The dam was an iron ore tailings dam and the collapse released large quantities of toxic materials and contaminated water. That material entered, ultimately, the Rio Doce, causing harm along the course of that river to the Atlantic Ocean.

4. The parties are agreed as to the scale of this litigation. In earlier applications the Claimants have described the proceedings as the largest class action ever brought in England and as being of unusual scale and complexity. The Defendants have previously noted that the claims are brought on behalf of an extraordinarily large class of claimants. There are about 202,000 individual claimants together with about 530 private businesses or foundations, 25 municipalities, 15 churches and faith-based institutions and the archdiocese of Mariana, about 145 individuals from the Krenak indigenous community and 5 utility entities.

5. The Defendants are linked by way of a dual listed company structure. The Seventh Defendant is the ultimate parent company of one of the joint venture partners of the Brazilian company which owned and operated the dam. In very

simplified terms the Claimants say that the Defendants are the ultimate controllers of those responsible for the operation of the dam.

6. The damages sought are considerable in amount and are for a large range of losses. The claims are made by reference to Brazilian law and the Claimants say that the Defendants' liability derives from provisions of the Brazilian constitution and law which, in very bare summary, make the Defendants liable for the actions of the companies of which they were the ultimate controllers. In this case it is not just liability which will be determined pursuant to Brazilian law but that law will also govern causation and redress. The redress sought is formulated by reference to Brazilian law with provision for what, under that law, are described as patrimonial and moral damages. The nature of the claims is set out in sundry places, but, in essence, there are a number of claims made by each of the categories of claimants for a range of redress and for compensation for sundry rights of different kinds. These range from the more easily recognised categories of damages for physical harm and for loss of earnings to damages for the effect on the heritage of the Krenak community.

The Jurisdiction Challenge.

7. Court proceedings have been launched in Brazil. There have been a number of individual proceedings together with class actions of various kinds. In addition a foundation, the Renova Foundation, has been created and this provides compensation on a non-litigious basis.

8. The Defendants seek a stay of the proceedings on jurisdictional grounds. That application is brought on three bases. The first is that the Seventh Defendant, an Australian company, applies for the proceedings to be stayed against it on the basis of *forum non conveniens*. It contends that Brazil is an available forum which is clearly and more distinctly appropriate for the trial than the courts of England and Wales. The First Defendant is domiciled in England and is an English company so an argument based on *forum non conveniens* is not open to it. However, it does apply pursuant to Article 34 of the Recast Brussels Regulation for a stay on the basis that the actions before the Brazilian courts are related to these claims and give rise to a risk of irreconcilable judgments such that a stay is necessary for the proper administration of justice. Reference is made in particular to 34 sets of proceedings in Brazil and very large numbers of individual proceedings together with a class action referred to by the parties as "the 155bn CPA". Finally, both defendants apply under CPR 3.4(2) for the claims to be struck out or stayed as an abuse of process or for them to be stayed on case management grounds under CPR3.1(2)(f) as being pointless, wasteful and duplicative of the proceedings and/or judgments in Brazil and the work of the Renova Foundation.

9. The Claimants resist the jurisdiction application. In doing so they make a number of criticisms of the approach of the Brazilian courts; the time it will take to resolve matters in Brazil; the awards in the Brazilian litigation; the capacity in general terms of the Brazilian system to provide adequate and timely redress; and the work of the Renova Foundation.

The Timetable.

10. The matter came before me on 13th September 2019 and I gave directions for the determination of the jurisdiction issues. These provided for a four-day hearing beginning on 9th June 2020. The Defendants' evidence was to be served by 29th November 2019 with the Claimants' evidence in response served by 28th February 2020 and any reply evidence from the Defendants by 17th April 2020. The Claimants had pressed for a shorter timetable but for reasons I gave at the time I substantially adopted the timetable proposed by the Defendants while recording my view that it was a "slightly generous timetable".

11. The timetable was subsequently modified by consent. The parties agreed that the time for the Claimants' evidence should be extended to 13th March 2020 to take account of difficulties encountered in gathering evidence due to the Christmas and New Year holidays; the Brazilian Carnival festivities; and severe flooding in the Minas Gerais state. The time for the Defendants' evidence in reply was extended to 1st May 2020. The Defendants say that this was on the footing that the Claimants accepted that there would be no objection to a further extension to 11th May 2020 if that were required. The Claimants don't accept that there was an agreement to consent to such a further extension though they do accept that the parties proceeded on the footing that this would leave some limited capacity for an extension to 11th May if that proved necessary. That difference of understanding is not of great significance for present purposes although I do note that the wording of the Claimants' solicitors' letter of 14th February 2020 says that the Defendants are to take "comfort" from the availability of the period to 11th May 2020. In any event it is to be noted that even before the current difficulties both sides were aware of the possibility that the time for service of the reply evidence might need to be extended to 11th May 2020. The parties properly reflected on the likely duration of the hearing and raised concerns as to the adequacy of the four-day estimate. As a consequence the time available was extended with a view to providing for a seven-day hearing starting on 8th June 2020 preceded by four days of pre-reading.

The Evidence as to Jurisdiction served to Date.

12. In support of the jurisdiction challenge the Defendants served three witness statements (from André Vivan de Souza, a Brazilian lawyer, and from André de Freitas, the chief executive of the Renova Foundation, and Efstathios Michael, a partner in the Defendants' solicitors) and two expert reports (one from Justice Rezek a former justice of the Brazilian Supreme Court and the other from Professor Didier an academic and practising lawyer) being a total of 500 pages with approximately 6,750 pages of exhibits. This material sets out the state of the litigation in Brazil arising out of the collapse of the Fundão Dam; explains the work of the Renova Foundation; gives an explanation of the relevant provisions of Brazilian law; and deals with issues of access to justice in Brazil.

13. In response the Claimants served two expert reports (one of 72 pages from Dr. Janot and the other of 238 pages from Professor Rosa) and twenty-five witness statements. The reports and statements together ran to a total of 800 pages and were accompanied by approximately 5,900 pages of exhibits. One statement, that of Marco Deluiggi, deals with the position of the proceedings in Brazil. Many of the other witness statements are relatively short but set out different

alleged failings on the part of the Renova Foundation. The expert reports also challenge the ability of the Brazilian legal system to provide adequate justice to the Claimants.

The Defendants' Application and the Claimants' Response in Outline.

14. The Defendants initially sought an extension of time of seven weeks saying that the effects of the Covid-19 pandemic and the restrictions put in place to deal with those effects had doubled the time which would be needed to prepare the reply evidence. They made the point that the lockdowns imposed in the United Kingdom and Brazil and the restrictions on travel between those countries came into effect just at the time when the Defendants' lawyers were about to engage in the preparation of that evidence. They point out that the Claimants' evidence was served on 13th/14th March 2020 with Brasilia going into lockdown on 14th March 2020 and entry into Brazil prohibited for non-Brazilian travellers from the United Kingdom on 23rd March 2020. They say that even with the making of proper efforts and the use of technology remote working takes much longer than traditional ways of working and that the deadline provided by the court timetable cannot be met. In that regard they refer to the difficulties involved in remote working and which are encountered by lawyers and other professionals having to operate from their homes rather than their normal workplaces. They set out particular difficulties faced by their experts as I will explain below. In the course of his submissions for the Defendants Mr. Gibson QC said that there had been further reflection and that the Defendants' lawyers now believed that an extension of five to six rather than of seven weeks would suffice to enable the reply evidence to be prepared. The Defendants acknowledge that such an extension would require vacation of the hearing date. They seek a relisting in either July 2020 or in the Autumn with the latter being preferred because although they acknowledge that the hearing could be conducted remotely the Defendants contend that an in person hearing is markedly preferable and say that there is a greater chance of this being possible in the Autumn of 2020 than in July.

15. The Claimants accept that a modest extension of time is appropriate but say that this should not be such as to cause vacation of the June hearing. They say, through Mr. Harrison, that with proper efforts remote working can result in considerable progress and they do not accept the Defendants' contentions as to how much longer is needed to produce evidence in that way as opposed to by more traditional methods. They take issue with some of the individual difficulties put forward by the Defendants in relation to the Defendants' witnesses. If the June hearing has to be vacated the Claimants press for a hearing in July rather than in the Autumn saying that delay is to be avoided and that a remote hearing of the jurisdiction challenge is perfectly feasible and compatible with the just determination of the application.

The Approach to be Taken.

16. The starting point as always is the overriding objective with the requirement that cases are to be dealt with justly; in ways which are proportionate to the amounts involved, the importance of the case, and the complexity of the issues; and expeditiously and fairly.

17. In the current circumstances regard is also to be had to PD51ZA paragraph 4 which provides that:

> "In so far as compatible with the proper administration of justice, the court will take into account the impact of the Covid-19 pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions."

18. The Claimants referred me to the decision in *Quah Su Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) where Mrs. Justice Carr set out an analysis of the principles to be applied when the court is considering whether to permit a very late application to amend, a very late application being one where granting the amendment would result in the loss of an already fixed trial date. The salutary reminder there that the loss of a trial or hearing date is no little matter is to be borne in mind. Otherwise, however, the principles governing late amendments to pleadings in normal circumstances are of little assistance in determining the approach to be taken to an application for the extension of time for the filing of evidence where it is said that the circumstances of a worldwide pandemic and of national lockdowns have caused delay in the gathering of evidence.

19. Of markedly more assistance are those cases where the courts have addressed the problems arising from the current circumstances.

20. I have been provided with a transcript of the extempore judgment of Teare J in the unreported case of *National Bank of Kazakhstan v Bank of New York Mellon.* There Teare J declined to adjourn a trial fixed for the following week which could not, because of the measures required to address the pandemic, be held in the traditional face to face manner. Instead he permitted only a short adjournment of the start date so as to enable arrangements for remote conferencing to be put in place and required the parties to cooperate with a view to putting such arrangements in place. Teare J took that approach in the light of the guidance as to remote hearings given by the Lord Chief Justice on 19th March 2020. In that guidance (quoted more fully in the decision in *Re Blackfriars Ltd* which I consider below) the point had been made that remote hearings would become the default position and that inevitably hearings would have to be conducted remotely in order to ensure the continued provision of access to justice. Teare J went on to make the point that "the courts exist to resolve disputes" and that they should strive to continue to do so even when that involves doing so by way of remote hearings. Teare J's decision was made the day before the publication of the "Civil Justice in England and Wales Protocol regarding Remote Hearings" which made provision for remote hearings and which began with the words "the current pandemic necessitates the use of remote hearings wherever possible".

21. In *Re Smith Technologies* (unreported 26th March 2020) ICC Judge Jones noted the approach taken by Teare J and similarly rejected an application to adjourn a trial made by reference to the difficulties flowing from the consequences of the pandemic although he did leave open the possibility of adjournment for particular health reasons. Judge Jones explained in the following terms that the difficulties arising from self-isolation and from parties and their lawyers being

in different locations were to be addressed robustly and that the parties were to be expected to take proactive measures to overcome such difficulties. Thus he said:

> "7. The adjournment is sought in the context of serious concern about the ability of the respondents to give and receive instructions because of the different locations of counsel, solicitors and clients. Also, because of self-isolation itself with one of the respondents coming within a vulnerable category. However, I do not see that location and self-isolation should, in principle, lead to communication problems. I take the view that instructions can be taken without anyone hearing them during the trial, using mute on Skype and mobile phones, either directly or through apps. Indeed, visual communication can be maintained. Whilst self-isolation and vulnerability are, of course, important, the whole reason for remote hearings is to achieve self-isolation protection. Remote hearings, as such, should not present a problem.
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> 8. It has been contended that the legal team for the respondents has no previous experience and there is insufficient time to learn to be able to participate fully and fairly. Bluntly, that is not good enough. Solicitors are going to have to act quickly. They need to practise Skype and put in place procedures to enable them to be effective trial lawyers. I have to observe that it is highly surprising that the technology available to a firm of solicitors is not more advanced than that available to the courts, but again I return to the fact that this is not difficult technology. Nor should it be difficult to organise an electronically presented defence.
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> …
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> 12. Mr. Pearson, as I understand it, has poor internet connection. That is plainly a matter that needs to be resolved together with the question of his ability to use his mobile phone. Again, I do not anticipate that those matters cannot be resolved. For example, one can easily enter contractual arrangements to obtain a short-term good internet connection and I am sure that can be done whether through businesses such "my wi fi", BT or others. I will be surprised if solicitors cannot assist whether by providing equipment or guidance.
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> 13. In so far as family difficulties/space problems arise in practice, co-operation will enable the parties to discuss a special trial timetable with considerable flexibility to allow those problems to be dealt with. The Court will be willing to provide case management directions."

22. In *Re Blackfriars Ltd* [2020] EWHC 845 (Ch) John Kimbell QC sitting as a deputy judge addressed an application made on 1st April 2020 in the context of the Covid-19 pandemic to adjourn a trail listed for five weeks beginning in June 2020. The deputy judge refused the adjournment and required the parties to cooperate in exploring the ways in which the trial could proceed by way of a remote hearing. I will not rehearse all of Mr. Kimbell's careful analysis of the material. It suffices to say that he surveyed the effect of the Coronavirus Act 2020; the regulations made under it; the Lord Chief Justice's guidance; the protocol; the decision of Teare J; and PD51Y. At [32] he rightly in my judgement said that:

> "There is … a clear and consistent message which emerges from the material I have referred to. The message is that as many hearings as

> possible should continue and they should do so remotely as long as that can be done safely."

23. Mr. Kimbell then addressed the potential difficulties which were said to be involved in the hearing of trials remotely. He surveyed the experience of the courts in conducting remote trials and reached, at [49], the conclusion that they had on the whole been successful albeit that they had been on a smaller scale than the five-week trial envisaged in that case. It was in the light of that assessment that the deputy judge declined the adjournment but instead required robust exploration of the ways in which arrangements for a remote hearing could be put in place.

24. In the light of those authorities and the material referred to therein I have concluded that the following principles govern the question of whether a particular hearing should be adjourned if the case cannot be heard face to face or whether instead there should be a remote hearing.

    i) Regard must be had to the importance of the continued administration of justice. Justice delayed is justice denied even when the delay results from a response to the currently prevailing circumstances.

    ii) There is to be a recognition of the extent to which disputes can in fact be resolved fairly by way of remote hearings.

    iii) The courts must be prepared to hold remote hearings in circumstances where such a move would have been inconceivable only a matter of weeks ago.

    iv) There is to be rigorous examination of the possibility of a remote hearing and of the ways in which such a hearing could be achieved consistent with justice before the court should accept that a just determination cannot be achieved in such a hearing.

    v) Inevitably the question of whether there can be a fair resolution is possible by way of a remote hearing will be case-specific. A multiplicity of factors will come into play and the issue of whether and if so to what extent live evidence and cross-examination will be necessary is likely to be important in many cases. There will be cases where the court cannot be satisfied that a fair resolution can be achieved by way of a remote hearing.

25. It is in the light of those principles that I will address the question of whether the jurisdiction dispute here can fairly be resolved by way of a remote hearing and the relevance that has to the date of any hearing if the currently listed hearing is vacated.

26. However, before that question is addressed I must address that of whether there should be an extension of time for the gathering of evidence because of the effects of the Covid-19 pandemic.

27. It was in relation to that latter question that the Claimants placed weight on the decision of Daniel Alexander QC sitting as a deputy judge in *Heineken Supply Chain v Anheuser-Busch Inbev* [2020] EWHC 892 (Pat).

28. The deputy judge was there faced, as I am, with an application to extend the time for expert reply evidence in circumstances where the extension was sought by reason of difficulties resulting from the Covid-19 pandemic and where to grant the extension sought would result in the vacation of a forthcoming trial date. However, the particular circumstances of that case were very different from those of the current matter. There the expert evidence in question was to be from two experts each of whom was to address a narrow issue. One required consideration of two items of prior art in the context of "a relatively straightforward set of patents". The other related to Belgian law and involved a reply to a report of some eleven pages of which only seven were substantive material.

29. Mr. Alexander took account of the approach taken by Teare J and by John Kimbell QC in the cases I have just considered. At [13] he identified a corollary of that approach which he regarded as being applicable when considering applications for extensions of time and when applying paragraph 4 of PD51ZA. He did so thus:

> "In my view, there is a corollary of that approach, namely that it is desirable where cases have been listed, that attempts are made to keep to the directions timetable where it is realistically possible to do so, without prejudicing safety or risking injustice as a result. It is against that background that paragraph 4 of PD 51ZA should be approached."

30. The deputy judge rejected the application for an extension of time which had been sought granting instead a markedly shorter one which enabled the trial to continue as planned. He explained his reasons for granting only a modest extension to take account of the effects of the Covid-19 pandemic in these words:

> "27… It has been said that, on occasion, a degree of self-isolation can increase productivity, avoiding some of the distractions of office life. That said, I am here also prepared to accept that the impact of the changes required in professional and personal life merits a degree of accommodation in deadlines, where that can be done without causing undue difficulty.
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> 28. In considering this issue, it is, however, necessary to bear in mind, particularly in current circumstances, that while lawyers are preparing expert evidence, some of their often much less well-remunerated compatriots may be putting themselves and their families at risk in saving lives, working long hours in inhospitable conditions. The guidance to which I have referred strongly suggests that, where it can be safely done and without risks to the integrity of the legal process, the wheels of justice should keep turning at their pre-crisis rate. It is not unreasonable to expect that lawyers concerned in keeping cases on track may need on occasion to push a little harder to enable that to be achieved. I also bear in mind that the nature of the proposed expert evidence is such that what may be lost in polish as a result of having fewer hours devoted to it by lawyers maybe gained in raw authenticity, as well as the fact that a more limited time

encourages confining the evidence to that which is truly essential."

31. I do not find that the comparison with other professionals working in very different circumstances assists greatly in determining the approach which should be taken to determining whether lawyers and those providing expert evidence can properly perform a particular task within a given time in particular circumstances. Similarly care needs to be taken with the metaphor of "the wheels of justice … turning at their pre-crisis rate". In my judgement the authorities and guidance to which Mr. Alexander referred explain the need for regard to be had to the importance of the administration of justice and to ensure that is maintained in the current circumstances. However, that also entails a recognition of the difficulties which are involved in remote working (as considered below) and that tasks such as the collation and preparation of evidence are likely to take longer than would otherwise have been the case if they have to be undertaken by persons confined to their homes and working remotely. There has to be a recognition that achieving the deadlines previously set (if that is what is meant by keeping the wheels of justice turning at their pre-crisis rate) will require more work on the part of the relevant lawyers in that they will have to spend longer in achieving the same result. The crucial question is the extent to which that is practicable in any given case. I am driven to the conclusion that in the language he used though not in the result he achieved Mr. Alexander appears to have given insufficient heed to the wording of paragraph 4 of PD51ZA which in terms provides that the court is to take account of the effect of the Covid-19 pandemic when considering applications for extensions of time albeit it is only to do so to the extent that this is compatible with the proper administration of justice. I also do not accept that the closing words of [28] as expressed by Mr. Alexander can be seen as having general application. I do not question that they were an appropriate description of the position in relation to the evidence in that case but care must be taken with the assumption that as a general rule if less time is spent on material or if there is less involvement by the lawyers the evidence will be shorter or will have more relevance or authenticity. That may well be correct in a number of cases but in many instances the converse is the case and more time is required to produce material which is shorter and focused than is needed to produce longer and more diffuse evidence.

32. In my judgment the approach to applications for the extension of time in the context of the Covid-19 pandemic is to be determined by having regard to the overriding objective; paragraph 4 of PD51ZA; and the protocols and guidance which have been referred to above. In addition regard is to be had to the approach to the adjournment of trials set out above. In the light of that the Defendants' application is to be assessed against the following principles.

    i) The objective if it is achievable must be to be keep to existing deadlines and where that is not realistically possible to permit the minimum extension of time which is realistically practicable. The prompt administration of justice and compliance with court orders remain of great importance even in circumstances of a pandemic.

    ii) The court can expect legal professionals to make appropriate use of modern technology. Just as the courts are accepting that hearings can

properly be heard remotely in circumstances where this would have been dismissed out of hand only a few weeks ago so the court can expect legal professionals to use methods of remote working and of remote contact with witnesses and others.

iii) While recognising the real difficulties caused by the pandemic and by the restrictions imposed to meet it the court can expect legal professionals to seek to rise to that challenge. Lawyers can be expected to go further than they might otherwise be expected to go in normal circumstances and particularly is this so where there is a deadline to be met (and even more so when failing to meet the deadline will jeopardise a trial date). So the court can expect and require from lawyers a degree of readiness to put up with inconveniences; to use imaginative and innovative methods of working; and to acquire the new skills needed for the effective use of remote technology. As I have already noted metaphors may not be particularly helpful but the court can expect those involved to roll up their sleeves or to go the extra mile to address the problems encountered in the current circumstances. It is not enough for those involved simply to throw up their hands and to say that because there are difficulties deadlines cannot be kept.

iv) The approach which is required of lawyers can also be expected from those expert witnesses who are themselves professionals. However, rather different considerations are likely to apply where the persons who will need to take particular measures are private individuals falling outside those categories.

v) The court should be willing to accept evidence and other material which is rather less polished and focused than would otherwise be required if that is necessary to achieve the timely production of the material.

vi) However, the court must also take account of the realities of the position and while requiring lawyers and other professionals to press forward care must be taken to avoid requiring compliance with deadlines which are not achievable even with proper effort.

vii) It is in the light of that preceding factor that the court must be conscious that it is likely to take longer and require more work to achieve a particular result (such as the production of evidence) by remote working than would be possible by more traditional methods. In the context of the present case the Defendants said that meetings conducted remotely took twice as long and achieved less than those conducted face to face. The Claimants challenged the precise calculation but accepted that such meetings would be likely to take longer and that is readily understandable particularly in a case such as the present involving large quantities of documents and requiring at least to some extent the use of interpreters.

viii) In the same way the court must have regard to the consequences of the restrictions on movement and the steps by way of working from home which have been taken to address the pandemic. In current

circumstances the remote dealings are not between teams located in two or more sets of well-equipped offices with fast internet connexions and with teams of IT support staff at hand. Instead they are being conducted from a number of different locations with varying amounts of space; varying qualities of internet connexion; and with such IT support as is available being provided remotely. In addition those working from home will be working from homes where in many cases they will be caring for sick family members or for children or in circumstances where they are providing support to vulnerable relatives at another location.

ix) Those factors are to be considered against the general position that an extension of time which requires the loss of a trial date has much more significance and will be granted much less readily than an extension of time which does not have that effect. That remains the position in the current circumstances and before acceding to an application for an extension of time which would cause the loss of a trial date the court must be confident that there is no alternative which is compatible with dealing fairly with the case.

Should Time be extended and, if so, for how long?

33. In the light of those principles should the Defendants' application be granted?

34. The Defendants originally sought an extension of seven weeks (double the period provided for in the timetable) for the service of their reply evidence. They now say that a period of five to six weeks is likely to suffice.

35. The Defendants point out that travel between the United Kingdom and Brazil is not possible explaining that the lockdowns in both countries were imposed just as the lawyers from the United Kingdom were about to travel to Brazil. The work has now to be done remotely giving rise to the difficulties I have summarised at [32 (vii) and (viii)] above. They say that these difficulties are particularly acute in the present case because of the volume of documentation which has to be considered and because of the need for interpreters to be included in the meetings conducted remotely.

36. The Defendants have set out the particular difficulties which their expert witnesses in Brazil are encountering. Justice Rezek is aged 76. He lives in Sao Paulo but is currently in Brasilia having been there when the lockdown came into effect. He is accordingly separated from his staff and library. Although he has a personal computer and access to email it is said that Justice Rezek is not used to working away from his office or to operating technology without the assistance of his staff. Mr. Gibson placed particular emphasis on the separation of Justice Rezek from his library as being a matter hindering the preparation of his reply evidence. Prof. Didier is said to be having to devote considerable time to supporting his vulnerable parents and his wife who is a diabetic. It is said that he also has to spend considerable time addressing the problems the lockdown is causing for his law firm of more than100 staff and partners dealing with administration and crisis management issues. He does not have access to his office and his internet connexion from home is slow and intermittent. The

Defendants also say that their witnesses Messrs Vivan de Souza and de Freitas are handicapped by having to work from home.

37. For the Defendants Mr. Gibson emphasised that the period of additional time sought is the result of careful assessment by the Defendants' legal team. He pointed out that the application had not been made at the first indication of the problems associated with the Covid-19 pandemic but only after an assessment had been made of what could be done and how long would be needed. In this regard he points to the reduction in the length of the extension sought saying that this is an indication of the thought being given to the matter by the Defendants' lawyers and that it is the result of a consideration of what steps can be taken by way of remote working. In addition the Defendants point to the extension which was given to the Claimants to take account of the difficulties caused by the Christmas, New Year and Carnival holidays in Brazil and the Minas Gerais flooding saying that the problems caused by the pandemic are of a different order of magnitude.

38. On behalf of the Claimants Mr. Harrison accepts that the consequences of the pandemic mean that some further time is needed for the preparation of the reply evidence but says that a markedly shorter period of time is needed in reality than is sought by the Defendants. Mr. Harrison argued that the Defendants' lawyers and experts could be expected rapidly to improve their skills in the use of remote technology so as to increase the speed with which work could be done remotely. In addition emphasis was placed on the fact that the evidence which is to be served by the Defendants is reply evidence and as such should be markedly more limited than first wave of expert evidence. In that regard Mr. Harrison made reference to the repeated judicial warnings to the effect that disputes as to jurisdiction should not be allowed to get out of hand and that the material adduced should be limited to that truly necessary to determine the issues. There is force in that point but in the circumstances here the preparation of the reply evidence is clearly going to be a substantial exercise as is shown by the fact that the original timetable envisaged a period of seven weeks being taken in its preparation.

39. In a related argument Mr. Harrison expresses concern that there was a risk of the forthcoming hearing becoming unmanageable because of the volume of material which is to be produced. The Defendants' evidence in support of this application set out the kind of material which it was believed would need to be included in the reply evidence. Mr. Harrison said the contents of this evidence suggested that the Defendants were intending to adduce evidence going beyond the scope of a reply to the Claimants' evidence and going beyond that appropriate for the determination of the jurisdiction issues. I did not find that a persuasive argument. The issue for me is whether the consequences of the Covid-19 pandemic and the measures taken to address it warrant an extension of the time previously allowed for the provision of the evidence. If the Defendants try to put forward evidence going beyond that which is properly required as reply evidence in this case then that can be addressed in the normal way once the evidence has been served. In some cases the court is able to say that it is clear that the necessary evidence will be limited in scope such that the court can be confident that it can properly be prepared within an identified short

period. This is not such a case. It is apparent that the preparation even of properly limited reply evidence will be a substantial exercise. I repeat that the question I have to address is the extent to which the current circumstances warrant an extension of the period previously allowed.

40. The Claimants cast doubt on the points made by the Defendants as to the difficulties that the latter's witnesses are facing. They refer to social media postings which have been made in the past by Justice Rezek and to lectures which are currently being broadcast by Prof. Didier by way of Instagram and You Tube. They say that in the light of these matters the court should regard the problems being put forward as having been exaggerated and in particular that the difficulties to which Prof. Didier is said to be subject should be treated "with some scepticism". I do not find that the Defendants' experts are deliberately exaggerating the difficulties that they face or that they are being anything other than genuine in the concerns they express as to how long it will take them to prepare the necessary evidence. The court would inevitably be cautious before making such a finding against these clearly distinguished professionals. The material put forward by the Claimants does not come close to justifying such a finding. However, I do take account of the scope for those reacting immediately to the onset of the pandemic and to the measures being implemented to address it to see the difficulties as greater and as more insuperable than is necessarily the case. That is not a matter of deliberate exaggeration but of a normal human reaction to the current unusual circumstances. I proceed on the basis of accepting that the problems expressed by the Defendants' witnesses are real and are genuinely perceived as posing grave difficulties but also of being conscious that experience is rapidly showing ways in which such problems can be addressed and their effects reduced (but not removed).

41. The Claimants argue that if an extension is granted and the trial moved then any revision of the timetable should be such as to ensure that the Claimants have a proper period of time before the new hearing date to consider the Defendants' reply evidence. This is a compelling point. If justice to the Defendants requires an extension of time for the preparation of the evidence on the basis that this will be a substantial exercise needing more time in the current circumstances of remote working then justice to the Claimants requires that they be given a proper and adequate period of time to consider that material in advance of the hearing.

42. I am satisfied that the Defendants have shown that in the current circumstances that even when all proper allowance is made for the use of technology and for the making of extra efforts the exercise of preparing the reply evidence will take significantly longer than was provided for in the timetable laid down in September last year. The points made by the Defendants as to the difficulties of remote working and the scale of the task to be undertaken are compelling in the circumstances here. I am satisfied that it will not be practicable for the reply evidence to be prepared by 11th May 2020 and that this is not due to any failing or deficiency on the part of the Defendants. In the light of the principles set out above I am satisfied that justice requires that the Defendants be given an extension of time of the order of the five to six weeks which they now seek

notwithstanding the consequence which this will have of the vacation of the hearing listed for 8th June 2020.

The New Date for the Hearing.

43. The Defendants seek an adjournment of the hearing to the Michaelmas Term of this year. They say that this means that there will be a greater prospect of being able to hold the hearing face to face in the traditional way at that time. Mr. Gibson accepted that it would be possible to conduct the hearing remotely but said that it would be markedly more convenient if it were conducted with all involved present in the same place. He placed emphasis on the complexity of the questions to be addressed and the volume of material to be considered. There is force in those points but rather less force in the point which Mr. Gibson seemed to be making at times in his submissions of the difficulty of hearings being conducted remotely through interpreters. The sundry witnesses whose evidence will be before the court are speakers of Brazilian Portuguese. However, no direction has been made for the giving of oral evidence or for cross-examination and such a direction would be highly unusual in the context of a jurisdiction challenge. It follows that the court will be considering reports, evidence, and documents which have been translated into English and will be receiving submissions in English. There will be no need for translation as far as the Defendants' officers and principal advisers (as opposed to their Brazilian lawyers) are concerned.

44. Mr. Gibson placed considerable weight on the contention that there is a greater prospect that travel between Australia and the United Kingdom will be possible in the Autumn than in July. He says that this is important because of the need for the Seventh Defendant's lawyers to be able to hear the proceedings and to engage in discussions with those conducting the hearing during the course of the hearing. If the Australian lawyers were able to travel to the United Kingdom this could be achieved readily. However, if travel between Australia and the United Kingdom is not possible and those lawyers have to be involved remotely then there are, Mr. Gibson says, real difficulties because of the time difference between England and Australia. The Australian lawyers would have to be working and participating in post-hearing discussions throughout the night and into the early hours of the morning and the Defendants argue that this would not be practicable. This is a relevant consideration but is, in my judgement, one of comparatively limited weight. Although there will undoubtedly be detailed discussions between the lawyers for each party at the end of each day's hearing it is likely that they will be predominantly concerned with matters of tactics and argument rather than of settlement or of change of approach. It follows that the prejudice to the Seventh Defendant if there is reduced input from its Australian lawyers during the course of the hearing is likely to be modest.

45. The Claimants press for any new hearing date to be in July and they would seek a date well before the end of that month. They say that the hearing involving as it does matters of legal argument can be conducted fairly and properly by remote means. They point to the length of time that has passed already in this litigation. The claim forms were issued in November 2018 and if the Defendants' preferred date were to be adopted it would not be until the Autumn of 2020 that the court heard the jurisdiction challenge. However, it is right to note that as the

Defendants point out Particulars of Claim were not served until May 2019 as the result of amendments and extensions of time sought by and granted to the Claimants. The Claimants say that a delay until the Autumn could cause practical difficulties for them. Municipal elections in Brazil take place in October. Those elections could result in changes in the control of or the officers of the various municipalities who are claimants. This could require the Claimants' lawyers to take fresh instructions and to give further advice potentially leading to delay. I agree with the Defendants that this is a factor of limited weight if only because the 25 municipalities form a very small part of the total number of claimants and because it cannot be more than speculation to say that the elections might cause changes of control. In addition the Claimants say that delay is to be avoided because of the possibility that steps will be taken in the sundry proceedings currently underway in Brazil which might alter the position and so impact on the view to be taken of the jurisdictional arguments. Here also I agree with the Defendants that this point can have no weight. A significant part of the Claimants' argument on jurisdiction is that the courts of England and Wales are an appropriate forum because of the slow (indeed the term "glacial" has been used in the Claimants' evidence) pace of litigation about these matters in Brazil. It is not open to the Claimants in such circumstances to say that a delay of a few months will bring about such a change in Brazil as to have a real impact on the jurisdiction challenge.

46. I approach this question in the light of the principles and considerations I have set out above. I also do so aware that the progress of the Covid-19 pandemic and of the measures to address it cannot be predicted with any degree of certainty. Matters might have moved to such a stage that it will be possible to have a traditional in person hearing in July alternatively the position could be such that it will not be possible to have such a hearing even in the Autumn. The most that can be said is that there is some scope for believing or hoping that the prospects of having an in person hearing with travel between England and Australia being possible are greater if the hearing is in the Autumn than if it is in July. However, matters cannot be put higher than that particularly as at least some commentators suggest there are likely to be waves of infection.

47. This is a complex matter of considerable importance to the parties. There will be substantial documentation to be mastered, presented, and analysed. However, the determination of the issue will involve judicial reading of that material and of the parties' skeleton arguments with subsequent oral submissions and argument. There will be no live evidence. In those circumstances this is clearly a matter which is capable of being fairly determined in a remote hearing (as the Defendants accept). A delay of a further period of three to four months is undesirable and is to be avoided if possible. This is particularly because as just explained there is no guarantee that an in person hearing will be possible in the Autumn (nor that it will inevitably be impossible in July). I have already explained that the detriment to the Seventh Defendant caused by the difficulties a remote hearing will pose to participation by its Australian lawyers is likely in reality to be modest and cannot justify a further delay.

48. In those circumstances the June hearing will be vacated and the jurisdiction challenge relisted for hearing on 20th July 2020. In light of the possibility that hearing may be conducted remotely and mindful of the scope for that to require some increase in the time taken I intend to list it with an eight-day time estimate and with provision for pre-reading from 14th July 2020. In the light of that I will extend the time for the service of the Defendants' reply evidence to a date in the week commencing 8th June 2020. I will hear submissions at the handing down of this judgment as to the precise date which is appropriate and as to the revision of the subsequent parts of the timetable to ensure that the hearing can proceed as proposed. That timetable will need to include provision for a pre-trial review/directions hearing to determine whether the July hearing will proceed remotely or in person and if the former in what way.