



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

Neutral Citation: [2022] EWHC 330 (TCC)

Case No: HT-2022-000304

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

Date: 21/12/2022

Before :

MRS JUSTICE O'FARRELL DBE

Between :

MUNICÍPIO DE MARIANA
(and the Claimants identified in the Schedules
to the Claim Forms)

Claimant

- and -

(1) BHP GROUP (UK) LIMITED
(formerly BHP GROUP PLC)
(2) BHP GROUP LIMITED

Defendant

- and -

VALE S.A.

Third Party

Alain Choo-Choy KC, Nicholas Harrison, Jonathan McDonagh and Russell Hopkins
(instructed by Pogust Goodhead (a trading name of PGMBM Law Ltd) for the Claimants
Charles Gibson KC, Shaheed Fatima KC, Stephanie Wood and Veena Srirangam
(instructed by Slaughter and May) for the Defendants
Simon Salzedo KC and Richard Eschwege (instructed by White & Case LLP) for the Third
Party

Hearing dates: 13th and 14th December 2022

Approved Judgment

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.

This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 21st December 2022 at 10.30am

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. This matter is before the court for an initial directions hearing, to consider the shape and scope of the proceedings, and identify steps required to be taken in advance of a case management conference (“CMC”) which will take place at the end of March or beginning of April 2023.
2. The main issues for the court to determine at this stage are:
 - i) what group litigation directions should be given to manage the proceedings;
 - ii) whether the court should fix a date for the first stage trial in respect of threshold liability issues; and
 - iii) what further directions the court should make in advance of the proposed CMC.

Background

3. The claims arise out of the collapse of the Fundão Dam in Brazil.
4. The material background is set out in the earlier judgment of the Court of Appeal at [2022] EWCA Civ 951. On 5 November 2015 Brazil suffered its worst ever environmental disaster when the Fundão Dam in southeast 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.
5. 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.
6. In these proceedings over 200,000 claimants seek compensation for losses caused by the disaster from the first defendant, a company incorporated in England and Wales (“BHP UK”), and the second defendant, a company incorporated in Australia (“BHP Australia”). The claimants are all Brazilian and comprise (i) over 200,000 individuals; (ii) 530 businesses, ranging from large companies to sole traders; (iii) 15 churches and faith based institutions; (iv) 25 municipalities; (v) 5 utility companies; and (vi) members of the Krenak community who have particular community rights, and for whom the river plays a unique part in their spiritual traditions.
7. 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 the third-party Brazilian entity (“Vale”) and BHP Brasil Ltda (“BHP Brasil”). BHP Australia is the ultimate parent company of BHP Brasil. At all material times BHP Australia and BHP UK have operated together as a single

economic entity under a dual listed company structure. The claims are brought jointly and severally against BHP UK and BHP Australia.

8. Following the disaster, there were criminal proceedings against various defendants in the Brazilian courts and also civil proceedings at federal and state level, comprising individual claims and class actions (“CPAs”). On 5 July 2016 a Brazilian private foundation (“Renova”) was established by Samarco, Vale and BHP Brasil as the vehicle through which they would carry out a programme of remediation and compensation.

The Proceedings

9. In November 2018, the claimants issued proceedings against BHP UK in the Business and Property Courts in Liverpool, Technology and Construction Court (“TCC”) by way of Part 7 claims (E50LV008 and E50LV010). A further claim form was issued on 3 May 2019 (HT-2019-LIV-000005) against both BHP UK and BHP Australia.
10. Between May and July 2019 the claimants served generic Master Particulars of Claim, together with approximately 200,000 Additional Particulars of Claim (“APOCs”) setting out the details of claims by individual claimants.
11. On 7 August 2019 the defendants 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 application was granted 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 the defendants’ applications were dismissed.
12. On 22 August 2022, with the consent of and at the request of the parties, His Honour Judge Cadwallader ordered a transfer of the claims to the TCC in London.
13. The defendants have sought permission to appeal to the Supreme Court; the outcome of such application is not yet known. The defendants’ request for a stay pending determination of their permission application was refused by the Court of Appeal (and not renewed before the Supreme Court) but its continued participation in these proceedings is subject to the claimants’ undertaking set out in the Court of Appeal Order dated 31 August 2022:

“(1) not to rely on any steps taken by the Defendants in the proceedings following this Order (including but not limited to the filing of an Acknowledgement of Service and/or Defence) as prejudicing any application for permission to appeal (or appeal) by the Defendants in any respect and (2) not to rely on any steps that the Defendants take and/or are ordered to take in the proceedings whilst permission to appeal/an appeal has not been finally determined in support of any argument that the Defendants have submitted to the jurisdiction.”

The Claims

14. The claimants seek to update their pleadings, as partially set out in the proposed Re-Amended Master Particulars of Claim (“RAMPOC”) served shortly before this directions hearing. The claims are all advanced under Brazilian law and include the following pleaded allegations:
- i) Articles 3(IV) and 14 of the Environmental Law and/or Articles 927 and 942 of the Civil Code impose strict liability on the defendants 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) The defendants 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) The defendants are liable under Article 116 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.
15. 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, as further explained in Appendix III to the draft RAMPOC.
16. The APOCs, of which there are approximately 200,000, have been prepared using a database, containing factual instructions unique to each named claimant, obtained through questionnaires administered online or manually, to generate automatically the statements of fact. The first witness statement of Thomas Goodhead, barrister and partner in Pogust Goodhead, dated 8 February 2019 and the example APOCs produced in the court bundle indicate that the following information has been served:
- i) The APOCs for the individual claimants state their date of birth, age, address at the time of the dam collapse, any physical or psychological symptoms suffered and details of the loss and damage sustained.
 - ii) The APOCs for the business claimants state the identity and nature of the business, the region in which it operated, the consequences to the business of the dam collapse, and details of the loss and damage sustained.
 - iii) The APOCs for the faith-based claimants describe the nature of their institution, territory of practice and ownership of property, the impact of the dam collapse on their places of worship, artefacts and congregations, together with details of the loss and damage sustained.
 - iv) The APOCs for the municipalities and utilities follow a similar pattern to the pleadings by the businesses.
 - v) The APOCs for the indigenous groups follow (and in the case of the Quilombola claimants, for whom APOCS have not yet been served will follow) a similar pattern but include (or will include) details of the cultural heritage, spiritual traditions and practices of their respective communities.
17. On 28 November 2022, by consent, the defendants provided the claimants with a draft of the Defence.
18. On 2 December 2022 the Defence was served, without prejudice to the defendants' pending application for permission to appeal to the Supreme Court in respect of their applications to strike out and/or stay the proceedings. The defence to the primary allegations of liability includes the following:
- i) The defendants 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. The defendants 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. The defendants 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.
19. Further, in response to the relief claimed:
- i) It is denied that there was any causal link between any activity or omission on the part of the defendants and the dam collapse and/or the claimants' alleged losses.
 - ii) The defendants plead that all the claims are time barred under Brazilian law.
 - iii) 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.
 - iv) The municipalities do not have standing or capacity to bring their claims in these proceedings.
 - v) The Defendants plead that certain of the claims should be struck out as an abuse of process, namely: claims by Claimants who have brought individual proceedings in Brazil against Samarco, BHP Brasil or Vale and/or Renova in relation to losses arising out of the Collapse, and claims by Claimants for moral damages in respect of the interruption of their water supply in the states of Minas Gerais or Espírito Santo, where those claims are for more than the amounts set in the IRDRs in Minas Gerais and Espírito Santo.
20. In general, the defendants assert that there is ample opportunity for victims of the disaster to receive full redress under sophisticated and well-established procedures in Brazil. Renova has disbursed over R\$24 billion in repair and compensation programmes, including over R\$11 billion in indemnities and financial aid to around 400,000 people. Almost all of the claimants are entitled to make claims in Brazil for compensation under programmes operated by Renova, in addition to the ongoing civil and criminal lawsuits in Brazil.
21. The claimants have produced a draft reply, dealing with the issues of limitation and settlement release, but intend to serve a full reply in due course.
22. On 2 December 2022 the defendants issued an Additional Claim against Vale, seeking declaratory relief and a contribution to any sums that the defendants might be found liable to pay to the claimants.

Group litigation directions

23. CPR 19.10 and 19.11 provide that the court may make a group litigation order ("GLO") where there are or are likely to be a number of claims giving rise to common or related issues of fact or law.
24. The objectives of the group litigation procedure in CPR 19 are:

- i) to provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable;
 - ii) to provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure;
 - iii) to achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner.
25. In these proceedings it is common ground that it would be appropriate for the court to give group litigation directions but neither party is seeking a formal GLO at this stage, particularly in circumstances where Pogust Goodhead represents all claimants. The court considers that such approach is sensible.
26. The challenge that is raised by these proceedings is the sheer volume of claimants, each of whom will have to establish liability, causation, loss and damage on the basis of a fact-specific case. That will require close co-operation by the parties and careful case management by the court. However, it is clear that there are a number of common issues that affect all, or a substantial class, of the claimants. The claims all arise out of one, devastating event, the collapse of the dam, as to which there is substantial agreement on the face of the pleadings to date. In the immediate aftermath of the collapse, Samarco, BHP Brasil and Vale jointly commissioned an independent geotechnical investigation into the causes of the dam's failure, which resulted in a report: "Fundão Tailings Dam Review Panel - Report on the Immediate Causes of the Failure of the Fundão Dam" dated 25 August 2016. Although the defendants have reserved their position, and the parties disagree as to risks posed by the design, construction and extension of the dam, the defendants plead that currently they have no reason to dispute the conclusions of the report as to the causes of the collapse. The precise volume of tailings released by the dam collapse is disputed but the defendants agree that the collapse of the dam was a social and environmental disaster. Thus, it is unlikely that material facts as to what occurred, the mechanism of failure and the scale of the disaster will require extensive investigation; the focus of these proceedings is likely to centre on responsibility under Brazilian law for the dam collapse, issues of limitation, settlement/release and standing/abuse of process. Subject to the outcome of those common issues, if liability were established, the court would then have the task of determining the nature, extent and quantum of the individual claims.

Parties' submissions

27. Mr Choo-Choy KC, leading counsel for the claimants, submits that the usual form of a GLO group register would be inadequate to address the scale of this litigation. The claimants propose that a more advanced tool should be used, namely, an excel spreadsheet referred to as the Master Schedule, which could be used as a working document by all parties, with additional functionality to categorise the claimants, with

a view to selecting test cases and/or eliminating claimants (such as those who have settled their claims).

28. The existing claimants are those named in the schedules attached to the claim forms issued on 2 November 2018 (Claim Form E50LV008), 5 November 2018 (Claim Form E50LV010) and 3 May 2019 (Claim Form HT-2019-LIV-000005). It is anticipated that a number of new claimants will seek to join the proceedings. Pogust Goodhead has decided to cease accepting new instructions from 31 January 2023. Any new claimants will be named on a further claim form to be issued by 17 February 2023. The claimants propose that by 17 February 2023 they will produce in the Master Schedule a definitive list of all claimants and identify them by category. Thereafter, the Master Schedule can be updated through the course of the litigation.
29. There are outstanding applications:
 - i) application dated 7 May 2019 by the claimants to amend the claim forms, including revised names and addresses of the claimants in the schedules to the claim forms and other corrections; and
 - ii) application dated 24 July 2019 by the first defendant to disallow those amendments (without prejudice to any jurisdictional challenge) as explained in the third witness statement of Efstathios Michael, partner at Slaughter and May, dated 24 July 2019, on grounds that include an arguable defence of limitation.
30. These applications were stayed pending the outcome of the defendants' strike out/stay application. Mr Choo-Choy's position is that the Master Schedule will include details of those claimants whose names have been amended (save for minor corrections) so that the ambit of any controversial amendments may be identified.
31. APOCs setting out the factual basis of each individual claim have been served in respect of most, but not all, claimants. There is an outstanding application by the claimants dated 5 May 2020 for an extension of time to serve APOCs in respect of 3,134 existing claimants, whose questionnaires were not processed properly by Epiq, as explained by Mr Goodhead in his statement dated 29 April 2020. The Master Schedule will include confirmation of whether each claimant has served an APOC. It is further proposed that other existing claimants (ie those to whom the 5 May 2020 Application does not apply) will be struck out unless they both serve an APOC by 16 June 2023 and apply for permission for an extension of time.
32. The defendants' proposal is that a group register should be established on which the claims managed as part of the group litigation will be entered. Mr Gibson KC, leading counsel for the defendants, submits that the group register is a vital tool for defendants and the court because it ensures that defendants know at any one time by whom they are being sued; who is bound by determinations on the common issues of fact and law and who is potentially liable for costs pursuant to the costs sharing orders. It also facilitates case management by the court. He urges the court to order a cut-off date after which no claim may be added to the group register unless the court gives permission; further, to provide for what should happen when a claim is removed from the group register, particularly apt in this case, where claimants could settle their claims in Brazil.

33. Mr Gibson submits that the Master Schedule proposed by the claimants is too complex and seeks to avoid the claimants' responsibility for compiling and maintaining at their cost the group register. The defendants' proposal, as set out in their draft directions, is that the parties should liaise with a view to agreeing the terms of group directions, including as regards the group register:
- i) the date by which the group register shall be established by Pogust Goodhead;
 - ii) the details of the claimants which will be contained in the group register;
 - iii) the standard minimum requirements which must be met by a claimant in order to be included in the group register;
 - iv) the cut-off date by which the claimants or future claimants are to be entered on the group register;
 - v) the procedure by which the group register shall be served on the defendants;
 - vi) the procedure by which the defendants may object to any claimant being entered on the group register and the process for resolution of any such dispute;
 - vii) the procedure by which claims which are discontinued are updated on the group register by Pogust Goodhead; and
 - viii) the procedure for updating the group register on a periodic basis by Pogust Goodhead.
34. Further, the defendants seek a direction that the parties should liaise with a view to agreeing:
- i) the date by which those claimants who have not served APOCs shall serve their APOCs;
 - ii) proposals for costs sharing;
 - iii) proposals for Schedules of Information to be provided by the claimants, setting out details of any claims and settlements in Brazil; and
 - iv) identification of common issues of fact and law.
35. Ms Fatima KC, leading counsel for the defendants, submits that it would be premature to seek to resolve the claimants' May 2019 application and BHP UK's July 2019 application until there is an identified court ordered mechanism regarding the proper collation and presentation of information regarding the claimant cohort and the parties have sought to progress that mechanism. On that basis, Ms Fatima invites the court to make an order that by a stipulated date the claimants and defendants should indicate to each other and to the court whether they seek to have the claimants' May 2019 application and BHP UK's July 2019 application listed to be heard at the Hilary CMC.

36. The defendants have consented to the claimants' application dated 5 May 2020, to extend time for service of the APOCs in respect of the failed processing of the 3,134 claimants (the costs of and occasioned by such application to be paid by the claimants).
37. However, Ms Fatima raises valid concerns regarding some 41,000 existing claimants named on the claim forms but in respect of whom no APOC has been served: "the Missing Claimants". The information provided to date by Pogust Goodhead is inadequate to enable Slaughter and May to identify how many, and which, particular claimants fall within the Missing Claimants' cohort. Further, the claimants have not explained what steps have been taken to contact the Missing Claimants. The defendants should not have the burden of identifying the Missing Claimants and making applications to strike out their claims. On that basis, the defendants propose the following order:

By [date], Pogust Goodhead shall serve (a) a complete list of the Claimants for whom they do not have, or no longer have, instructions to pursue their claims (the "Missing Claimants") with appropriate identifying information (to include (i) the name, CPF number and address of each Missing Claimant; and (ii) the location of each Missing Claimant in the schedule accompanying the relevant Claim Form(s) by reference to the corresponding row(s) in that schedule) and (b) an explanation of the steps they have taken, and when, to contact the Missing Claimants and with what, if any, outcome.

Group directions by the court

38. The starting point for case management of numerous claimants in such proceedings is to identify the claimants and the capacity in which they bring their claims; further, to establish a procedure for adding and discontinuing the claims, so that at any point in time the defendants may know by whom they are being sued.
39. The existing claimants have all been identified in schedules attached to the claim forms. The individual claimants are listed in alphabetical order, with names, addresses and CPF (*Cadastro de Pessoas Fisicas*) taxpayer registration number, together with the identification of those whose claim is brought by a litigation friend. The names and addresses of the Krenak community claimants are listed, in alphabetical order but without any CPF number. The other entities are listed in separate schedules, with their addresses and CNPJ (*Cadastro Nacional da Pessoa Juridica*) registered business number. The new claimants will be named on a further claim form to be issued by 17 February 2023.
40. This was an appropriate method of identifying the claimants but, as the parties acknowledge, it is imperative that there should be one group register to provide clarity and transparency as to the claimants at any point in time for the purpose of managing the group litigation. I consider that this can be done by use of the Master Schedule excel spreadsheet, to be prepared by the claimants, served on the defendants by 17 February 2023 and thereafter managed and maintained by the claimants.
41. Mandatory minimum requirements for entry onto the Master Schedule are that:

- i) the claimant or future claimant must be a named claimant identified in a claim form which has been issued and in respect of which the issue fee has been paid by 17 February 2023;
 - ii) the claim form on which the claimant or future claimant is named has been served on the defendants;
 - iii) the claimant or future claimant must state that they will rely on the AMPOC (in its current form or as amended); and
 - iv) the cut-off date for entry onto the group register has not passed.
42. The extract of the Master Schedule attached to the claimants' draft directions shows that it contains the following information, namely: (i) claimant ID number; (ii) claimant group or category (1) to (6); (iii) CPF number; (iv) relevant claim form on which the claimant was named; (v) whether the claimant has served an APOC; (vi) whether the claimant's details on the claim form are the subject of an amendment application; and (vii) if so, the original claimant name. The following additional information should be incorporated into the schedule by additional columns, namely:
- i) where available, the row number in the original claim form schedule in which the relevant claimant's name appeared;
 - ii) the CNPJ number in respect of each claimant that is a legal entity and not a natural person;
 - iii) the date of birth (where available) in the case of claimants who are natural persons and were aged under 16 at the date of the collapse;
 - iv) in the case of claimants who are natural persons, whether their claim is brought through a litigation friend or other legal representative.
43. The court considers that it would be appropriate to order a cut-off date of 17 February 2023 for entry onto the Master Schedule of any further claimants unless the court gives permission. This will provide certainty for the parties as to the size of the claimant cohort and provide a sound base from which further case management of the litigation can be conducted.
44. The claimants' proposal is that outstanding APOCs should be served by 16 June 2023, although they will use best endeavours to serve the APOCs in batches in advance of 16 June 2023 and, in any event, sample APOCs of the new claimants will be served in advance of the Hilary CMC. As regards the future claimants, that proposal is reasonable and sensible; it is understood that a very substantial exercise is likely to be required to obtain and verify the details of the new claimants.
45. However, the court considers that the deadline for service of any outstanding APOCs in respect of existing claimants should be 17 February 2023, when the Master Schedule is served. The claimants' application dated 5 May 2020 sought an extension of time for service of the APOCs in respect of 3,134 claimants, whose questionnaires had not been processed properly due to an error by the third party provider. Mr Goodhead sought an extension of time of 14 days from the date of the order. Although

the application was stayed pending the defendants' strike out/stay application, that matter was determined by the Court of Appeal some months ago and there has been ample time to resolve the technical error that occurred. Further, the defendants are entitled to an early resolution of the Missing Claimants issue, which has been the subject of much correspondence over a long period of time.

46. Therefore, the court will order the claimants to serve any outstanding APOCs from existing claimants by 17 February 2023. If an APOC has not been served by a claimant by that date, they shall be struck through on the relevant claim form and the Master Schedule and the claimants will be required to apply to the court to discontinue such claims at the Hilary CMC if not by earlier consent order.
47. Both parties agree that there needs to be a resolution of any outstanding issues in respect of the claimants' application dated 7 May 2019 and/or BHP UK's application dated 24 July 2019, both stayed pending the outcome of the defendants' strike out/stay application. Accordingly, the court will order that by 3 March 2023, the claimants and the defendants should indicate to each other and to the court whether they seek to have listed to be heard at the Hilary CMC those applications.
48. Further, the parties are required to liaise with a view to agreeing (or identifying any dispute for determination by the court at the Hilary CMC regarding) group litigation directions, including:
 - i) the procedure by which the defendants may object to any claimant being entered on the Master Schedule and the process for resolution of any such dispute;
 - ii) the procedure by which claims which are discontinued are updated on the Master Schedule by Pogust Goodhead;
 - iii) the procedure for updating the Master Schedule on a periodic basis by Pogust Goodhead;
 - iv) proposals for costs sharing;
 - v) proposals for Schedules of Information to be provided by the claimants, setting out details of any claims and settlements in Brazil; and
 - vi) identification of common issues of fact and law.
49. The court can see the potential benefits of the Master Schedule for categorising the claimants, their claims and identifying issues for test cases or sampling in due course. However, it would be premature for any order to be made in this regard before pleadings are closed and the entries of all claimants on the Master Schedule have been finalised.

The first stage trial

50. The parties are agreed that the trial of these many claims must be broken down into manageable segments but there is a difference of opinion as to what that should look like or when it should be ordered.

51. The claimants' proposal is that the court should direct a trial of key liability issues and should fix the date for such trial during the Hilary term of 2024 with an estimate of 6-8 weeks. The claimants have prepared a draft schedule of issues for the stage 1 trial, that can be summarised as:
- i) whether the defendants are strictly liable as polluters to indemnify the claimants for damage caused by the collapse, pursuant to Articles 3(IV) and 14 of the Environmental Law;
 - ii) whether the defendants are liable based on fault to indemnify the claimants for 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 the defendants are liable as controlling shareholders to indemnify the claimants in respect of loss and damage suffered by the claimants in consequence of the collapse, pursuant to Articles 116 and/or or 117 of the Corporate Law;
 - iv) issues of applicable law and principles in respect of defences of limitation and/or prescription; and;
 - v) whether the municipality claimants have standing and/or capacity to bring their claims in these proceedings.
52. Mr Choo-Choy submits that since all the losses suffered by the claimants resulted from the same event, the collapse, the defendants' liability in principle for such losses as a matter of Brazilian law should be determined as the first stage of this litigation. There is no good reason why directions for a first stage trial of liability should not be made at this hearing, particularly having regard to the fact that it is already more than four years since the proceedings were commenced and more than seven years since the collapse. There is a compelling argument that the court should set a date and estimate for the first trial of liability so as to avoid further delay.
53. Mr Choo-Choy submits that a defence has been served so that the court is now in a position to take an overview of the case. All issues in relation to the defendants' liability under the three main causes of action have been defined in detail. The limitation issues arise out of the case advanced in the defence that all claims in these proceedings are time barred because the claim forms did not comply with the relevant formal requirements under Brazilian procedural law for the commencement of claims in Brazil and were therefore ineffective to stop time running. Further the draft reply served by the claimants raises issues as to whether some of the claims are subject to prescription at all, the relevant period for prescription under Brazilian law, and whether any relevant period for prescription of claims against the defendants has been interrupted by the filing of CPAs, individual claims or protests in Brazil or, as regards BHP Australia, by the earlier filing of claims against BHP UK in this jurisdiction. As regards the issue relating to standing of the municipalities, this issue is pleaded in the defence, the claims of the municipalities are amongst the highest value claims and the issue is a narrow one so that it can conveniently be determined as part of the first stage trial.

54. The defendants' position is that, whilst a phased approach to determining the issues in this litigation is sensible and proportionate, it would be premature for the court to fix a trial date and estimate, or set down a timetable to trial. If the claimants want to pursue this proposal, then the appropriate time to do so would be at or after the Hilary CMC.
55. Ms Fatima submits that the court should reject the claimants' proposal for the first stage trial. Pleadings have not yet closed and therefore, the full shape of the case has not yet been articulated. The claimants' proposed issues are not an adequate basis for the listing of the trial; in particular, the issue of causation is an integral element of each of the causes of action relied on and therefore, which issues of causation would need to be, and could sensibly be, tried in a first trial is a point that requires precise examination of the pleaded issues. Their suggested timetable is unsubstantiated and ill-considered. The claimants have selected some, but not all of the limitation issues that arise on the pleadings; limitation is complex legally and factually in this case and the defendants may wish to ask the court to consider limitation in full at a first trial. One of the key defences raised by the defendants is the releases; many of the claimants have received compensation payments from Renova, made claims through the Novel System and commenced proceedings in Brazil. The court should first concentrate on resolving the group litigation issues, including identification of the common issues of fact and law that are likely to arise. Finally, the defendants have issued a Part 20 claim against Vale. Once Vale's position in response to that claim is known, the parties and the court can more fully consider what the consequences will be for the proceedings as a whole.
56. Having considered carefully whether I should order the first stage trial now or wait until the Hilary CMC, I have decided that it would be appropriate to order the trial date now for the following reasons.
57. First, threshold liability issues are a logical starting point for a case of this size and complexity. Although they may not dispose of the case in its entirety, findings in favour of one or more of the defendants would bring the litigation, wholly or in part, to an end; findings in favour of the claimants would enable the parties to concentrate on identifying test cases for different categories of claimant to determine causation and quantum.
58. Second, although pleadings have not yet closed, and the register of claimants has not yet been finalised, the pleaded issues between the parties are sufficiently clear so as to identify key threshold liability issues that the court will be required to determine.
59. Third, the schedule of issues drafted by the claimants needs further refinement to ensure that it reflects accurately the questions that the court can usefully determine. The defendants have not had sufficient time to consider the proposed issues in detail or to formulate any alternative or additional issues that could be determined in the first trial. Careful thought must be given by the parties as to the scope of evidence required for any issues to be included in the first trial. It is clear that experts in Brazilian law will be necessary but the questions to be addressed must be clear and material. Further, Mr Salzedo KC, leading counsel for Vale, helpfully indicated to the court that it might seek to have issues of jurisdiction and other matters dealt with by way of preliminary issues. Discussion of those matters needs to start now so that the court is in a position to order the issues that will form the subject of the first stage trial.

60. Fourth, although the precise list of issues may be in a state of flux and subject to further discussion and revision between the parties, there is a measure of agreement that there should be a staged trial, the first staged trial should address liability issues, and that trial should encompass threshold liability issues. That is sufficient to allow the court to fix a trial date, so as to secure court time and resources; the final scope of the issues and timetable to trial can be dealt with at the Hilary CMC, if not agreed.
61. Finally, these proceedings are getting a bit stale. I do not consider that it would be helpful to attempt to apportion blame for the delay. Indeed, given the scale and nature of the litigation, it is not surprising that there have been challenges, appeals and changes to the claims. However, it is now time to avoid further delay and make substantive progress in determining the dispute.
62. For the above reasons, I conclude that it would be appropriate to fix the first stage trial date now. Hilary term of 2024 is too soon, having regard to the date of the CMC which will be fixed to take place on 29 and 30 March 2023. The first stage trial will be fixed for 9 April 2024, with the first week set aside for judicial reading, followed by a hearing with an estimate of 8 weeks. The trial date and time estimate will be reviewed at the CMC.
63. The parties shall endeavour to agree the threshold liability issues to be tried at the first stage trial as follows:
 - i) The claimants shall provide to the defendants and third party their revised list of threshold liability issues by 4pm on 22 December 2022.
 - ii) The defendants shall respond with any proposed amendments to the claimants' revised list of threshold liability issues by 4pm on 20 January 2023 (legal issues) and 6 February 2023 (factual issues).
 - iii) The parties shall thereafter seek to agree the formulation of the threshold liability issues and file an agreed list with the court by 4pm on 27 February 2023. In the event of disagreement, the parties shall set out their rival proposals in a single document to be filed with the court by the same date.
 - iv) The court may thereafter make such further directions as it thinks fit, absent which it shall determine any dispute, and seek to approve the list of threshold liability issues for trial at the CMC listed on 29 and 30 March 2023.

Further Directions

64. The claimants have indicated that they will serve the draft RAMPOC on the defendants, containing any amendments necessary for the purpose of providing the generic particulars it is anticipated will be relied on by the further claimants (including additional details in respect of the further indigenous groups and the Quilombola communities) by 4pm on 22 December 2022.
65. I am not in favour of ordering the remaining pleadings in both draft and final forms, although is open to the parties to agree informal exchange if they think that it might be helpful. Therefore:

- i) By 4pm on 17 February 2023 the RAMPOC shall be served on the defendants.
 - ii) The amended defence shall be filed and served by 4pm on 24 February 2023.
 - iii) The claimants shall file and serve any reply by 4pm on 10 March 2023.
 - iv) The defendants shall file and serve any rejoinder by 4pm on 24 March 2023.
66. The parties are invited to draw up an agreed order reflecting the directions set out above. As the timetable leading up to the CMC at the end of March 2023 is tight, the parties may agree extensions of time of up to 7 days; other extensions will need the permission of the court.
67. The court will hear the parties on all consequential matters arising out of this judgment, including any further submissions on dates or further directions required prior to the CMC.