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Case No: HT-2022-000304

Case No: HT-2023-000058

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

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

Date: 07/08/2023

Before :

MRS JUSTICE O'FARRELL DBE

Between :

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

Claimants

- and -

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

Defendants

- and -

VALE SA

Third Party

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

Hearing dates: 12th and 13th July 2023

Approved Judgment

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

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. The matter before the court concerns two applications by the Part 20 defendant (“Vale”) challenging the court’s jurisdiction in respect of two Part 20 claims that the defendants (“BHP”) have brought against Vale.
2. Vale’s case is that there is no serious issue to be tried in respect of the Part 20 claims:
 - i) Brazilian law does not recognise the right to contribution unless and until BHP are found liable to the claimants and make a payment to them; BHP have not made any payment and therefore they do not currently have a right to a contribution from Vale;
 - ii) the claims were time-barred before the Part 20 claims were issued;
 - iii) some of the claims have been extinguished as a result of settlement agreements containing releases in favour of Vale, or judgments issued in favour of Vale in Brazil.
3. Further, Vale submits that this jurisdiction is not the appropriate forum for the Part 20 claims:
 - i) Brazil is the natural forum in that the claims are made under Brazilian law, brought against a Brazilian company, in relation to losses sustained in Brazil by Brazilian claimants, due to the collapse of a dam in Brazil, owned and operated by a Brazilian joint venture with two Brazilian shareholders almost a decade ago; Vale is amenable to being sued in Brazil or in an arbitration seated in Brazil if required;
 - ii) Vale is party to litigation in Brazil concerning the same events and losses (and at least some of the same claimants) where Vale’s alleged liability in respect of losses caused by the collapse of the dam will be determined; if this court accepts jurisdiction over the Part 20 claims there is an unavoidable risk of irreconcilable decisions in light of the ongoing Brazilian proceedings;
 - iii) there is no factor that demonstrates that BHP cannot obtain justice in the natural forum; BHP overstate the extent of the overlap with the English proceedings and the court cannot assume that the Part 20 claims are capable of being determined in England together with the claimants’ claims against BHP.
4. BHP oppose the applications. Their position is that there is a serious issue to be tried as to whether, if BHP are liable to the claimants, Vale is jointly and severally liable on the same or similar grounds and therefore liable to contribute to any damages payable:
 - i) the claims and the additional claims are governed by Brazilian law, the Brazilian law issues involved are unsuitable for summary determination and BHP’s expert evidence is clear and credible, demonstrating that BHP have a good claim; at the very least, it shows that there is a serious issue to be tried as to whether BHP are entitled to the relief they seek;
 - ii) limitation as a defence to the Part 20 claims is also a defence in the claims against BHP and included in the agreed list of issues for trial;

- iii) similarly, Vale's assertion that some of the claims have been compromised shows the overlapping issues between BHP's defence to the claims and Vale's potential defence to the additional claims.
5. BHP submit that this jurisdiction is the appropriate forum to hear the additional claims:
- i) the additional claims almost mirror the legal and factual issues that arise in the main claims, many of which will be considered at the forthcoming threshold liability trial; BHP have pleaded that Vale is liable to the claimants on the same basis as BHP; therefore, on any view there will be very significant factual and legal overlap between the claims regardless of whether Vale relies on identical defences to BHP;
 - ii) it is in the interests of justice, proportionality and efficiency to have the issues raised by the claims and the additional claims tried together in a single forum; now that the English court has finally determined that the claims will proceed here, the only available single forum for trial of these issues is England.

Background

6. On 5 November 2015 Brazil suffered its worst ever environmental disaster when the Fundão Dam in South East Brazil collapsed, releasing around 40 million cubic metres of tailings from iron ore mining. The collapse and flood killed 19 people, destroyed entire villages, and had a widespread impact on numerous individuals and communities, not just locally but as a result of the damage to the River Doce system over its entire course to the sea some 400 miles away. The Brazilian public prosecutor has estimated the cost of remediation and compensation at a minimum of R\$155 billion, about £25 billion at today's exchange rates.
7. The area affected by the dam collapse fell within two states, Minas Gerais, where the dam was situated, and Espírito Santo, in which the River Doce reaches the Atlantic ocean. The local government authority with responsibility for the area which included the dam itself, and the nearby villages which were destroyed, is the municipality of Mariana.
8. The dam was owned and operated by Samarco Mineração SA ("Samarco"), a Brazilian company jointly owned, in 50% shares pursuant to a joint venture agreement, by Vale and BHP Brasil Ltda ("BHP Brasil"). The BHP defendants operated together as a single economic entity under a dual listed company structure and the second defendant is the ultimate parent company of BHP Brasil.
9. Following the disaster, there were criminal proceedings against various defendants in the Brazilian courts. There were also civil proceedings at federal and state level, comprising individual claims and class actions ("CPAs"), including CPAs referred to as "the ADIC CPA", "the 20bn CPA" and "the 155bn CPA".
10. On 17 November 2015 the ADIC CPA was filed against Samarco by the Association for the Defence of Collective Interests ("ADIC") in the Federal Court, alleging violation of diffuse, collective and homogenous individual rights of all those impacted by the collapse in the States of Minas Gerais and Espírito Santo.

11. On 30 November 2015, the 20bn CPA was filed against Samarco, Vale and BHP Brasil by the Federal Government, the states of Minas Gerais and Espírito Santo, and nine government entities. The 20bn CPA sought orders that the named defendants should present plans to address the environmental and economic consequences of the dam collapse, take measures to ensure that the specific matters in those plans were dealt with, and fund the implementation of those plans through a private foundation in a minimum amount of R\$20 billion, the then estimated quantum of damage caused by the disaster.
12. On 2 March 2016, the parties to the 20bn CPA agreed to settle the proceedings, without any admission of fault or liability, by entering into a transaction and conduct adjustment term ("the TTAC"), an agreement governed by Brazilian law. Under the TTAC, the Brazilian defendant companies, including Vale, agreed to provide full redress to all persons, sole traders, communities and the environment in the areas affected by the collapse of the dam, through 42 programmes.
13. On 5 July 2016 a Brazilian private foundation, Fundação Renova ("Renova"), was established by Samarco, Vale and BHP Brasil as the vehicle through which they would carry out the programmes of remediation and compensation. The programmes implemented by Renova include the 'Novel System', a judicially supervised compensation scheme
14. In May 2016, the Federal Public Prosecutor filed the 155bn CPA against Samarco, Vale, BHP Brasil, the Federal Government and others, challenging the sufficiency of the relief provided for in the TTAC and demanding better relief for the victims of the collapse, estimating the damage caused at a minimum of R\$155 billion.
15. On 25 June 2018, the parties reached an interim settlement agreement in the form of the Governance and Conduct Adjustment Agreement ("GTAC"). The GTAC was signed by all parties to the 20bn CPA and the 155bn CPA. It provided a framework by which the parties would undertake negotiations towards a final settlement of the 155bn CPA. Pending such final settlement, the 155bn CPA proceedings were stayed. There is a dispute as to whether the stay remains formally in place, as the Federal Court continues to resolve any disputes that arise regarding the interpretation and effect of the TTAC, GTAC and reparation programmes through the Priority Axes. However, it is accepted by all parties to the GTAC that no decision on the merits of the original claims brought in the proceedings will be rendered before a final settlement has been achieved. The current status of the proceedings is that there is an ongoing mediation in respect of the renegotiation of the GTAC and TTAC.

Proceedings

16. On 2 and 5 November 2018, the claimants issued proceedings against the first defendant in this jurisdiction and on 3 May 2019, a further claim form was issued against both BHP defendants. On 24 February 2023 a new claim form was issued against BHP, increasing the total number of claimants to approximately 732,000. There are public statements from the Claimants' solicitors estimating the value of the claims as £36 billion.
17. The claims, seeking compensation for losses caused by the dam collapse, are brought jointly and severally against the BHP defendants. The claimants are all Brazilian and

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

18. On 7 August 2019 BHP applied for the claims to be struck out as an abuse of process; alternatively for the claims to be stayed on *forum non conveniens* grounds, pursuant to article 34 of Brussels Recast or the court's case management powers. The claims were struck out by Turner J, on the basis set out in his judgment dated 9 November 2020 at [2020] EWHC 2930 (TCC). The appeal against that judgment was successful, as set out in the Court of Appeal's judgment dated 8 July 2022 at [2022] EWCA Civ 951, and BHP's applications were dismissed. On 1 June 2023 the Supreme Court refused permission to appeal against the order of the Court of Appeal.
19. The claims are advanced under Brazilian law and include the following pleaded allegations in the Re-Amended Master Particulars of Claim ("the RAMPOC"):
 - i) Articles 3(IV) and 14 of the Environmental Law and/or Articles 927 and 942 of the Civil Code impose strict liability on BHP for loss and damage caused by the environmental disaster by reason of their: (a) ownership and/or control of the entity responsible for the damage; (b) failure to supervise the activity giving rise to the damage; (c) funding the activity of others which led to the damage; and/or (d) benefiting from the activity of others which led to the damage.
 - ii) BHP are liable under Articles 186, 927, 932 and 942 of the Civil Code for the loss and damage suffered by the claimants by reason of their voluntary act or omission, negligence or imprudence in: (a) disregarding advice and warnings as to the risks of collapse and/or (b) failing to take satisfactory action to address such risks.
 - iii) BHP are liable under Articles 116 and 117 of the Corporate Law, as controlling shareholders, for the loss and damage suffered by the claimants, by permitting activities involving a significant risk of substantial damage to the community.
20. The loss and damage suffered by the claimants is pleaded in general terms for each category of claimant in the body of the RAMPOC and can be summarised as follows:
 - i) The individuals claim compensation for physical and psychological injury, property damage, the need to move home, increased living expenses, loss of earnings, interference with fishing activities, loss of water and electricity supplies, and interference with their use and enjoyment of the river and land.
 - ii) The business claimants claim compensation for property damage, loss of profits, loss of income or increased costs, loss of business opportunities, loss of value and damage to reputation.
 - iii) The churches and faith-based institutions claim compensation for property damage, destruction or damage to artefacts of spiritual, artistic, historical and/or social significance, costs of property security and storage, loss of income, loss of water supply and loss of spiritual ties with the congregation.

- iv) The municipalities claim compensation for damage to property, the environment, cultural heritage, tourism and quality of life, costs of remediation, lost income and investment, loss of reputation and costs of settling claims arising out of the collapse.
 - v) The utilities claim compensation for costs of repair, remediation and testing of the water treatment plants, the water supply system and associated equipment, loss of revenue and loss of reputation.
 - vi) The indigenous groups and the Quilombola claimants claim compensation for environmental damage to their lands, damage to their practices, traditions and cultural heritage, psychological harm, loss of drinking water supply and property damage.
21. The Amended Defence contains a denial of any liability on the part of BHP and includes the following defences to the claims:
- i) BHP were not polluters within the meaning of Article 3(IV) of the Environmental Law so as to attract strict liability for the loss and damage caused by the dam collapse. They carried out no polluting activity, nor did they cause environmental degradation through any relevant omission.
 - ii) The allegations of fault-based liability are denied. BHP met the expected standard of conduct of parties in their positions and breached no legal duty.
 - iii) There is no liability under the Corporate Law. BHP were not controlling shareholders of Samarco and/or owed no controlling shareholder duties and/or did not breach any such duties by act or omission.
 - iv) It is denied that there was any causal link between any activity or omission on the part of BHP and the dam collapse and/or the claimants' alleged losses.
 - v) BHP plead that all the claims are time-barred under Brazilian law.
 - vi) Certain claimants have accepted compensation, pursuant to settlement agreements with Renova, Samarco, BHP Brasil, Vale and/or through the Novel System compensation scheme, and the terms of the release or waiver clauses in such settlements preclude the claimants from pursuing the claims in these proceedings.
22. On 2 December 2022, BHP served a Part 20 claim against Vale, seeking declaratory relief and a contribution to any sums that BHP might be found liable to pay to the claimants.
23. On 20 December 2022, Vale filed its acknowledgement of service, indicating that it intended to contest the court's jurisdiction.
24. On 13 April 2023 BHP issued a new Part 20 claim against Vale, on the same basis and in the same form as the first Part 20 claim, but in respect of any liability arising out of the new claim form issued by the claimants.
25. The Part 20 claims include the following allegations:

- “12. If, contrary to some or all of BHP’s defence, BHP are held to be liable to any of the Claimants, then BHP will seek contribution from Vale since Vale would also be liable to the Claimants on the same or similar factual and the same or similar legal bases.
13. Further, in seeking such contribution, BHP will rely on the facts and matters alleged in the AMPOC and the further facts and matters set out herein, in particular but without limitation:
- (1) From 2001 to 2015 (and to date) Vale was, with BHP Brasil, a shareholder of Samarco, directly held 50% of the share capital of Samarco, appointed 4 members of Samarco’s Board of Directors (2 full and 2 alternate members) and also appointed others ... These appointees included Vale’s Executive Officers in charge of the Ferrous Minerals (or Bulk Materials) division and other senior Vale executives, as further pleaded below ...
 - (2) Between 2008 and 2015 (and insofar as this is to be regarded as an appropriate period for considering the claims in the AMPOC), Vale’s Board of Directors appointed Executive Officers to Vale’s Executive Board, including a Chief Executive Officer. Between 2008 and 2015, Vale reported on its businesses in its Annual Reports and Forms 20-F under several ‘lines of business’. Samarco’s activities fell under Vale’s “*Ferrous Minerals*” or “*Bulk Materials*” lines of business, within the “*Iron Ore*” sub-division.
 - (3) Therefore the allegations in the AMPOC against BHP (arising out of BHP Brasil’s role in relation to Samarco) - regarding control of Samarco, knowledge of alleged risks relating to the Dam, and alleged failures to take sufficient action to address the alleged risks - would also apply to Vale.
 - (4) If, by reason of these and other allegations in the AMPOC, BHP are held to be liable to the Claimants, then Vale will also be liable with BHP under Brazilian law (a) as polluters under the Environmental Law; (b) for acts and/or omissions pursuant to the Civil Code and/or the Constitution; and/or (c) for acts and/or omissions regarding the ‘controlling shareholder’ claim...
14. Accordingly, if BHP are held to be liable to the Claimants, then Vale would be liable to contribute to 50% or more of any sums payable to the Claimants by BHP under Brazilian law or, alternatively, English law.”

26. Thus, the allegations by BHP against Vale substantially mirror the allegations made against BHP on the basis that Vale was (with BHP Brasil) a direct shareholder of Samarco on a 50-50% basis and with the same position within Samarco's governance structure. As such, the allegations made by the claimants regarding ownership of, benefit from, and control of Samarco, knowledge of alleged risks relating to the dam, and alleged failures to take sufficient action to address the alleged risks are said to apply to Vale in the same way and to at least the same extent that they apply to BHP. If, and to the extent that, those allegations establish that BHP are liable to the claimants, then BHP will rely on the same, or very similar allegations, to establish Vale's liability to the claimants and its liability to make a contribution to BHP.
27. The remedies sought against Vale are pleaded as follows:
- “93. In the premises, BHP would be entitled to contribution of 50% or more from Vale of any sums that BHP would be liable to pay to the Claimants, pursuant to Articles 275, 283 and 942 of the Civil Code (under Brazilian law), or alternatively pursuant to section 1(1) of the 1978 Act (under English law).
94. Accordingly, if, contrary to BHP's Amended Defence, BHP are found to be liable to the Claimants, then BHP seek as against Vale:
- (1) A declaration that (i) Vale would also be liable with BHP pursuant to Articles 265, 275, 283 and 942 of the Civil Code and liable to contribute to 50% or more of any sums that BHP would be liable to pay to the Claimants; alternatively, (ii) BHP would be entitled to seek contribution from Vale of 50% or more of any sums payable by BHP to the Claimants under section 1(1) of the 1978 Act.
 - (2) Contribution from Vale of 50% or more of any sums payable by BHP to the Claimants, including any sums paid in relation to the Claimants' costs of the proceedings, pursuant to Articles 265, 275, 283 and 942 of the Civil Code, or alternatively pursuant to sections 1(1) and 1(4) of the 1978 Act.
 - (3) Contribution from Vale to BHP's costs occasioned by the Claimants' claims (excluding the costs incurred by BHP in the claim for contribution against Vale) pursuant to sections 51(1) and (3) of the Senior Courts Act 1981.”
28. Following a CMC in March/April 2023, I handed down judgment on 12 May 2023, reported at [2023] EWHC 1134 (TCC), giving directions to a trial on threshold liability issues to be heard on 7 October 2024 with an estimate of 11 weeks, to include one week of judicial reading. The threshold liability issues include:

- i) whether BHP are strictly liable as “polluters” in respect of damage caused by the collapse pursuant to Articles 3(IV) and 14 of the Environmental Law;
- ii) whether BHP are liable based on fault in respect of damage caused by the collapse, pursuant to Articles 186, 927, 932 and 942 of the Civil Code and/or Article 225 of the Constitution and/or Article 116 of the Corporate Law;
- iii) whether BHP are liable as controlling shareholders of Samarco in respect of damage caused by the collapse, pursuant to Article 116 and/or 117 of the Corporate Law and/or Article 927 of the Civil Code;
- iv) various limitation issues, including whether environmental damage claims are subject to prescription, whether time runs from the date of knowledge of damage, and circumstances in which protests or service of proceedings give rise to an interruption of the limitation period;
- v) whether any of the claims (or categories of claim) are precluded by reason of settlement agreements entered into with Renova, Samarco, BHP Brasil, Vale and/or through the Novel System;
- vi) whether the municipalities have standing and/or capacity to bring their claims in these proceedings.

The applications

29. On 28 February 2023 Vale issued an application, seeking an order pursuant to CPR 11(1) that the court has no jurisdiction to hear the Part 20 claim; alternatively that the court should not exercise any jurisdiction that it may have and the proceedings against Vale are stayed. Further, Vale seeks an order that the Part 20 claim form should be set aside, and the purported service of the Part 20 claim form and particulars of the Part 20 claim should be set aside.
30. Following service of the new Part 20 claim, on 2 May 2023 Vale issued a jurisdiction challenge application in respect of that claim. The parties have agreed that the applications should be heard together.
31. Witness statements have been filed on behalf of Vale by Mr Lawson Caisley, solicitor and partner in White & Case LLP (second statement dated 28 February 2023, third statement dated 2 May 2023 and fourth statement dated 19 June 2023). Evidence has also been adduced from Mr Alexandre D'Ambrosio, Executive Vice President of Corporate and External Affairs at Vale (first statement dated 28 February 2023 and second statement dated 19 June 2023).
32. Witness statements have been filed on behalf of BHP from Mr Efstathios Michael, solicitor and partner in Slaughter and May (eighteenth statement dated 10 May 2023 and nineteenth statement dated 19 May 2023).
33. The court has the benefit of expert reports in relation to issues of Brazilian law. Vale relies on the expert evidence of Professor Georges Abboud, who produced a report dated 28 February 2023 and a supplemental report dated 19 June 2023. BHP relies on

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

Requirements of CPR 11

34. CPR 11(1) provides that a defendant who wishes to (a) dispute the court's jurisdiction to try the claim; or (b) argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
35. CPR 11(6) provides that an order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including (a) setting aside the claim form; (b) setting aside service of the claim form; (c) discharging any order made before the claim was commenced or before the claim form was served; and (d) staying the proceedings.
36. The applicable legal principles are not in dispute and are summarised in the speech of Lord Collins of Mapesbury JSC in *Altimo Holdings v Kyrgyz Mobil Tel Limited* [2011] UK PC 7 at [71]:
 - i) The claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, that is, a substantial question of fact or law or both.
 - ii) The claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given, in this case, one of the gateways set out in CPR PD6B paragraph 3.1.
 - iii) The claimant must satisfy the court that in all the circumstances this jurisdiction is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.
37. For the purpose of these applications, it is common ground that the Part 20 claims should be treated as having been served outside the jurisdiction pursuant to an application without notice and that Vale now seeks to set aside the notional permission. The relevant gateway relied on by BHP is paragraph 3.1(4) of CPR PD6B, namely, the claims are additional claims under Part 20 and the person to be served is a necessary or proper party to the claims or additional claims.
38. It is conceded by Vale that if it were to fail on limbs (i) - serious issue to be tried, and (iii) - appropriate forum, it would not succeed on limb (ii) - gateway. On that basis, the court does not have to determine any issue as to limb (ii).

Serious issue to be tried

39. It is agreed that the test is broadly the summary judgment test, although the burden is on BHP to demonstrate that there is a serious issue to be tried on the merits.
40. The principles to be applied can be summarised as follows:

- i) The court must consider whether BHP have a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 1 All ER 91.
 - ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]. There must be a plausible evidential basis for the claim: *Brownlie v Four Seasons Holding Inc* [2017] UKSC 80 per Lord Sumption at [7].
 - iii) The court must not conduct a “mini-trial”: *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at [95]; *Lungowe v Vedanta* [2019] UKSC 20 at [9]-[14]; *Okpabi v Royal Dutch Shell* [2021] UKSC 3 at [21], [110].
 - iv) The court should hesitate about making a final decision without a trial and must take into account not only the evidence actually placed before it at the application stage, but also any reasonable grounds identified for believing that a fuller investigation into the facts of the case would add to or alter the evidence relevant to the issue: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550; *Okpabi* at [127]-[128].
 - v) If the court is satisfied that it has before it all the evidence necessary for the proper determination of a short point of law or construction and the parties have had an adequate opportunity to address the question in argument, it should grasp the nettle and decide it: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 at [11]-[14]; *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].
 - vi) However, the court should be cautious about deciding an issue of foreign law on a summary basis because it is a question of fact which the trial judge is required to determine on the basis of expert evidence deployed by the parties: *Byers v Saudi National Bank* [2022] EWCA Civ 43 at [103].
41. Ms Fatima KC, leading counsel for BHP, submits that there is, at the very least, a serious issue to be tried in respect of BHP’s pleaded case namely, to the extent that they are liable to the claimants, they are entitled to a declaration that Vale is jointly and severally liable with BHP and, as a consequence, Vale would be liable to make a contribution to any sums payable by BHP to the claimants.
42. Mr Salzedo KC, leading counsel for Vale, submits that BHP’s claim for contribution is fundamentally flawed on the grounds that: (i) under Brazilian law there is no accrued liability on the part of Vale to pay a contribution to BHP; and (ii) Vale is not liable for the same loss or damage because the claimants’ claims are time-barred and/or have been settled.

Joint and several liability to the Claimants

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

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

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

44. Professor Schreiber’s evidence is that joint and several liability exists where imposed by express provision of law or agreed by the parties. The express provisions which impose joint and several liability include Article 942, which provides that where more than one person causes damage by violating another’s right, all wrongdoers shall be jointly and severally liable for the damage caused. The court will determine whether or not two or more parties are jointly and severally liable for another’s loss in the same way as it determines any other issue of civil liability, subject to the same burden and standard of proof, on the basis of evidence before it.
45. It is the view of Professor Schreiber that the joint and several liability between the co-authors of a civil wrong pre-exists any condemnatory judicial decision. Such liability accrues at the time of the wrongdoing; the role of the court is to recognise the joint and several liability that exists, rather than to create such liability.
46. Professor Schreiber explains that in every case of joint and several liability, two different sets of relationships will co-exist: (a) an external relationship between the wrongdoers and the claimant, where each wrongdoer is liable for the total amount of the damages due to the claimant; and (b) an internal relationship between the wrongdoers, where each wrongdoer answers to the others only for its part of the damages. A claimant is entitled to choose whether to enforce its rights against one or all of the joint wrongdoers. If one of the wrongdoers satisfies the total amount of the debt, the debt is extinguished under the external relationship between all wrongdoers and the claimant. In such circumstances, the wrongdoer who has satisfied the debt will retain the legal right to seek reimbursement against the other wrongdoers, in accordance with Article 283 of the Brazilian Civil Code. As between the wrongdoers, the debt is limited to the portion for which each wrongdoer is responsible, although there is a rebuttable presumption that they are liable in equal shares.
47. It is acknowledged by Professor Schreiber that the wrongdoers will not be ordered to pay damages for the civil wrong before their culpability has been established; the extent of the damage incurred has been proved; and causation attributable to the wrongdoers has been proved. However, his evidence is that under Brazilian law it is not necessary for a wrongdoer to be held liable in a previous lawsuit and pay the relevant amounts, before seeking the assistance of the court, to recognise that another is jointly and severally liable, and to protect the wrongdoer’s right to require that other to share the burden of the debt jointly and severally owed. A defendant may dispute its own liability and at the same time seek to establish that, if it is liable, another is jointly and severally liable. However, such defendant must have satisfied the debt owed to the claimant before it can obtain reimbursement (“*ação de regresso*”) from a jointly and severally liable wrongdoer for its share of the satisfied debt.
48. Brazilian procedural mechanisms are identified by Professor Schreiber that could be used prior to a claim for reimbursement. Firstly, it would be open to a defendant to bring another wrongdoer into the proceedings as a co-defendant, by a call to process (“*chamamento ao processo*”) under Articles 130 and 131 of the Brazilian Civil Procedure Code. Secondly, it would be open to a defendant to bring a declaratory action against another wrongdoer, to establish joint and several liability (“*ação declaratória*”) under Articles 19 and 20 of the Brazilian Civil Procedure Code.

49. Professor Abboud's evidence is that Article 942 of the Brazilian Civil Code provides for joint and several liability but it cannot be applied automatically. It is subject to proof as to (i) the occurrence of the damage, (ii) its extent, (iii) the identity of the perpetrator of the wrongful act that caused the damage and (iv) the existence or otherwise of a nexus of causation between the damage and the acts of those who are supposedly jointly and severally liable for it.
50. Professor Abboud states that Article 942 can only be applied if a court order recognises the existence of joint and several liability in any particular case. Prior to such recognition, it is not possible to state that joint and several liability exists and has been established. A lawsuit that seeks recognition of the existence of joint and several liability must, of necessity, involve the third party who supposedly perpetrated the wrongful act and to whom the claimant seeks to attribute the status of joint and several liability. The third party must be entitled to contest the proceedings, both procedurally and on the merits.
51. Article 283 of the Brazilian Civil Code provides that:

“A debtor who has settled the debt in full is entitled to demand his or her share from each of the co-debtors, with the share of the insolvent debtor, if any, divided equally among all of them.”
52. Professor Abboud explains that under Brazilian law it is only after payment has been made that a co-debtor who made the payment is entitled to collect from the others their share of the entire debt paid. Accordingly, his view is that it is necessary for there to be a final court order establishing joint and several liability, and for payment to have been made by the jointly liable wrongdoer before that wrongdoer is entitled to exercise any right to reimbursement against the other jointly liable wrongdoers.
53. In his supplemental report Professor Abboud accepts that in theory it would be possible for BHP to bring a declaratory action against Vale in Brazil, requesting a declaration that Vale is a debtor held jointly and severally liable together with BHP. However, BHP would have to admit that they were liable for the loss caused to the claimants in the English proceedings; it would not be possible for BHP to seek a conditional declaration that Vale would be liable if BHP were held liable in respect of the claimants and at the same time contest BHP's liability in respect of the claims.
54. The issue for this court is whether there is a real prospect of success for BHP in establishing joint and several liability of Vale to the claimants (if, and to the extent that, the claimants prove their case against BHP), and a right to seek a contribution/reimbursement in respect of any damages awarded against them. The experts are agreed that, as a matter of principle under Brazilian law, BHP and Vale could be found joint and severally liable to the claimants and, if such liability were to be established by a court, BHP could seek payment from Vale in respect of an appropriate share of any damages paid to the claimants. The experts are also agreed that under Brazilian law, BHP are not entitled to any reimbursement from Vale in respect of any joint and several liability unless and until BHP have made payment to the claimants.
55. The procedural arguments as to when and how BHP might establish or enforce any claim for contribution in the Brazilian courts are not directly relevant to this limb of the

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

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

Alternative contribution case

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

“[80] The ordinary and natural meaning of the provisions of the 1978 Act and the scheme of the legislation provide little assistance on the issue as to whether it is intended to have overriding effect. The Act contains no express provision that it applies regardless of the law otherwise applicable to the contribution claim. Furthermore, the provisions are neutral as to whether overriding effect is to be implied. They are equally consistent with the 1978 Act applying only where the applicable law of the contribution claim is English law. They cast no light on the prior question whether the 1978 Act has any application at all. Furthermore, I have been able to find no assistance on this point in the legislative history of the Act.

[81] Nevertheless, I am persuaded that the 1978 Act was not intended to have overriding effect so as to displace conventional choice of law rules...

...

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

60. BHP have not sought to persuade the court that there is a serious triable issue in respect of any claim under the 1978 Act as part of this jurisdictional challenge but they seek to preserve their right to rely upon their alternative case in due course. Ms Fatima contends that the absence of an automatic application of the 1978 Act where foreign law governs the underlying claims does not necessarily preclude its application in all circumstances. Mr Salzedo urges the court to decide this issue now on the basis that it is clear that this alternative case is misconceived and bound to fail.
61. It is not necessary for the court to determine this issue as part of the jurisdictional challenge. If BHP establish that there is a serious issue to be tried on the contribution claims under Brazilian law, it is immaterial that they might fail on their alternative case under the 1978 Act because they will have satisfied limb i) of the test. Equally, if BHP fail to establish any serious issue to be tried on the contribution claims under Brazilian law, they will have failed on limb i) of the test and this court will not accept jurisdiction; in the absence of jurisdiction, there would be no question of any application of the 1978 Act. In either scenario, this point is not determinative of the jurisdictional challenge before the court.

Limitation

62. BHP's claim for a contribution against Vale is predicated on the claimants establishing BHP's liability to them (which liability is denied, including a defence that the claims are time-barred), and BHP establishing Vale's joint and several liability to the claimants.
63. Mr Eschwege KC, leading counsel for Vale, submits that any claims that could have been brought by the claimants against Vale were time-barred before the Part 20 claims were issued. It is said that: (i) all claims against Vale under the original Part 20 claim would have been time-barred as at the date of issue on 2 December 2022; and (ii) all claims against BHP and Vale by the claimants would have been time-barred long before the new Part 20 claim was issued on 13 April 2023.
64. As to Vale's first point, regarding claims against it under the original Part 20 claim, BHP and Vale agree that any cause of action by the claimants against Vale accrued at the time of the collapse of the dam on 5 November 2015 and the limitation period started running from that date pursuant to Article 189 of the Brazilian Civil Code. It is also common ground that the relevant limitation period under Brazilian law for claims for compensation for loss by private individuals is three years pursuant to Article 206 of the Brazilian Civil Code. Therefore, it is said by Vale that all claims that are the subject of the original Part 20 claim would have become time-barred as against Vale by around 5 November 2018, more than four years before the original Part 20 claim was issued.

65. BHP rely on a defence that the claimants' claims against them are time-barred. However, if and to the extent that the claimants succeed in establishing a later date for accrual of the cause of action, or interruption of the limitation period, so as to render their claims in time, BHP seek to rely on such later date of accrual or the same interruption of the limitation period as against Vale.
66. Professor Schreiber explains that the limitation period runs consistently against all those who are jointly and severally liable, in that it starts running at the same time, it is interrupted by the same events, it re-starts running at the same time, and it ceases to run at the same time. The issue of proceedings against any jointly and severally liable person interrupts the running of the limitation period against all persons jointly and severally liable. If Vale is jointly and severally liable with BHP, and if the claimants' claims against BHP are not time-barred, then the claimants' claims against Vale will also not be time-barred.
67. Article 202 of the Brazilian Civil Code provides:
- “The interruption of the statute of limitations, which can only occur once, will occur:
- I - by order of the judge, even if lacking jurisdiction, who orders the summons, if the interested party promotes it within the time limit and according to procedural law;
- II – by protest, under the conditions of the previous item;
- ...
- Sole paragraph. The interrupted statute of limitations shall resume from the date of the act that interrupted it, or from the last act of the process to interrupt it.”
68. As explained by Professor Schreiber, if the interrupting event is a single complete event, such as the acknowledgment of the right by the debtor, the limitation period will start running again from the date of acknowledgement. However, if the interrupting event is the issue of proceedings, the limitation period will only re-start from the last act in such proceedings, the date when its final decision becomes unappealable (*res judicata*).
69. Professor Schreiber and Professor Abboud agree that Article 204 of the Brazilian Civil Code provides that if there is joint and several liability, then the interruption of the limitation period against one of the co-debtors will automatically interrupt the limitation period, at the same time, against all the other co-debtors who are jointly and severally liable for the debt. However, there is a dispute as to the implications of such provision in this case.
70. Professor Schreiber's view is that, if the claimants' claims against BHP were within time when the proceedings were issued, so as to interrupt the limitation period, and Vale were jointly and severally liable with BHP to the claimants, then the limitation period would be interrupted equally in respect of the claims against Vale.

71. Professor Abboud disagrees with that proposition. Firstly, his view is, as set out above, that when the claims against BHP were issued in November 2018, there was no recognition of any joint and several liability on the part of Vale, which was not joined to the proceedings or the subject of separate proceedings. Therefore, the interruption of any limitation period in respect of the claims against BHP did not apply to Vale. Secondly, he disagrees with Professor Schreiber's view that the limitation period always runs consistently in relation to jointly and severally liable co-debtors. Even if the Sole paragraph of Article 202 did apply to interrupt the limitation period in respect of the claims against Vale, the suspensive effect would cease to apply when the intervening limitation period elapsed pursuant to Article 206A, that is, when the claimants, or BHP, failed to progress the proceedings for a long period of time.
72. As to Professor Abboud's first objection, this turns on his view that there could be no joint and several liability on the part of Vale prior to judicial recognition of the same or joinder as a co-defendant. For the reasons set out above, that gives rise to a serious issue for trial.
73. As to his second objection, it raises a dispute on the expert evidence, together with a material issue of fact, namely, whether the claimants or BHP failed to progress the proceedings, including any Part 20 proceedings, within a reasonable period. The causes and reasonableness of any delay in the proceedings are contentious, particularly having regard to the period during which the proceedings were struck out following BHP's jurisdictional challenge. They are matters that are not suitable for summary disposal but should be determined on full evidence at trial.
74. BHP have further arguments, namely, that a limitation defence would not apply to their claim for declaratory relief; further, that any limitation period in respect of a claim for reimbursement would not start to run until such right arose, when BHP made payment to the claimants. Vale's response is that the court would be unlikely to grant declaratory relief if of no use, such as where the underlying claims were time-barred; further, it disputes that BHP has any accrued right to seek reimbursement. It is not necessary for the court to determine those points, in the light of my finding that there is a serious issue to be tried in respect of BHP's case that any interruption to the limitation period would be consistent as between BHP and Vale as jointly and severally liable wrongdoers.
75. As to Vale's second point, regarding claims against it under the new Part 20 claim, Vale's position is that although the new Part 20 claim was brought against it within two months of the new claims being filed by the claimants against BHP, the new claims were not issued against BHP until 24 February 2023, by which time the three-year limitation period for those claims and any claims that the claimants could have had against Vale, had long since expired.
76. BHP's position is that any limitation defence available to Vale stands or falls with BHP's own limitation defence to the new claims set out in the pleadings.
77. The claimants' case on limitation is multi-faceted and raises a number of issues of fact and law. The claimants assert that the commencement of the ADIC CPA against Samarco on 17 November 2015 in the Brazilian federal courts interrupted prescription in respect of all individual claims arising out of the collapse of the dam, not just against Samarco but also, by virtue of Article 204 of the Brazilian Civil Code, against any others jointly and/or severally liable for damage caused by the collapse. There are also

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

Settlement and release

78. Vale's case is that 33 of the 46 municipalities that are pursuing claims against BHP in these proceedings have concluded settlement agreements, pursuant to which they have agreed to release Vale and others from any claims. Around 427,000 other individuals and companies have also concluded such settlement agreements, although Vale is not currently in a position to identify how many of the claimants in these proceedings are included within that number.
79. BHP accept that such settlement agreements and/or releases potentially provide Vale with a relevant defence against the affected claimants. Indeed, BHP also rely on settlement agreements and signed releases in their defence to the claimants' claims.
80. The court has seen examples of some of the settlement agreement terms and releases. The validity and interpretation of the agreements is a matter of dispute as between the claimants and BHP, some of which will be determined at the threshold liability trial in October 2024. The court does not have before it full evidence as to the identity of each and every claimant affected, the terms of each settlement, or whether the validity of such settlements has been determined by the Brazilian courts. It appears to be accepted by Vale and BHP that not all claimants would be affected by these issues. They are not suitable for summary disposal, requiring substantial evidence of fact and law. On that basis, it is clear that there is a serious issue to be tried.

Conclusion on limb (i)

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

Proper forum

82. It is common ground that BHP must satisfy the court that England is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.
83. The relevant test is set out in *Spiliada Maritime Corporation v Cansulex Limited* [1987] AC 460 per Lord Goff at p.480G-481E:

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

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

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

- i) The burden of proof is on BHP to establish that this jurisdiction is clearly or distinctly the appropriate forum for the trial of the dispute: *Spiliada* (above).
- ii) The court is concerned to identify the forum in which the case could most suitably be tried for the interests of all parties and for the ends of justice: *Spiliada* (above).
- iii) The court must consider what is the natural forum for the claim against Vale, that is, the forum with which it has the most real and substantial connection, but in the wider context of the whole case, including the interests of all other parties: *Lungowe v Vedanta* (above) at [68].
- iv) A powerful and often decisive factor is the avoidance of a multiplicity of proceedings and the risk of irreconcilable judgments, favouring resolution of all related claims against all defendants in the jurisdiction in which such a trial is possible: *Lungowe v Vedanta* (above) at [74].

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

- i) The existence of the claims against BHP, which are continuing in England, provides a countervailing and stronger connection to this jurisdiction than any connection to Brazil. BHP did not choose to have the claims against them decided in England; on the contrary, they sought to have the claims heard in Brazil but failed. In light of the disposal of BHP's own jurisdiction challenge, England now offers the only forum in which a single trial of the claims and the Part 20 claims is possible.
- ii) The significant overlap between the claims and the Part 20 claims is a strong factor indicating that they should be heard together, to avoid the waste and duplication which will result from there being two trials of substantially the same issues, and the significant risk of inconsistent judgments, which would prejudice BHP.

86. Mr Salzedo submits that England is not the appropriate forum for the Part 20 claims:
- i) Brazil is the natural forum for the determination of BHP's claims against Vale and it is common ground that a Brazilian court would have jurisdiction to hear the claims: Vale is a Brazilian company; the claims relate to events that occurred in Brazil; the Part 20 claims are governed by Brazilian law; all losses for which compensation is claimed were sustained in Brazil by Brazilian claimants; the likely witnesses are in Brazil and their main language is Brazilian Portuguese; and many of the relevant documents are in Brazilian Portuguese.
 - ii) There are multiple ongoing proceedings in Brazil, to which Vale is a party, in which issues concerning Vale's alleged liability for specific loss caused by the collapse of the dam will be determined. These include active CPAs and thousands of individual claims. If this court accepts jurisdiction over the Part 20 claims, there is an unavoidable risk of irreconcilable decisions in light of the ongoing Brazilian proceedings.
 - iii) It is accepted that there is overlap between the issues raised by the claimants' claims against BHP and the Part 20 claims but the common issues arise in a different way, and on different facts as between Vale and BHP. Further, there are a number of additional issues that would arise in the Part 20 claims, such as the right to contribution, limitation and settlement issues (discussed above), and whether the corporate veil can be pierced under Brazilian law in the circumstances of this case. Moreover, unlike many 'necessary or proper party' claims, the court cannot assume that the Part 20 claims are capable of being determined in England together with the claimants' claims against BHP.
87. If BHP's claims against Vale were standalone proceedings, the natural forum in which those claims should be determined would be Brazil, for the reasons articulated by Mr Salzedo and summarised above. However, they are not standalone proceedings; they are additional claims within substantial proceedings brought by 732,000 claimants against BHP, in respect of which it has been determined that this jurisdiction is the appropriate forum. It is in that context that the court must consider the forum in which the claims against Vale could most suitably be tried for the interests of all parties and for the ends of justice.
88. A powerful factor in favour of this jurisdiction being the appropriate forum to determine the claims is the existence of the claims against BHP in these proceedings, which raise issues as between the claimants and BHP that significantly overlap with the issues as between BHP and Vale, and which form the basis on which BHP seek declaratory relief/contribution against Vale.
89. The significant overlap between the claims against BHP and the additional claims against Vale can be seen from a comparison between the pleadings. The foundation of the claims against BHP is their alleged interest in and control over Samarco, the owner and operator of the dam, through BHP Brasil. BHP's Part 20 claims against Vale have the same foundation, based on the 50:50 ownership of Samarco by BHP Brasil and Vale. The key allegations against BHP are that they are strictly liable as polluters under the Environmental Law; they are liable by reason of their disregard of, or failure to manage, risks posed by the dam; and they are liable as controlling shareholders of Samarco. These key allegations are repeated by BHP against Vale in the Part 20 claims.

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

90. Mr Caisley and Mr D'Ambrosio identify in their witness statements a number of additional issues that would arise in the Part 20 claims (but not in the claims against BHP). As identified above, there are legal arguments that affect any right BHP might have against Vale for declaratory relief or reimbursement but they are relatively narrow matters of Brazilian law that have already been defined. Mr D'Ambrosio asserts that in order for the claimants to establish claims against Vale as a shareholder of Samarco, it would be necessary for them to show that the assets of Samarco were not sufficient to cover the reparation required to compensate for the environmental damage, the 'disregard doctrine'. It is said that the claimants are only permitted to pierce the corporate veil of Samarco and access the assets of its shareholders, Vale and/or BHP Brasil, if they can establish this. Again, this is a relatively narrow issue, primarily of law, and the material on which any findings of fact are required is likely to be limited to factual background and documentary financial evidence.
91. Vale has indicated that it relies on issues of limitation and settlement that are not identical to those raised by BHP in their defence against the claimants. I accept that the matters identified by Vale raise substantial issues of fact and law. However, although they are different, there is significant overlap between the matters relied upon by Vale and those relied upon by BHP. Significantly, the underlying principles of Brazilian law, the proper construction of the settlements and the validation of signed releases by the Brazilian courts, are the same in each case.
92. Vale prays in aid the ongoing proceedings in Brazil, to which Vale is a party, in which issues concerning Vale's alleged liability for specific loss caused by the collapse of the dam will be determined. It is said with some force that this distinguishes the position of Vale from that of the BHP defendants, which are not parties to any proceedings in Brazil. Mr Salzedo submits that if this court accepts jurisdiction over the Part 20 claims, it will give rise to an unavoidable risk of irreconcilable decisions.
93. This risk is highlighted by Mr Caisley in his third witness statement by reference to the decision of the Federal Court on 30 March 2023, in which the court ordered Vale and BHP Brasil to deposit R\$10.34 billion against the compensation schemes, and stated:

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

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

94. I do not accept that this indicates a significant risk of irreconcilable decisions. The observations of the Federal Court were not part of the decision and did not suggest that findings of liability or awards of damages in foreign proceedings would be disregarded. The claimants have pleaded that they will give credit for any compensation received through Brazilian proceedings or compensation schemes so as to avoid double recovery. The focus of the above decision was on the distribution of funds that might become available through legal proceedings or otherwise and brought into account for the purpose of the compensation schemes in Brazil. That does not create any risk of conflict between the decisions on liability and/or damages made in England and Brazil.
95. In its Judgment dismissing BHP's applications for a stay or strike out of the claimants' proceedings at [2022] EWCA Civ 951, the Court of Appeal identified a number of relevant features of the Novel compensation scheme that may not provide full compensation for the claimants. In particular, it was noted that it does not apply to all the claimants; it produces “rough justice” in providing for compensation in fixed amounts in accordance with a matrix which will not reflect the full entitlement of particular victims; it does not preclude individuals pursuing claims (as evidenced by the thousands of individual claims identified by Vale); and it does not involve an adjudication of legal rights under Brazilian Law; it creates, rather than determines, rights to the compensation for which it provides, as opposed to determining the claims under Brazilian law. The Court of Appeal found on the evidence before it that the large business claimants, and most of the other institution claimants, could not benefit from the 155bn CPA, nor from the Renova or other schemes pursuant to TTAC/GTAC, although some of the municipalities' claims were arguably within the scope of a 155bn CPA generic sentence.
96. Mr Caisley has attached to his fourth witness statement an updated schedule of Brazilian collective legal proceedings brought by public authorities against Vale as at 19 June 2023. It is of great significance that most of these ‘active’ CPAs have been stayed or suspended, or concern the interpretation or application of the GTAC and TTAC (Priority Axis cases). Mr D'Ambrosio states that the 155bn CPA has not progressed beyond the pleadings stage because of the settlement negotiations. Likewise, although there have been thousands of individual claims against Vale, most have been settled, leaving only c.5,000 ongoing.
97. What is striking is that Vale has not identified any ongoing proceedings in Brazil that will determine liability in respect of the dam collapse and any entitlement to damages for a significant proportion of the 732,000 claimants seeking redress in the proceedings in this court.
98. Furthermore, Vale has not identified any ongoing proceedings in Brazil to which BHP could be made a party, thus avoiding a multiplicity of proceedings. If this court does

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

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

Conclusion on limb (iii)

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

Conclusion on jurisdiction challenge

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

Directions for the Part 20 claims

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

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

103. In those circumstances, I consider that a period of three months is adequate for it to prepare and file its defence and order that Vale should file and serve its defence to the Part 20 particulars of claim by 4pm on 10 November 2023.
104. In addition, I order Vale to comply with the following directions made in the main proceedings, namely:
 - i) The parties shall identify the issues on which they seek to adduce expert evidence and the identity of the expert(s) (and/or expert discipline(s)) by 27 October 2023. If agreed, a consent order should be submitted to the court for approval; if not agreed, by 31 October 2023 the parties should set out short, written submissions for the court to determine the dispute on paper.
 - ii) By 24 November 2023 the experts of like discipline (Brazilian law and any other experts) should commence discussions and agree the expert issues which each expert will cover, together with an agenda for subsequent discussions.
 - iii) By 19 January 2024 the experts of like discipline shall meet for the purpose of identifying the issues on which they are agreed and those on which they disagree, narrowing the issues between them and, where possible, reaching an agreed opinion on those issues.
105. Following hand down of this judgment by electronic circulation, the hand down hearing will be adjourned to a date on which the court will hear the parties on all consequential matters arising out of this judgment, including any applications for permission to appeal and further submissions on any additional directions required.