



Case No: HT-2022-000304

Case No: HT-2023-000058

Neutral Citation: [2023] EWHC 1134 (TCC)

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: 12/05/2023

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)**

Defendants

**(2) BHP GROUP
LIMITED**

- and -

VALE S.A.

Third Party

Alain Choo-Choy KC, Roger Mallalieu KC, Nicholas Harrison, Jonathan McDonagh, Russell Hopkins, Pippa Manby, Anisa Kassamali, Grace Ferrier, Antonia Eklund (instructed by **Pogust Goodhead**, a trading name of PGMBM Law Ltd) for the **Claimants**
Shaheed Fatima KC, Victoria Windle KC, Nicholas Sloboda, Patricia Burns and **Maximilian Schlote** (instructed by **Slaughter and May**) for the **Defendants**
Simon Salzedo KC, Richard Eschwege KC and **Crawford Jamieson** (instructed by **White & Case LLP**) for the **Third Party**

Hearing dates: 29th and 30th March 2023, 20th April 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 12th May 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. This matter is before the court for the first case management conference. The proceedings concern claims by the claimants against the first and second defendants, (“BHP”), for compensation arising out of the Fundão Dam disaster in Brazil.
2. 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 Part 20 defendant, a Brazilian entity (“Vale”) and BHP Brasil Ltda (“BHP Brasil”). The first and second 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.
3. The matter was last before the court at a directions hearing in December 2022, at which the court issued group litigation directions and fixed a first stage trial to determine threshold liability issues to commence on 9 April 2024 with an estimate of 9 weeks, including 1 week of judicial reading.
4. Since the last hearing:
 - i) a further claim form (HT-2023-000058) has been issued, increasing the total number of claimants to more than 720,000;
 - ii) the claimants have served a Master Schedule, setting out details of the claimants and the capacity in which they bring their claims;
 - iii) further pleadings have been served by the parties;
 - iv) Vale has issued an application challenging jurisdiction, which application has been listed for an expedited hearing on 12 and 13 July 2023;
 - v) the parties have engaged in detailed discussions regarding the list of issues for the first stage trial, date, estimate and timetable to trial, disclosure and other matters in preparation for the CMC.
5. The agenda items before the court are:
 - i) the scope of the issues to be determined at the first stage trial;
 - ii) timetable for the first stage trial in respect of threshold liability issues, including any revision to the date and/or time estimate of the first stage trial;
 - iii) Master Schedule directions;
 - iv) costs sharing and funding disclosure application / security for costs;
 - v) litigation friend application.

Issues for first stage trial

6. There is a substantial amount of agreement between the claimants and the defendants as to the threshold liability issues that should be determined at the first stage trial as set out in the draft list of issues and summarised below:
 - i) Issue 1 – strict liability as polluters: are BHP strictly liable as “polluters” in respect of damage caused by the collapse pursuant to Articles 3(IV) and 14 of the Environmental Law?
 - ii) Issue 2 – fault-based liability: are BHP 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) Issue 3 – liability as controlling shareholders: are BHP 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) Issues 4-5 – limitation: are the date(s) on which the claims in these proceedings were commenced determined in accordance with English Law or Brazilian law; if Brazilian law, on what date(s) were the claims commenced?
 - v) Issues 6-12 – limitation: are any of the identified categories of claim subject to prescription under Brazilian law; what are the relevant periods of prescription; and has there been any interruption of prescription pursuant to Article 204 of the Civil Code?
 - vi) Issue 14 – standing: do the municipalities have standing to and/or are they entitled to and/or do they have capacity to bring their claims in these proceedings?
7. The issues remaining in dispute are:
 - i) whether issues of causation should be excluded from the first stage trial to avoid the need for geotechnical expert evidence;
 - ii) whether additional limitation issues should be included (Issue 13);
 - iii) whether any settlement issues should be included (Issue 15);
 - iv) whether the list of issues should include references to issues as between BHP and Vale in the Part 20 proceedings.

Causation

8. In the draft list of issues before the court at the start of the CMC on 29 March 2023, the following issues of causation were included:
 - i) Sub-issues in respect of Issue 1 (strict liability as polluters):

1(b)(v) If a causal connection is required, was there a sufficient causal connection between the acts and/or omissions of BHP and the Collapse?

1(c)(i) Does the conduct of BHP amount to an activity carried out by them that caused the Collapse?

1(c)(iii) ...did an omission of BHP in breach of any such duty cause the Collapse?

ii) Sub-issue in respect of Issue 2 (fault-based liability):

2(f) Did BHP's conduct, or one or more aspects of such conduct, cause the Collapse under the relevant test of causation?

iii) Sub-issue in respect of Issue 3 (liability as controlling shareholders):

3(h) Did any breach by BHP of their duties and/or responsibilities under Article 116 ... cause the Collapse under the relevant test of causation?

9. The agreed cross-references to the pleadings against each question show that the questions reflect the issues that arise on the pleaded case of the claimants and the defendants.
10. The revised proposed list of issues drafted by the claimants for the resumed CMC hearing on 20 April 2023 deletes the above questions regarding causation of the collapse, in order to reduce the scope of the first stage hearing and avoid the need for geotechnical expert evidence.
11. Mr Choo-Choy KC, leading counsel for the claimants, submits that, notwithstanding references to the causes of the collapse in the Re-Amended Particulars of Claim ("RAMPOC"), questions of causation are logically irrelevant to the liability issues which the claimants propose should be determined at the first stage trial, namely, whether the defendants owed duties to act (or not to act) in a particular way and, if so, whether they were in breach of those duties. Therefore, questions of duty and breach, particularly any strict liability of the defendants as polluters, can be determined by the court without findings as to the causes of the collapse. Even if the court were required to consider the causes of the collapse as part of the first stage trial, that would not require geotechnical expert evidence because there is no real dispute as to the causes of the collapse of the dam, as opposed to the precise mechanisms of the collapse, addressed in the Panel Report. Although causation is denied (see paragraph 297 of the Amended Defence), it is pleaded at paragraph 23 of the Amended Defence that the defendants currently have no reason to dispute the conclusions of the Panel Report. Despite the pleaded reservation of their position, the defendants have not pleaded any positive case on causation so as to identify it as an issue in the proceedings.
12. The defendants object to the removal of the questions of causation from the first stage trial on the grounds that they are essential elements to the issues of liability and, in any event, geotechnical expert evidence would still be required on the revised issues as drafted.

13. Ms Fatima KC, leading counsel for the defendants, submits that prior to the CMC, the parties had largely agreed the list of issues, including liability issues in respect of each of the three causes of action pleaded by the claimants, which included the causes of the collapse. To exclude causation from the first stage trial would hinder real progress in the proceedings, necessitate a second liability stage trial, which would be wasteful, inefficient and unfair, and would extend the overall timeframe for resolving this litigation. Even on the revised list of issues proposed by the claimants, it is clear that allegations regarding the causes of the collapse fall to be determined, and thus require geotechnical expert evidence, as can be seen by cross-references to the relevant parts of the RAMPOC and Reply against the remaining liability questions. Further, aside from causation, other identified issues, such as risks associated with the design and construction of the dam, the nature and effect of design modifications, and the defendants' knowledge of and involvement in the events leading to the collapse, require geotechnical evidence. Therefore, the claimants' revised proposal would not result in their stated aim of obviating the need for geotechnical expert evidence from the scope of the first stage trial.
14. In my judgment, the scope of the first stage trial should include the issues of causation as initially agreed by the parties for the following reasons.
15. First, the issues as drafted necessarily include causation. Each of issues 1, 2 and 3 invites the court to determine liability in respect of damage caused by the collapse of the dam. As recognised by the parties when identifying the sub-issues against each cause of action, and as expressly pleaded by the parties, those questions of liability encompass causation.
16. Second, simply removing the direct questions of causation from the list of issues would not avoid the need to determine causation in order to decide the issues of liability. Although it is appreciated that the claimants' primary case on issue 1 (strict liability as polluters) is that no causal connection is required between the acts and omissions of the defendants and the environmental degradation to establish such liability, the defendants' pleaded case is that such causal connection is necessary. The parties have agreed the relevant sub-issue of fact and law at issue 1(b) in the following terms:

“Were BHP responsible, directly or indirectly, for the activity of Samarco which resulted in the Collapse, having regard to the matters alleged in RAMPOC [271]-[281]?”

Removing the explicit question of causation at 1(b)(v) would preclude the court from determining issue 1(b), unless the claimants' primary argument succeeded.

17. The position is even clearer in relation to issues 2 and 3. At paragraph 282 of the RAMPOC the claimants plead that they must establish that the defendants (with others) caused the collapse by their voluntary act or omission, negligence or imprudence within the meaning of Article 186 of the Civil Code. If the sub-issue of causation at 2(f) is removed, the court will be unable to determine issue 2 (fault-based liability). Paragraph 286 of the RAMPOC pleads that the collapse resulted from a breach by BHP of their duties and/or responsibilities under Article 116 of the Corporate Law. If the sub-issue of causation at 3(h) is removed, the court will be unable to determine issue 3 (liability as controlling shareholders).

18. Third, I accept Ms Fatima's submission that removal of all issues of causation from the scope of the first stage trial would result in a dislocated trial of fragmented and partial sub-issues. It would be possible to re-draft the issues so that they addressed questions of legal principle by way of preliminary issues, or questions of law and fact that were limited to duty and breach but did not extend to causation. However, that has not been proposed by the parties, it would be a departure from the structure of the list of issues to date and it would result in a much narrower first stage trial that would not produce a judgment on key issues of liability. Such a limited first stage trial would not be an efficient use of court resources, as it would necessitate a subsequent, second stage trial on liability, and it would result in undesirable delay to resolution of the dispute.
19. Fourth, removing the explicit issues of causation from the list of issues would not necessarily avoid the need for geotechnical expert evidence in the first stage trial. Mr Choo-Choy correctly highlights the absence from the Amended Defence of any pleaded alternative cause of collapse for which Samarco should not be held responsible, which might affect the basis on which any liability of the defendants could be established. If no positive case is pleaded by the defendants, the geotechnical expert joint statement is likely to contain agreement on such matters and the court will not be troubled by such evidence at trial. However, there are a number of other pleaded allegations that are disputed and raise technical issues, such as the risk of catastrophic damage posed by the dam as constructed and/or extended, advice and warnings as to such risks, including the Pristino Report (a report prepared in 2013 for the purpose of considering Samarco's application to renew its operating licence), and appropriate steps that could and should have been taken by the defendants to address such matters. Those disputed matters are identified in the revised list of issues, with cross-references to the material parts of the pleadings, and are likely to require geotechnical expert evidence.
20. Having regard to the above matters, the court will order that the scope of the first stage trial should include the identified issues of causation as set out in issues 1, 2 and 3.

Limitation – Issue 13

21. The parties have agreed a number of issues concerning the applicable law and principles to determine the periods of limitation for the claims and the circumstances in which prescription may be interrupted under Brazilian law. The defendants have proposed the inclusion of Issue 13, namely, the effect on the period for prescription for claims in respect of which:
 - i) the claimant did not suffer damage or a particular type of damage until a date/dates after the date of the collapse;
 - ii) the claimant did not have knowledge of their claims until a date/dates after the date/dates when they suffered damage (or a type of damage);
 - iii) the claimant has suffered continuing damage; and/or
 - iv) the claimant is, or was for all or part of the period since the collapse, a person falling within the terms of Article 198(I) of the Civil Code, including in particular a person lacking in capacity within the meaning of Article 3 of the Civil Code (i.e. a minor).

22. Following service of the Rejoinder and recent exchanges by the parties, they have reached agreement on the above formulation of these issues. They have also agreed on the principle of trying these additional issues by reference to hypothetical facts, which are the subject of ongoing discussion. I am satisfied that the above matters are issues of principle in respect of threshold liability, it would be sensible to determine them with the other limitation issues and it would be appropriate to include them in the first stage trial. Accordingly, issue 13 will be included in the list of issues for determination at the first stage trial.
23. However, a note of caution is sounded. Although it would be sensible for the parties to agree and use illustrations of facts or assumptions that arise on the Additional Particulars of Claim, against which to argue the points of principle, the court is unlikely to make findings based on hypothetical facts. Any agreed illustrations or assumptions may be used as examples when considering the competing arguments on prescription under Brazilian law but the court's findings will be limited to the questions of principle as defined in the list of issues.

Settlement – Issue 15

24. Issue 15 is in dispute. The defendants propose that the court should determine whether any of the claims are precluded by reason of settlement agreements entered into with Renova, Samarco, BHP Brasil, Vale and/or through the Novel System by reference to sample settlement agreements, which are likely to be common to a large number of claimants or specific classes of claimants.
25. There have been a number of iterations of the issue prepared by both parties, including the draft served with the defendants' skeleton argument for the resumed CMC on 20 April 2023:

Are any of the claims precluded by reason of the claimants having entered into any of the sample settlement agreements with Renova, Samarco, BHP Brasil, Vale and/or through the Novel System? In particular:

- (a) Is the claimant precluded from bringing proceedings against BHP UK and/or BHP Australia:
- i) as a result of the extinction of their claims by the settlement agreement; and/or
 - ii) on the true construction of the relevant settlement agreement; and/or
 - iii) as a result of the Brazilian law principles identified at paragraph 42 of the Amended Defence?
- (b) On the true construction of the relevant settlement agreement, is the claimant precluded from bringing claims in respect of one or more of the heads of loss claimed by the claimants in these proceedings?

- (c) Does the Consumer Defence Code apply to any of the sample agreements? If so, is it an “adhesion contract” within the meaning of Art.54 of the Consumer Defence Code and, if so, did it fail to comply with the requirements of that article?
 - (d) Can any of the sample settlement agreements be set aside pursuant to article 54 Consumer Defence Code, Art.138 Civil Code, Art.145 Civil Code or Art.157 Civil Code in circumstances where:
 - i) the terms of the settlement agreements (in particular the Novel System) reflect judicial decisions; and/or
 - ii) the relevant claimant has not made a successful application to the Brazilian Court to have it set aside; and/or
 - iii) the settlement agreement has been ratified/homologated by the Brazilian Court; and/or
 - iv) certain categories of settlement agreement have been declared valid in recent court decisions - in particular, the Novel System Agreements; and/or
 - v) the limitation period for the annulment of settlement agreements is four years from the date of the settlement agreement pursuant to Art.178 Civil Code?
26. The proposed issue as formulated is not agreed by the claimants. The claimants produced a revised list of issues of law relating to the settlement agreements during the course of the hearing on 20 April 2023 but their primary position is that these should not be included in the first stage trial. Mr Choo-Choy explains that there might be clear cut issues of construction or law relating to one or more forms of settlement agreement entered into by the claimants which might be suitable in principle for determination at or soon after the first stage trial. If it could be shown that this would dispose of a substantial proportion of individual claims and, if such claims could be identified and added to the first stage trial without unduly complicating or extending that trial, the claimants would agree to include the issue. Mr Choo-Choy submits that there is no available information as to the numbers of claimants who have entered into the numerous forms of settlement and might be affected; further, many of the settlement sums were very modest. Further, the issues of construction will be affected by the background facts and may raise factual matters, such as misrepresentation and mistake. The issues are not directly related to the other issues of liability, such as liability and limitation and are best dealt with together with other related issues by test cases in relation to claims by individual claimants. Finally, he submits that the outcome of the first stage trial could obviate the need to determine settlement agreement issues.

27. Ms Fatima submits that the settlement agreement issues in the defendants' revised draft can be determined by reference to legal principle and sample agreements. Therefore, there would be no requirement for the court to resolve any substantial dispute of fact. The defendants do not know how many claimants would be affected by the settlement issues but it is likely to be in the tens of thousands; their position is that determination of those issues would whittle down the numbers of claimants or resolve a significant part of the dispute. The sample settlement agreements can be selected by reference to those that are common to a large number of claimants or specific groups/categories of claimant. The threshold liability issues all turn on Brazilian law and this would include the proposed settlement issues. Further, the Consumer Defence Code is relied on in respect of both the limitation and settlement issues. Given that the Brazilian law experts will be required to give evidence at the first stage liability trial on the liability and limitation issues, including the settlement issues would avoid duplication of evidence at a later trial and save costs.
28. The court is satisfied that this is a significant issue raised by the defendants and that it raises points of principle under Brazilian law that would be suitable for determination in the first stage trial. The issues in the draft lists by the parties do not require substantial factual evidence and the issues of construction can be raised by selecting representative samples. The precise number of claimants affected is not known but it is clear that a great many have entered into some form of settlement. The modest value of any of the settlements is not material in that a determination on this issue will confirm or remove those claimants from the litigation.
29. The claimants' revised settlement questions raise generic issues of law that could be suitable for determination at the first stage trial but the defendants' revised proposals, based on sample settlement agreements, are more likely to produce findings that will facilitate disposal or settlement of significant parts of the case, or reduce the scope of the dispute. Therefore, the revised draft of issue 15 set out above will be included in the list of issues for determination at the first stage trial.
30. The court will invite the parties to agree the sample settlement agreements to be included in the first stage trial. The sample agreements should cover the questions as framed and should be selected to include the most widely adopted set(s) of settlement agreement terms together with those considered by the Brazilian courts. In the absence of an agreed list of samples, the court will direct each party to select a limited number of settlement agreements on which they wish to rely for the purpose of the first stage trial.

References to the Part 20 claim

31. The defendants have included references to their Part 20 claim against Vale in the draft list of issues for the first stage trial, which have not been agreed. Vale has not engaged with the formulation of the issues, pending the outcome of its jurisdictional challenge to be heard in July 2023. The inclusion of the references to the Part 20 pleading do not affect the procedural steps required to be taken by any of the parties at this stage and should be retained as useful indicators of the issues that might affect Vale. If Vale's challenge to jurisdiction succeeds, the references can be deleted; if the challenge fails, references to Vale's defence and any reply can be added.

Timetable, date and estimate for first stage trial

32. At the directions hearing in December 2022 the court ordered the first stage trial to be held on 9 April 2024, with the first week set aside for judicial reading, followed by a hearing with an estimate of 8 weeks, based on the draft list of issues then available. Directions were given for the parties to attempt to reach agreement on the issues to be determined, with any dispute to be resolved at this CMC. The court was clear in its judgment that the date and time estimate for the first stage trial would be reviewed at this CMC, once the scope of the issues had been clarified.
33. The claimants' position is that the current date for the first stage trial should be maintained. Even if issues 13 and 15 are included, and geotechnical and licensing evidence required, it is common ground that the parties would require a trial period of 10-11 weeks plus 1 reading week, particularly having regard to the removal of expert issues on causation. That could comfortably be fitted into the April 2024 hearing currently fixed, even if the start date were pushed back a bit.
34. As to the timetable to the hearing, Mr Choo-Choy submits that the following outline timetable proposed (excluding technical expert evidence) is workable and can comfortably be accommodated so as to meet the trial date:
 - i) disclosure if given on a rolling basis (as proposed by the defendants) could be completed by mid-December 2023;
 - ii) expert reports on Brazilian law and, if required geotechnical and licensing issues, could be prepared in tandem with disclosure, such that meetings could take place, joint statements could be prepared and reports could be exchanged by mid to late December 2023;
 - iii) factual witness statements could be served by the end of January 2024 / mid-February 2024;
 - iv) a PTR could be held in March 2024;
 - v) the first stage trial could commence on 9 April 2024 or, if a short adjournment is needed to accommodate further expert evidence, in early May 2024.
35. The claimants oppose any postponement of the first stage trial date so as to accommodate participation by Vale, the Part 20 defendant, on the basis that this would result in otherwise unnecessary delay to the trial of at least fourteen months, causing serious prejudice to the claimants, who suffered loss and damage more than seven years ago. A large proportion of them are individuals of limited means; many have had their livelihoods destroyed; many are very elderly; many have hitherto received no compensation or very limited compensation in Brazil and have brought proceedings in this jurisdiction for that very reason. The claimants have already had their claims delayed by several years as a result of the defendants' unsuccessful jurisdiction and strike out applications. As this court noted at the directions hearing in December of last year, given the previous history and the staleness of these proceedings, there is a need to avoid further delay. The claimants submit that these considerations alone should be sufficient to dispose of the defendants' adjournment application.
36. Further, the claimants submit that the defendants have caused delay by not seeking to join Vale to the proceedings until recently; as long ago as November 2019 they stated

that they were contemplating a claim against Vale in the event that their jurisdiction challenge failed but, despite the Court of Appeal decision in July 2022, they waited until December 2022 to issue the Part 20 claim. Any adjournment to accommodate Vale's participation could serve no purpose: its jurisdiction challenge could succeed (or the claim could be stayed for arbitration); and it could be some considerable time before any such issues are finally disposed of, particularly if there are any appeals.

37. Finally, the claimants argue that there is no real prejudice to the defendants if it is necessary for the court to order a separate trial for the claim against Vale. The defendants will still be able to pursue Vale, the risk of duplication of evidence and costs is of limited significance when viewed against the overall size of the litigation and the risk of inconsistent findings is remote.
38. The defendants' position is that the first stage trial should be adjourned to Trinity term 2025. Relevant background factors that the court should take into account are the very high value of the litigation, estimated by the claimants to be about £36 billion; the very large size of the group action, now involving 720,000 claimants; and the complex issues of fact and law raised by the claims. Postponement of the first stage hearing is justified on two separate grounds, namely: (i) the timetable proposed by the claimants is too compressed and unworkable; the parties need more time to prepare adequately for the hearing; and (ii) the Part 20 proceedings are so closely connected with the main claim that they should be case managed and heard together; Vale has failed to engage on the issues or timetable pending its forthcoming jurisdiction challenge hearing in July 2023 and would be unable to participate in a trial in April 2024.
39. The defendants' application for postponement of the first stage trial is supported by the seventeenth witness statement of Mr Efstathios Michael of Slaughter and May, dated 14 March 2023. Mr Michael explains that the defendants' legal team is adequately resourced for the scale of the litigation but there is simply insufficient time to prepare for a trial in April 2024, particularly given the need for expert evidence, and it would put the parties under too much pressure. The burden of disclosure will fall primarily on the defendants. The defendants have agreed to provide initial disclosure by way of 106,000 documents already disclosed in proceedings against them in New York (now settled) and Australia, together with sets of minutes and meeting materials for various Samarco Committees and Subcommittees for the period 8 August 2012 to 5 November 2015. However, a number of disclosure matters have not yet been finalised. The parties have agreed Model D disclosure but the DRD issues are widely drawn, the agreed date range is 2008-2016 and there are a large number of custodians. An initial review by the defendants' solicitors indicates that there are millions of documents in the pool for review and search terms have not yet been agreed. Even with the benefit of technological assistance, it is a very substantial undertaking. The defendants have proposed that disclosure should be given in tranches but they consider that it will take until the end of this year to complete the exercise.
40. Mr Michael explains in his witness statement that there are difficulties in obtaining witness statements because a number of relevant individuals are subject to ongoing criminal proceedings in Brazil and are unavailable or unwilling to provide evidence in these proceedings. Although preparation can start following pleadings, it is unrealistic for the claimants to expect witness statements to be prepared prior to the conclusion of disclosure.

41. The parties have agreed that permission should be sought for up to three experts for each party on Brazilian law. The defendants are not yet in a position to identify the other issues on which expert evidence is needed, in particular, prior to the service of Vale's defence, but it is likely that expert evidence will be required in respect of geotechnical and licensing issues. The expert reports, including the Brazilian law expert reports, need to be informed by the facts relevant to the expert issues. Therefore, the claimants' suggestion that expert reports should be produced in advance of disclosure or factual witness statements is not appropriate. In summary, the defendants' position is that the claimants' timetable is too compressed and unworkable.
42. The defendants seek an adjournment of the first stage trial to 2025 to ensure that Vale can participate in the same. They reject the claimants' criticism levied at them for the timing of the Part 20 claim against Vale, which was issued when they served their Defence. Reliance is placed on the overriding objective in CPR 1.1, CPR 20.1, which provides that the purpose of Part 20 is to enable counterclaims and other additional claims to be managed in the most convenient and effective manner, and CPR 20.13, which provides that, when giving directions in relation to an additional claim, the court must ensure that, so far as practicable, the original claim and all additional claims are managed together.
43. Ms Fatima submits that there is an obvious overlap between the main claim against the defendants and the additional claim against Vale. Vale was the other joint venture partner in Samarco, the owner of the dam and, therefore, was in a similar position to the defendants. If, contrary to their defence, the defendants are held liable to the claimants, then Vale is liable to the claimants on the same, or very similar, factual and legal bases. The causes of action based on Brazilian law against the defendants would be the same as those against Vale and there would be significant overlap in relation to the Brazilian law evidence on the limitation issues that would arise in both claims. The factual allegations made by the defendants against Vale are the same, or very similar, to those made by the claimants against the defendants, particularly regarding allegations of control of Samarco and knowledge of the risks relating to the collapse of the dam. It is likely that the same defences will be deployed in both the main claim and the additional claim.
44. It is said that given the overlap in the threshold liability issues included in the first stage trial, and the prejudice that the defendants would suffer by two trials on the same issues and the risk of inconsistent findings, it is desirable that they should be managed and tried together.
45. Vale's position is that it is entitled to refuse to engage on the substance of the claim prior to resolution of its jurisdictional challenge, listed on 12 and 13 July 2023, and any determination of that issue will be too late for Vale to participate in the first stage trial if heard in April 2024. Mr Salzedo KC, leading counsel for Vale, submits that even if Vale were to begin immediately with preparations for the first stage trial, it would still be impossible for it to participate because it has not been kept updated regarding the changes to the claimants' case, the other parties agree that there is insufficient time for Vale to be ready for a trial in April 2024 and the claimants do not consider it necessary or desirable that Vale should participate in that trial. Further, if Vale's jurisdiction application (and any arbitration application) fails, it intends to bring its own Part 20 claim against BHP Brasil, the other 50% shareholder of Samarco. It would be appropriate for the defendants' claim against Vale and Vale's claim against BHP Brasil

to be determined together but it is unlikely that BHP Brasil would be ready to participate in a trial in April 2024.

46. Mr Eschwege KC, leading counsel for Vale, submitted that the court is not in a position to make any assumption about Vale's participation in the trial, or require it to co-operate with the other parties on procedural directions, pending determination of the jurisdiction challenge. The defendants and Vale have agreed the terms of the order that preserves Vale's jurisdiction challenge.

Date for first stage trial

47. In considering the date for the first stage trial, I keep in mind the principles of the overriding objective in CPR 1.1, requiring the court to deal with cases justly and at proportionate cost. As Mr Salzedo succinctly stated, the court must balance the needs of the claimants, who want an early resolution of their claims; the needs of the defendants, who want adequate time to prepare for the first stage trial and the opportunity to include relevant Part 20 issues; and the needs of Vale, who wants a determination of its jurisdiction challenge before taking steps in the Part 20 proceedings.
48. The starting point for the court is to consider whether the current date for the first stage trial is feasible, having regard to a procedural timetable that is reasonable and proportionate to the circumstances of the case.

Disclosure

49. Mr Sloboda, counsel for the defendants, correctly emphasises that the task of disclosure is substantial in this case, having regard to the period of time over which material documents will have been produced in connection with the design, construction and extension of the dam, operation of the dam, including assessment of the risk of collapse, and the controlling shareholder issues. The nature of the claims is such that, as submitted by Mr Sloboda, the defendants will bear most of the burden of disclosure.
50. The parties have agreed that the initial tranche of disclosure, comprising documents disclosed in the US and Australian proceedings, should be given by the defendants by 28 April 2023, save for a small number of documents that are subject to review for privilege, in respect of which any further disclosure will be given by 19 May 2023.
51. The claimants seek an order for early disclosure of documents on which each party relies and all documents which are known to be adverse at that date. However, paragraph 5.4(3) of Practice Direction 57AD does not require a party to disclose adverse documents by way of initial disclosure and the above agreement as to initial disclosure is reasonable and proportionate at this stage.
52. There has been a substantial amount of agreement between the parties since the start of the CMC hearing in March 2023 but there remain outstanding disputes regarding the list of disclosure issues, date range for searches, custodians and search terms.
53. The list of issues in the Disclosure Review Document ("DRD") are largely agreed, as set out in the DRD dated 18 April 2023; the only outstanding matters are Issues 1(b) and (c) and Footnote 6.

54. Issue 1 in the DRD is concerned with the question whether the defendants exercised control over Samarco. Issue 1(A) is agreed:

“What was the defendants’ role in the selection or appointment of BHP affiliated persons on the Samarco Board and/or Samarco Committees and/or Subcommittees?”

55. Issues 1B and 1C proposed by the claimants are not agreed:

“1(B). What were the actual reporting lines that were formally established between (i) appointees to the Samarco Board and the defendants; (ii) BHP affiliated persons appointed to Samarco Committees and subcommittees and the defendants; and/or (iii) BHP affiliated persons who attended Samarco Board meetings and the defendants?”

1(C). What were the responsibilities and functions formally assigned to BHP affiliated persons on the Samarco Board and or Samarco Committees and/or Subcommittees?”

56. Mr Sloboda reasonably objects to issues 1(B) and 1(C) on the ground that they are unclear and too wide, particularly having regard to issues 2 and 3 that raise more focussed questions concerning the defendants’ participation or influence in decisions relating to safety and risk management, operation, production and costs at Samarco. It is sufficient for the claimants to have disclosure of documents in response to the specific question at 1(A). The defendants have indicated that if the claimants want specific categories of documents in respect of issues 1(B) and 1(C), such as organisational charts, this is unlikely to be opposed. In the claimants’ further note dated 21 April 2023 they agreed that these issues should be deleted and they would raise Model C requests.

57. Footnote 6 proposed by the claimants is as follows:

“In all of the claimants’ proposed issues for disclosure, references to knowledge or awareness of particular matters extend to constructive knowledge of such matters (i.e. whether the defendants should have known of the relevant matters in all the circumstances of the case).”

58. I accept Mr Sloboda’s submission that the defendants could not sensibly search for documents that demonstrate constructive knowledge. It is a matter for argument and deduction based on documents that would respond to the issue of actual knowledge. This footnote should be deleted.

59. The date range for searches initially agreed by the parties was 1 January 2008 to 31 December 2016. The claimants have suggested that this should be reduced in scope to start from 1 January 2011 but the defendants object. The RAMPOC makes allegations as to the adequacy and/or risk of liquefaction associated with the original design and construction of the dam which occurred in 2008. On that basis, it is likely that there are documents from 2008 that support or undermine the claim and defence. The original date range agreed of 1 January 2008 to 31 December 2016 should be maintained.

60. The position of the claimants on the appropriate custodians for inclusion in section 2 of the DRD is a moving feast but the court has reached a conclusion on the following matters. The starting point is the list of 29 custodians listed by the defendants, including 27 custodians in the US proceedings together with 2 additional custodians referred to in the RAMPOC, which the court considers to be a sensible selection. The disputes concern (a) individuals involved in the post collapse investigation; (b) individuals holding a risk or audit function; and (c) individuals that the claimants wish to swap in and out of the list.
61. It is said by the claimants that document searches should extend to one year after the dam collapse but should include individuals who were directly involved in the investigation into the collapse because their documents could include material identifying any failures. The claimants have proposed Lindsay Maxsted, John Schubert and Malcolm Brinded. The defendants object to the inclusion of these individuals on the basis that Jacques Nasser, who sat on the post collapse committee, has already been included in the list of custodians. I consider that it is sufficient to include as a custodian one of the members of the post collapse committee, as all relevant papers, notes and discussions should be found through that custodian. Therefore, the additional three custodians are unnecessary.
62. The claimants also seek to add as custodians those individuals in senior positions of responsibility in the risk and audit departments, namely:
 - i) Max Wetzig (BHP group risk assessment and assurance);
 - ii) Christian Guzman (BHP audit manager);
 - iii) Carlos Villalobos (BHP's senior manager of technical audits);
 - iv) Brett Swayn (BHP iron ore vice president of health, safety, environment and community); and
 - v) Chris Corless (BHP head of risk and governance for iron ore).
63. I consider that the claimants have made out a good case for including all of the above individuals as custodians. They have identified the position held by each individual and Appendix 2 to the claimants' first CMC skeleton argument establishes their involvement in risk assessments of the dam prior to its collapse. Therefore, they should be included.
64. The claimants seek to remove some of the custodians previously listed by the defendants and to add others. Their justification for removing custodians is to reduce the overall scope of searches. However, the previous list was based on the custodians identified in the US litigation and has been agreed for some time (the only issue being whether any more custodians should be added). Further, the initial disclosure that the defendants have agreed to give will already include material disclosure from those individuals; therefore, removing them from section 2 of the DRD will not in practice remove them from the scope of disclosure. They should remain on the list of custodians.
65. As to the additional names identified:

- i) Wagner Alves, an employee of BHP and then Samarco, is referred to at paragraph 130 of the RAMPOC; as such, he is an appropriate custodian and the defendants do not object to adding him back in;
 - ii) Mike Henry (GMC member and president of HSEC, marketing and technology between 10 May 2013 and 31 December 2014) is not necessary because his successor, Dean Dalla Valle, who is already included, sat on the GMC during period covered by Mr Henry;
 - iii) Alistair Mytton (head of group risk assessment and assurance between July 2013 and 31 December 2016) is not necessary because the court has already ordered the inclusion of other risk assessment custodians as set out above;
 - iv) the unnamed iron ore business risk and audit member is not necessary because the court has already ordered the inclusion of other risk assessment custodians as set out above.
66. The parties are in the process of agreeing key word search terms and do not require the court to determine any issues at this stage. They will update the court by the end May 2023 if they have reached agreement or need a further hearing.
67. The parties have agreed that Models A/B should be used by the claimants and Model D should be used by the defendants. There is also now a measure of agreement that disclosure could be given in tranches. The court considers that extended disclosure should be provided in tranches on the following dates:
- i) 1 September 2023;
 - ii) 13 October 2023; and
 - iii) 27 November 2023.

Witness statements

68. This is a case in which much of the evidence will be contained in documentary evidence. It is therefore appropriate that the factual witnesses should have an opportunity to read material documents as disclosed prior to finalising their witness statements. I recognise that the defendants have some difficulty in obtaining witness statements from individuals who are the subject of, or involved in, criminal proceedings in Brazil. However, there is sufficient time for the defendants to identify appropriate individuals who can give factual witness evidence for the purpose of the first stage trial.
69. The court considers that the parties should serve and file factual witness statements, together with any notices to rely on hearsay evidence, by 2 February 2024.
70. Permission is granted to the parties to serve and file supplemental witness statements that are responsive by 1 March 2024.

Expert evidence

71. The parties are agreed that each party should be given permission for up to three Brazilian law experts to cover questions of liability, standing, limitation and settlement as set out in the list of issues for the first stage trial.
72. Although the Brazilian law experts should be in a position to start preparing their reports based on the pleaded issues and list of issues for the first stage trial, I accept the defendants' submission that they should have an opportunity to consider the material documents and factual witness evidence before finalising the reports, so as to ensure that their opinions are directed at the relevant factual scenario.
73. As set out above, I consider that geotechnical expert evidence is likely to be required, based on potential issues in the pleadings.
74. There is a dispute between the parties as to whether licensing expert evidence is required for the purpose of the first stage trial. The licence point arises on the pleadings as follows:
 - i) In paragraphs 177-182 and 202 of the RAMPOC, the claimants set out their case as to the defendants' knowledge and involvement in the operation of the dam, including matters that gave rise to a risk to the stability of the same.
 - ii) At paragraphs 206(14)(e) and 231(2) of the Amended Defence, the defendants rely on the renewal of Samarco's operating licence, together with the fact that a licence was successfully obtained by Samarco to raise the elevation of the dam in support of its position that the Board of Directors' decision to approve the elevation was reasonable.
 - iii) At paragraphs 89-91 and 103 of the Amended Reply, the claimants allege that Samarco's operating licence and the licence to raise the dam were obtained on the basis of material misrepresentations and non-disclosures to the licensing authority, Supram.
75. The defendants' position is that the matters above require expert evidence to be adduced regarding the licensing regime, the requirement to disclose information, the materiality of any non-disclosures and the impact of the same on decision-making. The claimants' position is that they have deleted paragraphs 89.3 and 89.4 of the Amended Reply regarding alleged disclosure obligations under the licensing regime; also paragraphs 89.6 and 91.3, stating what would have happened if proper disclosure had been made. On that basis, it is said that licensing expert evidence is not required for the first stage trial and the defendants have not identified the licensing expert issues on which evidence would be needed.
76. Having regard to the pleadings on this point, there is a potential issue as to the licensing regime, what information should have been provided by Samarco and what impact any such information would have had on the renewal or grant of the material licences. It would be sensible for the court to build into the directions provisions for any licensing issues to be defined and for the experts to produce a joint statement on those issues. However, the issues are relatively narrow and are unlikely to impact significantly on the overall scope or duration of the first stage trial.

77. CPR 35.1 provides that expert evidence shall be restricted to that which is reasonably required to resolve the proceedings. Although the court's permission is not generally required to instruct an expert, the court's permission is required before an expert's report can be relied upon or an expert can be called to give oral evidence (CPR 35.4).
78. The parties have not yet identified specific experts or the questions on which any geotechnical experts or licensing experts would be required to give evidence. The claimants raise a valid point that the defendants have not yet pleaded any positive alternative case on geotechnical issues. The defendants have explained that they will not be able to identify the scope of the technical defences until Vale has pleaded its defence to the Part 20 claim (or Vale's jurisdictional challenge succeeds).
79. The court will not give permission to the parties to adduce expert evidence until the expert issues have been defined. Therefore, the following timetable will be directed:
- 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.
 - iv) By 16 February 2024 the experts of like disciplines shall prepare and file a joint statement in accordance with CPR 35.12, setting out those issues on which they agree and those on which they disagree, with a summary of their reasons for disagreeing.
 - v) By 15 March 2024 the experts shall file and exchange their reports, limited to the expert issues remaining in dispute.
 - vi) By 12 April 2024 the experts shall file and exchange any supplemental report on which they intend to rely.

Date and estimate for first stage trial

80. It is evident from the above timetable that a first stage trial in April 2024 is not feasible. Although in theory it would be possible to fit in a pre-trial review in late April 2024 and start the first stage trial in May 2024, the suggested alternative date proposed by the claimants, it would be too tight and would not allow for any slippage. That would not be a sensible timetable to fix at this stage, given the size and complexity of the case.
81. The question then arises as to an alternative date for the trial. Naturally the claimants want to resolve their claims as quickly as possible. The dam collapse occurred more

than seven years ago and they seek compensation from those they hold responsible. As against that, it is of note that most of the claimants did not commence proceedings in this jurisdiction until 2023 and therefore are not in a position to demand an early trial. The defendants are entitled to a reasonable time to prepare their response to the allegations and their evidence in defence. Even breaking the trial into stages, this is a very substantial piece of litigation. However, it is clear that investigations and proceedings arising out of the dam collapse, involving the defendants, have been ongoing since 2015 in other jurisdictions, together with the jurisdiction challenge in this jurisdiction. Therefore, the defendants have had a long period of time in which to assess the merits of their defence and collect evidence. It is difficult to make any assumptions as to the part Vale (or any other Part 20 defendant) might play in the first stage trial until the jurisdiction challenge has been resolved. Obviously, if the jurisdiction challenge were to succeed, Vale would have no further role in the litigation. If the jurisdiction challenge were to fail, it is likely that Vale would be affected by the issues in the first stage trial and should be given an opportunity to catch up so that it could participate. However, it would not be appropriate for the court to manage this large, heavy litigation around Vale or any possible appeals; regard must be had to the needs of the other parties, together with other court users, and to efficient and cost-effective case management.

82. Balancing all the relevant factors in these proceedings, the sensible course of action is to postpone the first stage trial from April 2024 and to fix a later trial in the Autumn of 2024. That will give the parties a more relaxed, achievable timetable and will provide time for Vale and others to participate if necessary.
83. For the above reasons, I direct that the date for the first stage trial will be revised to 7 October 2024 with an estimate of 11 weeks, to include 1 week of judicial reading.
84. The PTR shall be fixed on a date in June 2024, with an estimate of 2 days. The parties should liaise with TCC listings to obtain a suitable date, which should be inserted into the order for directions.

Master Schedule

85. The parties have agreed that by 14 July 2023 the claimants will file and serve an updated version of the Master Schedule with corrections. Thereafter, the parties will seek to agree a suitable timetable for resolving any outstanding disputes.
86. The Master Schedule will be re-served by solicitors for the claimants at quarterly intervals, from 1 December 2023 onwards.

Costs sharing

87. The terms of the draft costs sharing order have been agreed by the parties and approved by the court.

Funding application

88. Mr Mallalieu KC, leading counsel for the claimants, explained that the ATE policies are now in place, issued in the name of Pogust Goodhead, backed by undertakings as

set out in Annex A to the claimants' draft order. The parties have agreed the terms of the order and undertaking. On that basis, the court approves the arrangements.

Litigation friend

89. The claimants seek the appointment of Ms Karin Kässmayer, a Brazilian qualified lawyer specialising in environmental law, as a professional litigation friend pursuant to CPR 21.6 to conduct proceedings for the child claimants, at least until the end of the first stage trial.
90. The defendants take no position on this application.
91. CPR 21.4(3) provides that a person may act as a litigation friend if they (a) can fairly and competently conduct proceedings on behalf of the child or protected party; (b) have no interest adverse to that of the child or protected party; and (c) where the child or protected party is a claimant, undertake to pay any costs that the claimant is ordered to pay, subject to any right to be repaid from the assets of the child or protected party.
92. Ms Kässmayer satisfies the above test and has indicated that she is willing and able to act as a litigation friend. On that basis, the court approves the appointment and approves the terms of the appointment included in the claimants' draft order.

Further Directions

93. The parties are invited to draw up a revised composite order reflecting the above matters and submit it for approval when agreed, or for the resolution of any outstanding issues.
94. The court will hear the parties on all consequential matters arising out of this judgment, including any further submissions on any additional directions required.