Neutral Citation Number: [2021] EWHC 146 (TCC)

Case Nos: E50LV008;
E50LV010;
HT-2019-LIV-00005

IN THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT
QUEEN'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS LIVERPOOL SITTING IN MANCHESTER
IN THE MATTER OF THE FUNDÃO DAM DISASTER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2021

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

MUNICÍPIO DE MARIANA — **Claimant**

(and the Claimants identified in the Schedules to the Claim Forms)

- and -

(1) BHP GROUP PLC — **First Defendant**
(formerly BHP BILLITON PLC)
(2) BHP GROUP LTD — **Seventh Defendant**

- -
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Charles Hollander QC (before August 2020), Graham Dunning QC (after August 2020), Nicholas Harrison, Jonathan McDonagh, Zahra Al-Rikabi, Elizabeth Stevens, Ibar McCarthy, Gregor Hogan, Anirudh Mathur and Russell Hopkins
(instructed by **PGMBM a trading name of Excello Law Limited**) for the **Claimants**

Charles Gibson QC, Shaheed Fatima QC, Daniel Toledano QC, Nicholas Sloboda, Maximilian Schlote, Stephanie Wood and Veena Srirangam
(instructed **by Slaughter and May**) for the **Defendants**

Hearing dates: 22, 23, 24, 27, 28, 29, 30, 31 July 2020
Further written submissions: September - December 2020

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JUDGMENT

The Hon Mr Justice Turner :

INTRODUCTION

1. The claims in this case were brought by some 202,600 individuals and corporate entities each of which is alleged to have suffered loss as a result of the collapse of the Fundão dam in Brazil on 5 November 2015. It is believed (at least in terms of the number of parties involved) to have been the largest action ever brought in an English court.

2. On 9 November 2020, I acceded to the defendants' application to strike out all of these claims on the ground that they amounted to an abuse of the process of the court. The full background to the litigation is set out in paragraphs 15 to 46 of the substantive judgment to be found at ***Município De Mariana & Ors v BHP Group Plc & Anor*** [2020] EWHC 2930 (TCC) and no purpose would be served by rehearsing that narrative here.

3. That decision has generated a number of ancillary issues between the parties relating to permission to appeal and costs which it is the purpose of this judgment to resolve. It had not been my original intention to set out my reasons for refusing permission to appeal in a formal judgment but, having received representations from the parties on this matter, I was satisfied in the particular circumstances of this case that there may at least be some merit in adopting this unusual course.

PERMISSION TO APPEAL

4. As a general rule, an application for permission to appeal made to the judge whose decision is sought to be challenged leads to that judge filling in Form N460 which provides space for: "Brief reasons for decision to allow or refuse appeal". However, in cases of particular complexity, the Court of Appeal has recently encouraged first instance judges to descend into greater detail. As Floyd LJ observed in ***Teva UK Ltd v Boehringer Ingelheim Pharma GmbH & Co KG*** [2016] EWCA Civ 1296:

> "13…This court will always be assisted, therefore, if the judge takes the time to give full reasons for refusing permission, as Morgan J did in this case."

I am entirely satisfied that this is a case the circumstances of which justify (and, indeed, require) the provision of fuller reasons than would generally be considered to be appropriate in response to an application for permission to appeal. I fully recognise that it will only very rarely be proportionate for

a judge at first instance to embark upon as lengthy a consideration of the question of permission to appeal as appears in this judgment. There are, however, particular features of this case which I believe validate this approach.

5. Importantly, whilst fully acknowledging that the nature and scale of these claims were always bound to generate some level of complexity in this litigation, I have to say that much of the morass of detail which this Court has had to consider is the product of chronic forensic hyperactivity.
6. I made no secret of my concerns in this regard in my substantive judgment:

> "7. These features, however, go only some way towards justifying the accumulation of huge swathes of documentation. The trial bundles comprise 2,085 items set out in 30,015 pages which have been "distilled" into no fewer than five core bundles. There are nine further bundles containing 127 authorities. The defendants' skeleton argument was 187 pages long and was the product of the collective endeavours of three leading and four junior counsel. The claimants, not to be outdone, deployed a skeleton argument which was 211 pages long and, by the end of the hearing, had been supplemented incrementally by no fewer than 22 appendices the steady flow of which gave rise to a growing frisson of resentment on the part of the defendants. Submissions lasted for eight full days and have been recorded in a transcript which is about 1,200 pages in length."

7. Perhaps it would have been naïve of me to have expected that these observations might have had some, at least modest, impact on the conduct of this litigation thereafter.

8. Even if the claimants had reached the view that my concerns had been idiosyncratically over-stated, they still had, at least, the benefit of the more authoritative requirements of para 5 of PD52C which provides:

> "**Grounds of Appeal**
>
> 5(1) The grounds of appeal must identify as concisely as possible the respects in which the judgment of the court below is –
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity, as required by rule 52.21(3).

> (2) The reasons why the decision under appeal is wrong or unjust must not be included in the grounds of appeal and must be confined to the skeleton argument."

9. I do not understand how it could possibly have been thought that the draft grounds of appeal now before me could be considered to be compliant with the Practice Direction. The draft relied upon comprises no fewer than 70 paragraphs spread out over 39 closely typed pages. This is the very antithesis of the conciseness required by the Practice Direction. Furthermore, the document is replete with material which is plainly intended to be excluded under para 5(2) of PD52C.

10. As Nugee J (as he then was) observed in ***Les Grands Chais de France SAS v Consorzio di Tutela della Denominazione di Origine Controllata Prosecco*** [2020] EWHC 1633 (Ch):

> "33. The Appellant's Grounds of Appeal is a long and diffuse document (running to 11 pages and 44 paragraphs) and does not identify separate numbered grounds in the usual way. The Practice Direction governing appeals to the Court of Appeal (Practice Direction 52C) provides that the Grounds of Appeal must identify as concisely as possible "the respects in which" the judgment of the Court below is wrong (or unjust because of a serious procedural or other irregularity), contrasting this with "the reasons why" the decision under appeal is wrong (or unjust), and expressly provides that the latter must not be included in the Grounds of Appeal and must be confined to the skeleton argument (PD 52C para 5(1), (2)). That makes it clear that the purpose of the Grounds of Appeal is to identify the grounds relied on, not argue them.
>
> 34. … The Grounds of Appeal should therefore in my judgment be a short document concisely identifying (and numbering) the separate grounds relied on in support of the appeal; it should not develop or argue the Grounds which is a matter for the skeleton argument."

11. The claimants' approach in this case does not amount to a matter of mere formal procedural non-compliance. Their bloated draft grounds serve only to obfuscate rather than to illuminate what they may perceive to be the merits of their challenge. This, in turn, gives rise to the risk that a judge, whether at first instance or on appeal, may be persuaded to give permission to appeal not through a focussed analysis but having been worn down by a process of relentless documentary attrition. With draft grounds of this length, combined the benefit of bitter experience, I am not optimistic that any greater self-restraint will be exercised in the drafting of any future skeleton arguments.

12. In this context, the defendants have sought to argue that what they have described as the "over-optimistic approach" of the claimants' legal team with respect to this application may best be explained as a means by which they hope to sustain the continued loyalty of the claimants to this litigation in the demoralising face of my adverse substantive judgment. It is to be noted in this context that, long before the hearing before me had even commenced, no fewer than 37,000 claimants have either been double counted or appear already to have lost interest in pursuing their claims without giving any notice, formal or otherwise, of their intention so to do.

13. The defendants, in the ninth witness statement of Efstathios Michael, have drawn the attention of the Court to the following:

> "27…the following public statements have been made by Mr Goodhead of PGMBM, who has responsibility for the conduct of these proceedings on behalf of the Claimants. Mr Goodhead has, since the Judgment was handed down, said the following in numerous press articles and public statements:
>
> (1) "the decision is fundamentally wrong and ignored basic British and European laws.";
>
> (2) "this is a shameful misrepresentation of the situation…we are carefully studying the decision and we are all of the same opinion: that it is extremely likely that our appeal will be successful";
>
> (3) "this [Judgment] is an abuse and an insult to the affected parties. We will appeal immediately… We will sue them (BHP) until the end of the world";
>
> (4) "what amazed us was how the judge let himself be confused by the artifices of BHP Billiton's lawyers… It was a very flawed proceeding, which undermines 30 years of precedents and practice in the English courts"; and
>
> (5) "BHP's legal chicanery…has resulted in a fundamentally flawed judgment that we intend to appeal immediately…we are overwhelmingly confident that it will be overturned... BHP have arrogantly and disgracefully labelled this litigation as 'pointless and wasteful'".

14. Doubtless, the defendants would seek to argue in this context that the audience to which the draft Grounds of Appeal are more comfortably directed is the claimants themselves (or future potential claimants) as part of an unsubtle recruitment and retention initiative rather than to this Court.

15. This is not a point upon which it would be helpful for me to adjudicate. I do, however, consider that Mr Goodhead's public accusation that the defendants were guilty of "legal chicanery" in either the formulation or presentation of their arguments before me is, even putting the matter at its lowest, both extremely regrettable and entirely without substance. I will assume, in his favour, that Mr Goodhead did not fully understand what the word "chicanery" means before he chose to deploy it.

16. Nevertheless, for my own part, it is essential that I must stress that my adjudication on the application for permission to appeal and all other outstanding ancillary matters will remain uncontaminated by what Mr Goodhead has since acknowledged to have been his "somewhat hyperbolic" utterances. A judge responding to an application for permission to appeal his own judgment must be particularly sensitive to the perception that he is marking his own homework and, in this case, I wish to emphasise that my approach remains, as the parties are fully entitled to expect, entirely objective.

17. The fact remains, however, that, setting aside speculation as to the explanation for the tumidity of the draft grounds, my task and, I have little doubt (since this application to me for permission to appeal will be refused), that of one or more judges of the Court of Appeal has, as a result, been made far more time consuming than ought to have been necessary.

18. Against this background, and with the advantage of having heard eight days of oral argument at first instance, I will attempt to strike a balance between, on the one hand, descending into too much detailed analysis of the draft grounds and, on the other, failing to provide the Court of Appeal with a level of appropriate assistance when, in due course, it faces the task of considering the merits of the proposed appeal.

19. In ***A v G, N (by his guardian, CP)*** [2009] EWHC 2096 (Fam), it was unsuccessfully argued on behalf of the losing party that:

> "…experience shows that if you set out your detailed reasons for asking leave – effectively disclosing your intended grounds of appeal – then judges use that as an opportunity in Form N460 to embellish and add to their Judgments and to influence the Court of Appeal against the appellant. It is for the Court of Appeal to determine appeals and applications thereto for Leave to Appeal and in my submission the introduction of Form N460 was wrong because it allows the Judge under appeal to be effectively heard

> in the Court of Appeal via his response to a leave application in the lower court."

Although this contention was rejected by the court in that case, I am sensitive to the dangers of fuelling any adverse perception arising from the detail to which I have descended in my analysis of the draft grounds of appeal. My reasons for refusal are not to be construed as amounting to a rear-guard action to add to, embellish upon or shore up that which is already set out in the substantive judgment. Accordingly, I will aim to confine myself to relatively brief (and, I emphasise, by no means comprehensive) observations upon each draft ground. I will also strive to confine my response to this application to matters which have already been articulated within the judgment itself the reasoning behind which will and must remain unchanged and unqualified by what follows.

Abuse of Process

Ground 1: The Judge's overall approach to the Defendants' abuse of process application (paragraphs 47-145 of the judgment) was wrong in law and as a matter of principle.

20. It was both appropriate and convenient to address the issue of abuse of process before considering the Article 34 and forum non conveniens issues. There would have been no point in first determining whether the claims should be stayed on either of the jurisdictional grounds when a full review of all the circumstances was, as here, capable of driving the Court to the conclusion that the claims should, in any event, be struck out on abuse of process grounds. Indeed, it is to be noted, in this regard, that leading counsel for the claimants did not resist this approach when it was suggested to him during the course of the hearing and, so far as I can recall, raised none of the objections now articulated in the draft grounds.

21. More fundamental, however, is the point that, ultimately, the order in which these issues were addressed was immaterial to the outcome. The claimants lost on all of these issues as they would have done regardless of the sequence of analysis.

22. Of course, the Article 34 and forum non conveniens points gave rise to issues distinct both inter se and from those falling to be considered in response to the abuse of process application but this does not, and cannot, mean that the factual considerations relevant to the determination of each of such issues are mutually exclusive. In the event, the judgment deals with each of the issues discretely taking into account the respective factors material to their determination in each case.

23. The suggestion that analysis of the abuse of process application should have precluded consideration of any and all factors which may also have been material to the Article 34 and forum non conveniens points is unsustainable and contrary to well established authority. Paragraphs 79 – 86 of the substantive judgment deal with this point.

24. The judgment does not create a "novel form of abuse based on jurisdictional considerations" which "trump the rules under the Recast Brussels Regulation". On the contrary, the approach to the abuse issue is not merely consistent with but mandated by the observations of Lord Briggs in ***Lungowe and others v Vedanta Resources Plc*** [2020] A.C. 104 to which specific reference is made in paragraph 82 of the substantive judgment.

25. The judgment deals with all of the "basic undisputed facts" and "public policy considerations" which are now sought to be redeployed in the draft grounds of appeal. The complaint is expressly directed to "the relevant legal weight" to be attached to the same. Effectively, this is an invitation to the Court of Appeal to spend a further eight days entertaining submissions with a view to revaluating all of the arguments which were unsuccessfully deployed before me over the same timescale at first instance. As the Court of Appeal has repeatedly and recently emphasised, an appeal court should not be drawn into substituting its own views for those of the first instance judge where the task he or she was undertaking was in the nature of an evaluative assessment. There is no suggestion which I can decern from this or indeed any of the draft grounds that the judgment contains any error of primary fact as opposed to secondary inference. It would, in any event, have been wholly inappropriate for me to attempt to resolve any real and substantive issues of disputed primary fact in the context of an abuse of process application.

26. I observe, in passing, that under ground 1(b) e of the draft grounds the claimants are attempting to include a ground of appeal which has already been considered and rejected and which is dependent on the issue of the relative financial robustness of the Brazilian and English companies. Reference may be made in this regard to my separate judgment on this point: ***Município De Mariana v BHP Group Plc*** [2020] EWHC 2471.

27. The substantive judgment involved the consideration and application of the well-established authorities on abuse of process to the facts relevant to these claims. The claimants can be in no doubt from the robust and unambiguous terms in which I reached my conclusions that I considered that this was a clear and obvious case.

28. The claimants persist in asserting, without qualification, that it is a "fundamental principle that a claimant may choose whom to sue". This mantra, thus baldly stated, permeated the submissions made before me both orally and in writing and continue to form the bedrock of the draft grounds of appeal. It is plainly wrong for the reasons set out in paragraph 99 of the substantive judgment.

Ground 2: Insofar as he held that the proceedings should be struck out as an abuse of process because of the risk of irreconcilable judgments and the likelihood of "cross-contamination" of parallel proceedings in England and Brazil (paragraphs 79-120 of the judgment), the Judge erred in law, took into account irrelevant matters, proceeded on an incorrect factual footing and/or failed to take into account relevant matters.

29. There is no error of law involved in taking into account the risk of cross-contamination of parallel proceedings in the context of an abuse of process application. Reference may be made, once more, to paragraph 82 of the judgment.

30. The assertion that the judgment "proceeded on an incorrect factual footing" is unsupported by a single example of any error of primary fact. Once again, the claimants are attempting to re-run the arguments which failed at first instance by way of challenge to the evaluative judgment which was adverse to their case.

31. There could be no justification for drawing a distinction between those claimants which had already brought claims in Brazil and those which had not. As noted in the judgment, with but one exception, every claimant reserved the right in future to maintain parallel proceedings in both jurisdictions and, indeed, was encouraged to participate in the English litigation upon formal, written assurances from their solicitors that this would remain the case. Leading counsel for the claimants was not prepared to accede to the suggestion that the claimants should make any concessions on this position until, perhaps, they had already succeeded in resisting the defendants' applications (by which time, of course, the incentive to make any such concession would have all but evaporated).

Ground 3: Insofar as he held that the proceedings should be struck out as an abuse of process because of the disadvantages of proceedings in England as opposed to Brazil (paragraphs 108-114 of the judgment), the Judge erred in law and took into account irrelevant matters.

32. This ground overlooks the fact that my conclusion that the claims should be struck out as an abuse of the process of the court was one which I expressly reached *without* the need to consider the additional practical burdens which would be placed on the English courts. Paragraph 104 expressly confirms this to be the case.

33. In any event, the claimants' arbitrary and mechanistic attempt to divide the factors relevant to the issues of forum non conveniens and abuse of process into two hermetically sealed compartments is unsupportable and contrary to authority.

Ground 4: Insofar as he held that the proceedings should be struck out as an abuse of process because they would be unmanageable and/or because of the burden they would impose on the English court system (paragraphs 98-107 of the judgment), the Judge erred in law and in principle, took into account irrelevant matters and failed to consider relevant matters.

34. The Court is not only entitled but duty bound to consider, where relevant, the impact upon the courts of claims alleged to constitute an abuse of process. I do not know what authority, if any, the claimants seek to rely upon to establish their contention that such a consideration can only be taken into account where the court reaches its conclusion "at a glance" rather than upon following "any analysis". If, having undertaken a process of analysis, a court reaches a clear conclusion then the fact that a mere cursory glance might otherwise have left room for doubt is an unpromising ground for challenge.

35. Again, the claimants do not identify any errors of primary fact in the substantive judgment and the draft grounds of appeal amount to nothing more than complaints that the evaluative process involved in the Court's analysis should have given rise to a different conclusion.

Ground 5: Insofar as he held that the proceedings should be struck out as an abuse of process because it was clear that, whatever challenges were faced by Claimants in obtaining relief from other parties in Brazil, they would on balance face greater challenges in their proceedings in England (paragraph 121-135 of the judgment), the Judge erred in law, took into account irrelevant matters, failed to consider relevant matters and made findings that were not available to the Court on the material before it at an interlocutory stage on a strike out application.

36. I concluded, as a matter of secondary inference from the primary facts, that proceedings in England would not simply be extremely difficult, prolonged or expensive but "irredeemably unmanageable". This conclusion could be,

and was, reached independently of any consideration of the adequacy of the redress available in Brazil. Once, I had concluded that proceedings in England would be futile, the clear conclusion was that the continuance of those proceedings in the circumstances of this case would amount to an abuse. As it happens, my assessment, as set out in the substantive judgment, was that, in any event, the claimants' pessimism concerning the position in Brazil was significantly mitigated by a number of factors which I proceeded to identify.

37. It is to be noted in this regard that I also concluded that to allow the proceedings to progress in England would have a deleterious impact on proceedings in Brazil and make matters there worse rather than better.

38. It is undoubtedly the case that the defendants argued that "full redress" was available in Brazil but success on this contention was not a prerequisite to their success on the abuse of process issue.

39. The claimants contend that the analysis in the judgment purports to "second guess" the considerations which lay behind the decisions of the individual claimants to sue. The opposite is true. Paragraph 119 of the judgment makes it clear that I did not take into account the defendants' dark speculations concerning the motives of the claimants. My conclusions were based entirely upon an objective analysis of what the consequences of pursuing litigation in this jurisdiction would be rather than upon the motives lying behind it.

40. I deal with the chance of future settlement of the claims at paragraph 109 of the judgment.

Ground 6: Insofar as he struck out the proceedings on the grounds that the Claimants had taken a "tactical decision to progress closely related damages claims in the Brazilian and English jurisdictions simultaneously" (paragraph 141 of the judgment) or otherwise based on the principle in *Henderson v Henderson*, the Judge erred in law, proceeded on an incorrect factual footing, took into account irrelevant matters and/or failed to take into account relevant matters.

41. Paragraphs 126 and 127 of the substantive judgment provide full and uncontroversial details of the extent to which claimants have sought to achieve redress in England and Brazil simultaneously. Furthermore, paragraphs 94 and 95 correctly point out that the individual claimants had all been assured that bringing proceedings in England would not preclude them from pursuing parallel remedies in Brazil. There is no justification for

the suggestion that the judgment was based upon any misunderstanding of these undisputed primary facts.

42. As is clear from paragraphs 53 to 56 of the judgment, the so-called "rule" in ***Henderson v Henderson*** covers not just one but a broad range of considerations which are potentially relevant to the issue of abuse of process in any given case. They are not considerations which must be addressed separately from other relevant issues and, having thus been compartmentalised, fall either to be conclusively made out or, alternatively, discarded.

Ground 7: In striking out as an abuse of process the claims of the 58 large corporate and municipality Claimants who could not benefit from Renova or the 155bn CPA, which were by far the most valuable claims (paragraph 136-139 of the judgment), the Judge erred in law and took into account irrelevant matters.

43. The challenge to this finding is based on the unsustainable contention that, when considering an abuse of process argument, the court must close its eyes to the fact that, as here, conflicting developments in parallel jurisdictions would render the proceedings completely unmanageable. All of the 58 claimants here referred to have either made claims in Brazil or are, at least, entitled to make such claims. The fact that such claims do not fall within the parameters of the Renova programme or the 155bn CPA is, in this context, not determinative of the issue.

44. As is noted in paragraph 82 of the judgment, Coulson J (as he then was) held in ***Lungowe v Vedanta Resources Plc*** [2016] EWHC 975 (TCC):

> "84. In my view, in an appropriate case, and notwithstanding Owusu, the court must be able to exercise its case-management powers to grant a stay. The court remains the master of its own process and procedure, and it would be a very odd result if the court was obliged to do something that was contrary to good and sensible case management."

Article 34

Ground 8: In holding that there was a risk of irreconcilable judgments such as to engage his jurisdiction to grant a stay under Article 34, and in addressing the nature of any such risk (paragraphs 166-188 of the judgment), the Judge erred in law, proceeded on an incorrect factual footing,

took into account irrelevant matters and failed to take into account relevant matters.

45. This and all subsequent grounds of appeal fall for consideration only in the event that any of the claimants' challenges to the decision to strike out the claims for abuse of process are considered to have a real prospect of appellate success. I have concluded that they do not but, in case I am wrong, I will proceed to examine the remaining grounds.

46. The question as to whether a broad or narrow approach should be taken to the concept of "irreconcilable judgments" was not one which it was necessary for me to determine. I expressly concluded at paragraph 174 that, whichever approach were to be taken, the result would be the same.

47. In any event, for the reasons set out in paragraphs 166 to 174 of the judgment, I was and remain entirely satisfied that the broader approach is the correct one.

Ground 9: In holding that the actions were related actions and that the condition set out in Article 34(1)(a) was satisfied (paragraphs 159-163 and 166-200 of the judgment), the Judge erred in law, proceeded on an incorrect factual footing, took into account irrelevant matters and failed to take into account relevant matters.

48. Again, I am unable to discern from the draft grounds of appeal any example of an error of primary fact.

49. My reasoning on the significance of the dispute over the alleged status of BHP Brasil as an indirect polluter is to be found at paragraphs 87-89 and 174-181 of the judgment. The analysis is self-explanatory.

50. I recognised the tension between the ***Kolomoisky*** and ***EuroEco*** authorities in paragraph 194 of the judgment and concluded that the proper path was to follow the former which the latter did not seek to distinguish.

51. The claimants' contention that the analysis of Article 34(1)(a) should have incorporated a "value judgment" takes their case no further. Such a judgment inevitably forms an essential part of the court's assessment under the issue as to whether a stay is necessary for the proper administration of justice or in the exercise of discretion. The argument that the Court ought to have addressed such considerations in a different order, even if it were correct, makes no difference to the ultimate conclusion.

Ground 10: In failing to address the question whether it was "expected that the court of the third state will give a judgment capable of recognition" in England but holding that the condition set out in Article 34(1)(b) was satisfied because a Brazilian judgment in the 155bn CPA would be capable of recognition and enforcement in England (paragraphs 201-203 of the judgment), the Judge erred in law and failed to take into account relevant matters.

52. This ground is unarguable. There will almost always be a chance that extant proceedings in the court of the third state will conclude, by way of settlement, discontinuance or otherwise, without proceeding to judgment. Paragraphs 176-177 of the substantive judgment note the claimants' inevitable concession that the Brazilian court would, unless there were further developments, proceed to judgment on the issue of BHP Brasil's alleged status as an indirect polluter. My conclusion in paragraph 222 of the judgment, that the risk of inconsistent decisions was thus, at the very least, a real one was unassailable.

53. In these circumstances, the issue as to how likely the expectation of a judgment is to be fulfilled is relevant to the later exercise of discretion on the question of whether it is necessary in the interests of the proper administration of justice to grant a stay. It is in this context that I conclude that the risk of inconsistent judgments is a real one.

Ground 11: In holding that a stay was "necessary for the proper administration of justice" (Article 34(1)(c)) (paragraphs 204-232 of the judgment), the Judge erred in law, proceeded on an incorrect factual footing, took into account irrelevant matters, failed to take into account relevant matters and reached an objectively unreasonable decision.

54. Paragraphs 204-232 of the judgment set out my reasoning on this issue in detail.

55. Paragraph 206 of the judgment deals with the issue of the relationship between Article 34 and forum non conveniens. The position is correctly set out by the authors of chapter 11 of "The Brussels I Regulation Recast" referred to in paragraph 207 of the judgment and the claimants identify no authority in support of any narrower approach. Paragraph 210 makes express reference to the relevance of the broad purpose of Article 34 to avoid the risk of inconsistent judgments.

56. It was not essential that the determination of the 155bn CPA should create an issue estoppel in English proceedings. The central question is as to whether there arises a risk of inconsistent judgments and not whether the judgment of one state will be binding upon that of another. Paragraphs 184 to 186 of the judgment deal expressly with this issue but are not referred to in the draft grounds.

57. The chance that, regardless of the Court's adverse ruling on Article 34, there may still be irreconcilable judgments within the jurisdiction of Brazil itself does not preclude the Court from staying the claims in England. Paragraphs 210 to 214 of the judgment deal with this point.

58. It is inaccurate to contend that the judgment does not address the issue as to whether the Brazilian court could be expected to give a judgment within a reasonable time. Paragraph 225 expressly refers to the question of full and timely address in Brazil and refers back to paragraphs 121 to 133. Once I had reached the evaluative conclusion that, if the proceedings in England were allowed to continue, then they would not only prove to be irredeemably unmanageable in this jurisdiction but also, at the same time, have a severely negative impact on the further progress of proceedings in Brazil, it is impossible to see how facilitating such a consequence could have promoted the claimants' Article 6 rights in any shape or form.

Ground 12: In (provisionally) exercising his discretion to grant a stay of all the claims until the conclusion of the 155bn CPA (paragraphs 233-234 of the judgment), the Judge erred in law, proceeded on an incorrect factual footing, took into account irrelevant matters, failed to take into account relevant matters and reached an objectively unreasonable decision.

59. This ground takes the claimants no further. It is entirely parasitic upon the challenge to the correctness of my conclusion that that a stay is necessary for the proper administration of justice under Ground 11.

Forum non conveniens

Ground 13: In holding that even if the action was to continue in England against BHP plc, Brazil would remain the "natural forum" for the trial of the Claimants' claims against BHP Ltd under the first stage in the *Spiliada* test (paragraphs 239-241 of the judgment), the Judge failed to take into account relevant matters and reached an objectively unreasonable decision.

60. The grounds of appeal concerning the issue of forum non conveniens fall for consideration only in the event that any of the claimants' challenges to the

decision to strike out the claims for abuse of process are considered to have a real prospect of appellate success.

61. Furthermore, BHP plc could only be regarded as an "anchor defendant" for the purposes of the application of the first stage of the ***Spiliada*** test if it had failed to establish the risk of inconsistent judgments under Article 34.

62. Even if the anchor of BHP plc had not already been weighed by these findings, the risk of inconsistent judgments as between the two defendants in this litigation was, as I found, sufficiently attenuated to prevent it from becoming a decisive factor in my evaluative judgment. Again, this ground of appeal amounts to nothing more than an attempt to re-run the process of evaluation by seeking to fine-tune the weight to be given to individual undisputed primary facts.

Ground 14: In holding that the Claimants had failed to establish reasons by which justice required that a stay should not be granted under the second stage of the *Spiliada* test (paragraphs 243-259 of the judgment), the Judge erred in law, failed to take into account relevant matters or to evaluate the evidence before him, and took into account irrelevant matters.

63. The second stage of the ***Spiliada*** test, that "there are circumstances by reason of which justice requires that a stay should nevertheless not be granted", is necessarily framed in the broadest possible way.

64. As Lord Briggs observed in in ***Vedanta*** at paragraph 88 the question of whether or not there is a real risk that substantial justice will be unobtainable in the foreign jurisdiction, although generally treated as separate and distinct issue, it is not a free standing and determinative question. Of course, in very many cases it is likely to be so simply as a matter of practical reality.

65. The circumstances of the instant case, however, provide a working example as to why it is appropriate that the Court must be equipped to take the most flexible approach to the second stage of the ***Spiliada*** test. The central reasons are set out in paragraphs 248 and 249 of the judgment.

Ground 15: Insofar as the Judge held that he would grant a stay of the proceedings on case management grounds (paragraphs 260-263 of the judgment), he erred in law and failed to take into account relevant matters.

66. The judgment expressly recognises that if the defendant had lost on the first three grounds then there would be no residual merit in their case management grounds.

CONCLUSION ON PERMISSION TO APPEAL

67. Although the draft grounds are many and various, it may assist to identify from the substantive judgment, by way of conclusion, the point of central importance to which all other considerations are of secondary significance.

68. This is to be found at paragraph 104 of the judgment:

> "In all the circumstances, I am entirely satisfied that these claims would be not merely challenging but irredeemably unmanageable if allowed to proceed any further in this jurisdiction."

69. It may be thought impossible (certainly in the circumstances of this case) to conceive of a situation in which the pursuance of "irredeemably unmanageable" proceedings could be categorised as anything other than an abuse of the process of the court.

70. That central finding comprised an evaluative judgment reached after a very thorough consideration of vast quantities of documentary evidence and following eight days of oral argument. I do not see how the claimants can begin to establish that this conclusion was wrong when applying the narrow and well-established parameters within which appellate interference in such cases is permissible.

71. If the claimants are unable to surmount this hurdle then they can entertain no reasonable hope to establish that they have either a real prospect of appellate success or that any other compelling reason arises for an appeal to be heard. In particular, all arguments relating to the application of Article 34, forum non conveniens and case management thereafter fall away as being of no practical relevance.

COSTS

72. Three issues arise for determination:

    (i) Are the defendants entitled to an order that the claimants should pay all or, alternatively, only a proportion of the costs of the action?

    (ii) What sum should the claimants be ordered to pay on account of such costs?

(iii) What disclosure should the claimants be ordered to make regarding the funding of the litigation?

73. I propose to deal with each in turn.

THE COSTS ORDER

74. The claimants concede that the defendants are entitled to their costs of and occasioned by the action but contend that only 50% of these should be awarded on the grounds that the defendants have only succeeded on some but not all of the grounds they relied upon. The sums at stake are, potentially, very high. Subject to detailed assessment, the defendants total claim for costs incurred is in the sum of £16,066,947.64.

75. The claimants' stance is based on the contention that the defendants were not successful on all of the issues raised upon their applications. In this regard, and also with respect to the other issues relating to costs, I have considered carefully the matters set out in the tenth witness statement of Mr Goodhead the central points of which I will outline but the details which I will not repeat in this judgment.

76. The starting point is CPR 44(2) which provides insofar as is material:

> "44.2— Court's discretion as to costs
>
> (1) The court has discretion as to—
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs—
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order…
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful;…"

77. As to the proper approach to the application of these rules to the circumstances of any given case, the guidance given by Gloster J (as she then was) in ***HLB Kidsons v Lloyds Underwriters*** [2007] EWHC 2699 (Comm) requires no further embellishment:

> "10. The principles applicable as to costs were not in contention. The court's discretion as to costs is a wide one. The aim always is to "make an order that reflects the overall justice of the case" (Travellers' Casualty v Sun Life [2006] EWHC 2885 (Comm) at paragraph 11 per Clarke J). As Mr. Kealey submitted, the general rule remains that costs should follow the event, i.e. that "the unsuccessful party will be ordered to pay the costs of the successful party": CPR 44.3(2). In Kastor Navigation v Axa Global Risks [2004] 2 Lloyd's Rep 119, the Court of Appeal affirmed the general rule and noted that the question of who is the "successful party" for the purposes of the general rule must be determined by reference to the litigation as a whole; see paragraph 143, per Rix LJ. The court may, of course, depart from the general rule, but it remains appropriate to give "real weight" to the overall success of the winning party: Scholes Windows v Magnet (No 2) [2000] ECDR 266 at 268. As Longmore LJ said in Barnes v Time Talk [2003] BLR 331 at paragraph 28, it is important to identify at the outset who is the "successful party". Only then is the court likely to approach costs from the right perspective. The question of who is the successful party "is a matter for the exercise of common sense": BCCI v Ali (No 4) 149 NLJ 1222 , per Lightman J. Success, for the purposes of the CPR , is "not a technical term but a result in real life" (BCCI v Ali (No 4) (supra)). The matter must be looked at "in a realistic … and … commercially sensible way": Fulham Leisure Holdings v Nicholson Graham & Jones [2006] EWHC 2428 (Ch) at paragraph 3 per Mann J.
>
> 11. There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in Budgen v Andrew Gardner Partnership [2002] EWCA Civ 1125 at paragraph 35: "the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues". Likewise in Travellers' Casualty (supra), Clarke J said at paragraph 12:
>
> > "If the successful Claimant has lost out on a number of issues it may be inappropriate to make separate orders for costs in respect of issues upon which he has failed, unless the points were unreasonably taken. It is a fortunate litigant who wins on every point.""

78. In the circumstance of this case, there can be no doubt that the defendants were the successful parties and it is against this background that I must approach the issue of costs.

79. The first ground upon which the claimants urge me to depart from the general rule is that during the course of the hearing the defendants elected to narrow the basis upon which they sought to present their case with respect to the application of Article 34.

80. In short, the defendants had relied upon about 70 group actions (referred to as CPAs) progressing in Brazil as giving rise to the risk of inconsistent decisions in England and Brazil. As I noted in the judgement at paragraph 55:

> "For the purposes of this case, BHP Plc, during the course of the hearing, narrowed its case so as to identify the 155bn CPA (of which the Priority Axes and Local Commission Proceedings were to be treated as part) as the sole action upon which it relies for the purposes of Article 34 . I did not consider it necessary in reaching my central conclusions to determine the controversial issue as to whether the Priority Axes and Local Commission Proceedings formed part of the 155bn CPA. There remains no need for me therefore to consider the status of these, the other CPAs or legal proceedings."

81. In my view, this was a pragmatic and welcome decision. I am thoroughly unpersuaded that it should redound to the defendants' disadvantage on the issue of costs.

82. In particular, the defendants had always presented the 155bn CPA as a proper and freestanding basis upon which the Court could make a finding about inconsistent judgments which, if successful, would render the consideration of the others CPAs unnecessary.

83. The defendants' decision to focus exclusively upon the 115bn CPA was not because it had become clear that reliance upon the other CPAs would have been doomed to failure but that by distilling the thrust of their contentions the Court would thus be best equipped to deal with the point proportionately. Thus was, as I considered at the time, a helpful step. It is not one which is apt to attract adverse costs consequences.

84. It will often be the case that a party may perfectly reasonably present both a primary and an alternative case on any given issue to a court and, for legitimate and pragmatic reasons, elect to limit its reliance to the former as the hearing progresses. Of course, where for example, the alternative case is seen to have been unmeritorious from the start then adverse consequences

may well follow. However, where, as here, it has been abandoned as an act of pragmatism which lightens the burden on the court then it would normally be inappropriate to deter such a procedural choice. As it happened, the defendants did not need to succeed on the alternative argument because they were successful on their central contention. The defendant did not lose the alternative argument. I simply did not have to consider its merits.

85. Furthermore, at least some work was necessary on the broad range of CPAs to assist the Court in understanding the background to the claims in Brazil in general and to provide a useful context for the abuse application. In the scheme of things, I am satisfied that the expenditure on this issue, although by no means insignificant in absolute terms, was, in relative terms, modest.

86. In conclusion, I am satisfied that it would be wrong to penalise the defendants in costs for the work done in this area.

87. The second ground relied upon by the claimants relates to the issue as to whether there was a legal obligation on the part of Renova and the Brazilian companies to make full redress under the TTAC/GTAC. This was a heavily fought-over issue between the parties but one which it became unnecessary for me to resolve because I was satisfied, in the light of my other findings in favour of the defendants that the matter was academic. The issue was not, however, determined against the defendants and it was entirely reasonable for them to expend costs in meeting the claimants' case on the point. It would be wrong to make an adverse costs order against them in these circumstances.

88. Finally, the claimants seek to argue that the success of the defendants on the Article 34 issue was based on a "wait and see" rather than a consolidation basis and so they should face an adverse costs consequence in respect of the latter. It must be remembered, however, that the determination of the Article 34 issue was, in itself, already an academic exercise as a result of the claimant's failure on the abuse of process point. In the event, I did not find that consolidation was neither a jurisprudential nor practicable possibility but that the issue had been rendered otiose by the claimants' firm intention not to commence proceedings against the defendant in Brazil in any event. Paragraphs 208-218 of the judgment set out my reasoning. Ultimately, the defendants were successful in surmounting all of the necessary hurdles to win on the Article 34 issue and, in the circumstances of this case, there arises no justification for penalising them in costs by reason of the route by which such success was achieved.

89. In my view, the claimants did not even come close to establishing any basis upon which the general rule in CPR 44(2) should be displaced. The

defendants will therefore be awarded their costs of the action to be the subject of detailed assessment.

INTERIM PAYMENT ON ACCOUNT

90. CPR 44.2(8) provides:

> "Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

91. The defendants seek an interim payment in the sum of £9,640,168.58 which represents 60% of the total costs of the action which they have incurred.

92. The claimants do not dispute the fact that a sum on account of costs falls to be awarded but contend that the reasonable sum in this case should be £2,410,042.15. This figure is based upon the assumption that the Court would award the defendants' only half of their costs. I have ruled that they defendants are entitled to the whole of their costs and so the conceded figure falls to be doubled to £4,820,084.30 before any further analysis comes into play. This sum amounts to about 30% of the defendants' estimate.

93. The proper approach to assessment is set out in the notes at 44.2.12 in the White Book 2020 which provides:

> "Necessarily, the determination of "a reasonable sum" involves the court in arriving at some estimation of the costs that the receiving party is likely to be awarded by the costs judge in the detailed assessment proceedings or as a result of a compromise of those proceedings. In a case of any complexity, the evidence and submissions arguably relevant to that exercise may be extensive. The court has to guard against the risk that it may be drawn into costly and time-consuming "satellite" litigation. There is no rule that the amount ordered to be paid on account should be the "irreducible minimum" of what may be awarded on detailed assessment (Gollop v Pryke, (Warren J)). The relevant authorities were reviewed in Excalibur Ventures LLC v Texas Keystone Inc [2015] EWHC 566 (Comm), (Christopher Clarke LJ), where the judge concluded that what is "a reasonable sum on account of costs" will have to be an estimate dependent on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. The judge explained (paras 23 and 24) that a reasonable sum would often be one that was an estimate of the likely level of recovery subject, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a

> likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad. In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment."

94. At first blush, the sum spent by the defendants' on costs would appear to be extremely high. I commented in my substantive judgment that I had witnessed a forensic arms race. I must certainly bear this consideration in mind as a factor which introduces greater than usual breadth of argument over the proper assessment of an interim award. A breakdown of the bill is set out in paragraphs 34 to 85 of the ninth witness statement of Efstathios Michael to which is appended a detailed schedule of costs. No purpose would be served by rehearsing the contents here. Suffice it to say that the general picture painted by the accumulation of primary facts therein identified is a plausible one.

95. On the other hand, the following points can validly be made:

    (i) The scale of the litigation was unique involving as it did nearly a quarter of a million claimants;

    (ii) The claimants did not comprise a homogenous group but were made up of individuals, small, businesses, large businesses, members of the indigenous Krenek community, municipalities, churches and utility companies all claiming different and wide ranging remedies;

    (iii) The applicable law was that of Brazil and much of the relevant documentation was in Portuguese;

    (iv) The state of the many and various parallel proceedings in Brazil was extremely complex and necessarily involved a major investigation. These proceedings did not remain static but were subject to significant developments over the period leading up to the hearing which gave rise to inevitable additional expenses involved in tracking a moving target;

    (v) The defendants faced vast volumes of material from the claimants in response to the applications and, at least to some extent, were justified in descending to some level of precautionary detail in order to deal with it;

(vi) The potential value of the claims in the event of success may have been in the region of several billion pounds;

(vii) The costs of litigating the substantive claims, in the event that the application to strike out had been unsuccessful, would have been extremely high;

(viii) The figure claimed by the defendants relates to the costs of and occasioned by the action and not simply the applications.

96. It is also appropriate for me to note that although the claimants have mounted focussed attacks on particular areas of the defendants' expenditure, they have chosen not to reveal the headline figures in their own costs bill. This, of course, they are fully entitled to do although it inevitably means that the Court is likely to be more circumspect about the overall weight to be applied to the challenges applied to narrower fronts. It is to be noted that the claimants have pointed out that over 1,000 lawyers and paralegals were involved in investigating, considering and pleading the claims and a team of nearly 50 English barristers were deployed on the case. Of course, the magnitude of the work involved in making claims, as opposed to responding, to them is likely to be greater but these statistics are, at least, illustrative of the scale of the conflict.

97. I have, once again, taken into account the matters relied upon by Mr Goodhead in his tenth witness statement, and in all the circumstances, I am satisfied that the interim payment should be assessed at a lower percentage of the claimed costs than would usually be the case in the general run of cases. This case is not in the general run. In the exercise of my discretion, I would award 50% of the total bill thereafter modestly rounded down to give a figure £8,000,000. This sum is to be paid by 4:00pm on 12 February 2021.

FUNDING

98. There are outstanding issues relating to the disclosure of documentation and information from the claimants relating to the funding of the claims.

99. In particular, the defendants are understandably concerned that the claimants were in breach of an order of the Court of Appeal (relating to an aborted challenge to one of my rulings in the course of the hearing) to pay the defendants' costs in the sum of £30,000 over a period of two weeks. The defendants are worried that this delay, together with the claimants' under-particularised suggestion that they may need more than 14 days in which to make an interim payment on account of costs greater than that which they had conceded in November last year, raise doubts over the claimants' professed ability to meet the bill in due course.

100. In the circumstances, I am minded to revisit any issues of disclosure and the provision of information which may remain outstanding between the parties in the light of this judgment for further consideration after 12 February 2021. I will consider further representations from the parties as to whether such consideration should be on paper or by way of an oral hearing.