Neutral Citation Number: [2020] EWHC 2471 (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

Manchester Civil and Family Court Centre,
1, Bridge Street West,
Manchester, M60 9DJ

Date: 18/09/2020

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**

- -
- -

Charles Hollander QC, Graham Dunning QC, 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: 2 September 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be at 10:30 on Friday 18 September 2020.

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THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. On 5 November 2015, the Fundão dam in south eastern Brazil collapsed and over 40 million cubic metres of iron ore mine tailings were released into the Doce River. The consequences were catastrophic.

2. The polluting waste eventually found its way to the Atlantic Ocean over 400 miles away. It destroyed, damaged or contaminated everything in its path. Nineteen people died. Hundreds of thousands were affected and suffered loss. Entire villages were obliterated

3. In these proceedings, about 202,600 individual, corporate and institutional claimants contend that the defendants are liable to compensate them for losses sustained as a result of the disaster. The defendants resist the claims arguing, in particular, that legal liability to the claimants falls not upon them but upon the shoulders of others including the owner and operator of the dam which was, and is, Samarco Mineração SA ("Samarco"), a Brazilian mining company.

4. The corporate structure of which Samarco is a part is elaborate. Essentially, Samarco is a non-operated equal joint venture between Vale SA ("Vale") and BHP Billiton Brasil LTDA ("BHP Brasil"). The first defendant, BHP Group Plc ("BHP Plc") is a company incorporated in England. The second defendant, BHP Group Limited ("BHP Ltd"), incorporated in Australia, is a separate legal entity but linked with BHP Plc in a dual listed company arrangement which provides for a unified management structure. BHP Ltd is the ultimate owner of BHP Brasil. In this context, the defendants contend that, under Brazilian law, unlike Samarco, they are not liable to the claimants as polluters or otherwise.

5. The defendants not only deny substantive liability but have invited the Court, in response to applications based upon four distinct procedural grounds, to find that the case against them should be allowed to proceed no further in this jurisdiction. They contend that:

   (i) the claims should be struck out or stayed as an abuse of the process of the court;

   (ii) the claims against BHP Plc should be stayed by the application of Article 34 of the Recast Brussels Regulations;

   (iii) the claims against BHP Ltd should be stayed because England is *forum non conveniens*;

(iv) alternatively, the claims against both defendants should be stayed on case management grounds.

6. One issue in the case was whether or not the claimants could expect to obtain full redress if they were limited to pursuing their claims in Brazil and not in England.

7. During the course of his submissions, Mr Hollander QC on behalf of the claimants sought to ventilate an argument concerning an issue as to Samarco's financial position but which had not been included in his skeleton argument and to which there had been no previous reference in any other context. In the exercise of my case management powers, I ruled that it was not open to him to bring the issue of Samarco's solvency into consideration.

8. It is the consequences of that decision which have given rise to the dispute between the parties which it is the purpose of this judgment to resolve.

BACKGROUND

9. The procedural history of this case does not make for happy reading. I will aim to keep it short.

10. I readily acknowledge the complexity of the issues to which the defendants' applications give rise. These features, however, go only some way towards justifying the accumulation of the huge swathes of documentation thereafter deployed by the parties. The trial bundles comprised 2,085 items set out in 30,015 pages which had been "distilled" into no fewer than five core bundles. There were nine further bundles containing no fewer than 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' skeleton argument, the authors of which comprised one leading counsel and eight junior counsel, 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.

11. A close analysis of the parties' cases thus reveals a fractal pattern of progressively complex and ever-finer recursive detail of sharply declining significance. I dread to think of the costs which have been expended on this exercise.

12. In this context, I note the observations of Lord Briggs in ***Lungowe v Vedanta Resources Plc*** [2019] 2 W.L.R. 1051:

> "6. It is necessary to say something at the outset about the disproportionate way in which these jurisdiction issues have been litigated. In Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada) [1987] AC 460, 465, Lord Templeman said this, about what was, even then, the disproportionate manner in which jurisdiction challenges were litigated:
>
> > "In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial Court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere."
>
> That dictum is, in my mind equally applicable to all the judges in what are now the Business and Property Courts of England and Wales, including, as in this case, the Technology and Construction Court."

THE HEARING

13. During the course of the hearing, I expressed concern to Mr Gibson QC, one of the three leading counsel acting for the defendants, about the quantity of material which had been deployed by both sides. His explanation relied partly upon the procedural complexity of the proceedings in Brazil and partly upon the need to respond to the growing number of submissions raised and documents relied upon by the claimants in what, to my mind, had long since deteriorated into a forensic arms race.

14. At the first case management conference to be listed before me, which took place just three weeks before the hearing had been due to commence, I was presented with a fait accompli in terms of the volume of material which had already been collated and deployed by the parties over the preceding period of seven months. I took the view that any attempt retrospectively, and at the eleventh hour, to restrict the deployment of such material would be likely to do more harm than good. The parties would be distracted from the task of preparing the case and there would almost inevitably have arisen time-consuming disputes as to what material should be abandoned and what retained. The genie was already out of the bottle. For these reasons, I indicated that I would proceed on a "we are where we are" basis. I permitted the parties to serve further evidence to deal with specifically

defined recent developments in the Brazilian proceedings but to be strictly confined to no more than 20 pages each. I also accepted that the skeleton arguments would probably have to be longer than usual in order to cover the relevant ground. There was, however, a limit to the extent of the arguably over-generous indulgence I was prepared to afford the parties whilst at the same time remaining loyal to the need to comply with the overriding objective.

15. That limit was reached on the morning of the seventh day of the eight-day hearing.

16. By that stage, the Court had already been the unenthusiastic recipient of a considerable number of "speaking notes" from Mr Hollander QC which the cynical observer may have categorised, at least in part, as a labelling exercise to render the late introduction of new or more detailed material more palatable to the Court. Hitherto, Mr Gibson QC, on behalf of the defendants had responded to the deployment of such notes with weary resignation rather than outright opposition. On this occasion, however, he objected specifically to the introduction of a new argument to the effect that Samarco might not be able to afford to meet the judgments in all the claims brought against it in Brazil. His cri de coeur was expressed in these terms:

> "My Lord, I had hoped that would be it, but last night, and indeed this morning, we had a further repetition of what we have been enduring, which is another blizzard -- a harassment, I don't know what the collective name for hand-ups is, a harassment of hand-ups and we've received four more this morning. We are provided with these with no opportunity to look at them and this is a case in point."

17. In particular, Mr Hollander had sought to introduce documents variously referred to appendices/schedules/hand-ups/speaking notes two of which related to "Samarco and BHP Brasil's stance in the umbrella CPAs" and "Claimants' submissions in respect of routes to full redress". I read and digested their contents in their entirety. In effect, the claimants were thereby seeking, for the first time, to cast doubt on Samarco's financial robustness. For convenience, I will henceforth refer to this as "the Samarco issue".

18. Of particular significance was the claimants' freshly minted Appendix 22 paragraph 9 of which provided:

> "For the right to "full redress" to be meaningful, if must be a right that can be enforced against an entity capable of paying the relevant level of compensation in full. There can be no

> assurance that any judgments ultimately obtained against Samarco will necessarily be met…"

And at paragraph 10:

> "In these circumstances, the claimants' decision to sue these defendants is an obvious one. Where there are several defendants liable for a loss, claimants have every right to look to a defendant against whom an order may most easily be satisfied."

19. Having absorbed the relevant parts of the material relied upon, I enquired where the allegation relating to the Samarco issue might be found in the claimants' skeleton argument:

> "MR JUSTICE TURNER: Where does this appear in your skeleton argument? I can see the evidence upon which the submission would be grounded, but I would like to know upon what notice the defendants were put that this was part of your armoury.
>
> MR HOLLANDER: I'm not seeking -- what I'm seeking to say is that --
>
> MR JUSTICE TURNER: Shall we go step by step? Is the point in your skeleton argument "yes" or "no"?
>
> MR HOLLANDER: No, it's not."

20. Mr Hollander then relied upon the proposition that the documents to which he had made reference had been disclosed by the defendants and not the claimants. I did not regard this to be a trump card.

> "MR HOLLANDER: They have themselves said that Samarco, in documents before the Brazilian court, may not be good for the money.
>
> MR JUSTICE TURNER: All this may or may not be the case. I have got huge, huge, volumes of documentation and evidence in this court. I think the Court is entitled to know in advance what the issues are, not for there to be a treasure hunt at the last minute for documents in evidence to support a case that…has not previously been articulated in written argument and I don't think that's unreasonable.
>
> MR HOLLANDER: I take your Lordship's point."

21. Not only was there no mention of the Samarco issue in the claimants' 211 page skeleton argument but the only allegation relating to the solvency of Samarco in the claimants' pleaded case had earlier been expressly disavowed by their solicitors in correspondence. Under Article 4 of the

Brazilian Environmental Criminal Code, a company may find itself liable in respect of the environmental torts of a related company where the latter is shown to be financially unable to meet its liabilities. This basis of claim against the defendants was expressly relied upon in respect of Samarco in the Master Particulars of Claim. However, on 19 March 2020, the claimants' solicitors had written to the defendants' solicitors indicating that the claimants would not be pursuing this basis of claim. They stated that the relevant paragraphs were formally withdrawn. The clear implication is that the claimants were not intending to allege that Samarco would be unable to meet its liabilities. The claimants advanced (and continue to advance) no alternative explanation as to why their pleaded case on this issue would otherwise have been abandoned.

22. Furthermore, it was obvious from the fifth witness statement dated 29 November 2019 of Mr Michael, a partner in the defendants' firm of solicitors with conduct of the case, that the defendants were asserting that the claimants had rights of full redress in Brazil and that there was no instance in which Samarco (and others) had failed to make such redress through lack of funds. In March 2020, the claimants served about 1,000 pages of witness statements and experts' reports in which there was no suggestion whatsoever that Samarco might not be able to meet its liabilities.

23. It is abundantly clear from the defendants' skeleton argument that they were proceeding upon the assumption that the solvency of Samarco was simply not in issue. This assumption was entirely reasonable and, if the point were not conceded by the claimants, ought to have been challenged straightaway and not on the penultimate day of the hearing.

24. I formed the view that, if I were to permit the claimants to raise and develop the Samarco issue, then I would have been obliged to grant the defendants the opportunity to respond. Bearing in mind the superabundance of material which had already been deployed by both parties on all the other issues in the case, I was in no doubt that this new point, if permitted to flourish, would derail the timetable of the hearing. It is to be noted that, despite the fact that the hearing before me had been listed to take place over eight days, by order of Judge Eyre QC on 20 April 2020, it had proved to be only just possible within this timescale to accommodate the parties' submissions relating to the matters already in issue. Indeed, on the final day, it was necessary to start at 9.30am, to curtail the length of the short adjournment and for the Court to sit until 4.45pm. It was the last day of term. By reason of the necessary social distancing restrictions imposed by the Covid 19 risk assessment, the Civil Justice Centre in Manchester, not without serious potential disruption to

other court users, had been obliged to sacrifice no fewer than four of its largest courtrooms to facilitate access to the hearing which was being transmitted to relay courts via video link.

25. In his oral submissions, Mr Hollander sought to introduce the Samarco issue as a response to a point I had made on the previous day:

> "MR HOLLANDER: Let me deal with Samarco. **I think it really arose from your Lordship's questioning yesterday** about Samarco and the point here is that Samarco themselves have relied on their lack of funding…"

26. Thereafter, he repeated the suggestion that he was responding to an issue which I had raised:

> "MR HOLLANDER: I think frankly it arose because **your Lordship raised the point** in questions."

27. And again:

> "MR HOLLANDER: All I was saying, and I expressed myself badly, was that actually **your Lordship asked some questions about Samarco** and we dealt with it in the light of that."

28. It is thus necessary to read carefully the 159 pages of transcript of day six of the hearing in order to ascertain which of my interventions had prompted Mr Hollander's attempt to introduce the Samarco issue on the following day. The relevant, and only relevant, passage is, I believe, to be found at pages 137-8:

> "MR JUSTICE TURNER: Is there any remotest chance that if you were to be unsuccessful in this application anybody would want to sue BHP Plc in Brazil?
>
> MR HOLLANDER: I should think it is extremely unlikely.
>
> MR JUSTICE TURNER: I can see why we have to look at this, but it is probably as a matter of fact an academic exercise although I see where it fits into the legal issues…
>
> MR HOLLANDER Effectively the whole point of suing in this jurisdiction is that essentially suing in Brazil has not been a success. And that's why I make [the] point about that you have a number of defendants who are potentially jointly and severally liable or who are -- it doesn't matter -- who are all liable as contract breakers or tortfeasors on a particular attempt. You try to get relief against one defendant in Brazil or three defendants perhaps. You -- your attempts to do so get bogged down, so you then sue in a different jurisdiction, different defendant, who is also liable and that's what is being done. There's no embarrassment in doing that at all. It's a perfectly

> legitimate thing to do. **For example, if -- suppose the -- you have concerns about the -- concerns about the financial stability of the defendant in Brazil. This is just an example. Then you then sue a different defendant, against whom you don't have concerns about their financial stability in a different jurisdiction, particularly** -- or you find that the proceedings in the Brazilian jurisdiction are, as I put it, got bogged down and not going anywhere and providing you with the relief**.** There is no possible criticism, in my submission, of suing a different defendant, who is also liable, in a different jurisdiction. So that's what -- but -- so that's why it's been done." [Emphasis added]

29. It is to be noted that at no stage on that day had I suggested that the solvency of Samarco was an issue upon which I was inviting or encouraging the claimants to revisit their case.

30. During the course of his submissions, Mr Hollander appeared to dilute his own point. Rather than press home the contention that the corporate accounts, for example, provided objective evidence of Samarco's insolvency, he began to suggest that the subjective impression given to the claimants was the central issue. He put it thus:

> "However, it is **sufficient for my purposes** to say that we are entitled to decide who we want to sue **for all sorts of individual subjective reasons.**"

And:

> "This simply goes to the **subjective position** as to why we have sued these people, these defendants, rather than necessarily Samarco."

31. A problem with this contention was that there was no evidence, to which my attention was at that stage directed, that any claimant had actually reached the "subjective" conclusion that the financial state of Samarco had played any part in his or her decision to bring a claim against these two defendants in England. Moreover, if the issue of Samarco's solvency had really been a genuine and significant cause for concern on the part of the claimants, then it was completely incomprehensible why it had not been raised much earlier as a matter of blindingly obvious and free-standing importance.

32. It is also clear, as the exchanges between us progressed, that Mr Hollander neither wanted nor expected any formal ruling from me on the point and, after I had raised my concerns and because he recognised the force of the point, he said:

> "Shall I move on?

33. This was a clear invitation to me to direct my attention to his next point rather than to give a formal ruling on the issue.

34. Also, before I actually gave my unsolicited ruling, Mr Hollander gave every appearance that he had conceded the point:

> "MR HOLLANDER: I have on board your Lordship's point and I understand what you are saying and I recognise the force of it."

35. It might now appear somewhat incongruous that, their leading counsel having expressly conceded that he understood and recognised the force of my approach, the claimants should now seek to argue that it was so deeply flawed that no reasonable judge could have made the decision to which such an approach inevitably led.

36. Accordingly, I ruled that I was going to proceed on the basis that there was "no evidence before me relied upon to suggest that Samarco may not be able to pay". I took the view that the reasons for my decision were entirely clear from the exchanges which I had had with counsel and which had been recorded in the transcript, copies of which were provided to all parties and to the Court at the end of each day.

37. Mr Hollander expressed no concern that my ruling required any further formality of reasoning and, on the contrary, again observed immediately after I had given it that he understood what I was saying. I was left with the clear impression that the importance which the claimants were, at that stage, placing upon the point amounted to little more than a velleity. Indeed, nothing more was said by either side about the issue during the course of rest of that day and the whole of the next.

PERMISSION TO APPEAL

38. On 3 August 2020, I began writing the substantive judgment. I had expressly informed the parties that it was my intention to work on the judgment during the long vacation. The claimants then, without informing the Court, launched an unheralded application for permission to appeal my ruling on the Samarco issue to the Court of Appeal. It would appear that the claimants' advisors had intended that I should not be made aware of the application and that I would thus proceed to give substantive judgment in ignorance of their application for permission. Apparently, they feared that, if I were told about the application, I might interpret it as an attempt to influence my substantive judgment. The defendants' solicitors, however, and in my view rightly, considered this to be inappropriate and the claimants' solicitors relented. Thus it was that, some five days after the appellant's notice had been lodged and three weeks into my judgment writing time, I was informed of what had been going on.

39. I considered this to be a most unsatisfactory state of affairs. My particular concern was that the claimants appeared simply to have assumed that consideration of their application for permission should be deferred until after I had handed down substantive judgment. It would appear that the claimants' intention was to allow me to hand down a judgment in accordance with my ruling on the Samarco issue and then to seek ex post facto, in the event that they were to lose, to undermine that judgment on the grounds that it had been vitiated by my ruling on that issue.

40. Of course, the claimants were fully entitled to seek permission to appeal against my ruling and, all other things being equal, no criticism could be levelled against this course of action. However, all other things are not equal.

41. Firstly, the proper and obvious course would have been for Mr Hollander to apply to me for permission to appeal my ruling under CPA Part 52.3 (2)(a). It is not mandatory to seek to permission to appeal to the lower court but in the circumstances of this case, the advantages were obvious. As the notes at 52.3.6 of the White Book provide:

> "Commentary on r.52.3 in successive editions of the White Book since the 2000 edition has suggested that, although that rule in terms gives parties a choice to apply for permission either to the lower court or to the appeal court, and expressly states that a refusal in the lower court does not act as a bar to an application to the appeal court, for several reasons a would-be appellant would generally be well-advised in the first instance to apply for permission to the lower court for five reasons. The reasons are:
>
> (a) the judge below is fully seized of the matter and so the application will take minimal time. Indeed the judge may have already decided that the case raises questions fit for appeal;
>
> (b) an application at this stage involves neither party in additional costs;
>
> (c) no harm is done if the application fails. The applicant "enjoys two bites at the cherry";
>
> (d) if the application succeeds and the applicant subsequently decides to appeal, they avoid the expensive and time-consuming permission stage in the appeal court;
>
> (e) no harm is done if the application succeeds, but the applicant subsequently decides not to appeal."

42. And as the Court of appeal observed in ***T (A Child)*** [2002] EWCA Civ 1736:

> "13. I can say with complete confidence that, in the vast majority of cases, practitioners should follow the guidance contained in the notes to the rule and apply to the trial judge at the point of judgment. Applications that come direct to this court without prior application to the trial judge usually result from a hand down without attendance, followed by the discovery that the trial judge is either then sitting in crime or has gone away for annual leave. Of course, there will always be cases in which, either the client is not available to give instructions or the client having initially instructed counsel not to apply, then changes his or her mind and requires an application to be made. So there can be no absolute rule, nor any sanction applied to those who neglect to apply to the trial judge. However, it seems to me that, as a matter of practice, when a judgment is handed down by a judge of the Family Division in this building, the aggrieved party should consider in advance of the hand down fixture whether or not an application for permission is to be made and if the decision is to apply, then the application should be made at the hand down. The judge thereby has an opportunity to give on the requisite form his or her reasons for rejecting the application, the statement of which may be of some value to this court if the permission application is subsequently renewed."

43. In my view, these observations apply with equal force to civil proceedings.

44. It must be borne in mind that the decision in respect of which the application for permission to appeal is directed is, of course, that of 30 July 2020 and not any decision flowing from the judgment which has yet to be handed down. Accordingly, the obvious time for applying to me for permission to appeal was on that day or the day after. Alternatively, the claimants knew that I was writing the judgment in this case in the vacation and would, therefore, be likely to be available, as was indeed the case, to entertain a written application for permission to appeal.

45. The claimants have not indicated why no such application was made to me.

46. The upshot of all this is that the claimants had expected a single judge of the Court of Appeal to adjudicate on the merits of an application for permission without providing him or her with such assistance as may have been derived from any statement of reasons from me as recommended in ***T (A Child)***. Such an approach is particularly unhelpful in a case of such complexity as this in which I had had the considerable advantage of spending over a week pre-reading vast quantities of documentary material and had had the benefit of eight full days hearing oral argument.

47. True to form, the skeleton argument in support of the application for permission to the Court of Appeal extends to no fewer than 55 paragraphs.

48. In the light of the above history, I struggle to resist the conclusion that the claimants and/or those representing them have signally failed to comply with CPR Part 1.3 which provides:

> "1.3 The parties are required to help the court to further the overriding objective."

49. Furthermore, the grounds upon which permission to appeal are sought consist primarily of complaints that my ruling did not consider various factors either at all or in appropriate detail.

50. If the claimants had considered this to be the case then the proper course would have been to invite me to give fuller reasons for my decision. Such an invitation should been issued immediately after I had made my ruling, on the following day or, at the very latest, promptly thereafter. As the Court of Appeal pointed out in ***English v Emery Reimbold & Strick Ltd*** [2002] 1 W.L.R. 2409:

> "25. Accordingly, we recommend the following course. If an application for permission to appeal on the ground of lack of reasons is made to the trial judge, the judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the respondent."

51. I am not satisfied that my ruling on the Samarco issue was defective on the grounds of lack of reasons but, in any event, had I been requested to give fuller reasons, I would have obliged. The failure to request further reasons is another illustration of the obvious potential disadvantages of failing to seek permission to appeal at first instance.

52. This, then, was the unsatisfactory position as at 24 August and, on 27 August, I invited the parties to make submissions to me concerning the order in which the determination of the application for permission and the handing down my substantive judgment should proceed.

53. The claimants' solicitors responded to my invitation in a letter dated 2 September informing me, unsurprisingly in the light of the fact that his name did not appear as one of the authors of the grounds of appeal, that Mr Hollander was no longer instructed in the case and that his place had been filled by Mr Dunning QC who, so far as I am aware, is new to the case. Be that as it may, Mr Dunning had proposed an alternative course which, inevitably, was supported by yet further detailed written submissions. This time, the suggestion was that I should simply accept that I had been wrong on the Samarco issue, change my mind and save the Court of Appeal the job of putting me right.

54. I am unattracted by this proposal.

55. I accept that circumstances may arise in which a judge my change his or her mind after giving judgment. Indeed, the issue was recently addressed by the Supreme Court in ***In re L and another (Children) (Preliminary Finding: Power to Reverse)*** [2013] 1 W.L.R. 634. However, in the instant case, the point is academic because I am not persuaded that my decision was wrong.

THE GROUNDS OF APPEAL

56. For convenience of reference, I will consider each ground of appeal in turn.

57. **Ground (1): Wrong in principle to treat skeleton argument as a pleading**

The Judge erred in principle in proceeding on the basis that the Claimants should prima facie be restricted to points set out in their skeleton argument, thereby effectively treating the skeleton argument as a pleading. The evidence had been completed prior to exchange of skeleton arguments and the Claimants were properly entitled to develop their case by taking additional points in oral argument based on that evidence and in response to the Defendants' oral submissions.

58. I disagree.

59. Of course a skeleton argument is not a pleading but this does not mean that a party enjoys carte blanche to introduce issues at the eleventh hour which have been entirely omitted from its skeleton. It is to be noted that PD52A 5.1(2) provides that a skeleton argument must "both define and confine the areas of controversy". Although this Practice Direction is applicable specifically to appellate proceedings, I do not doubt that the principle applies, at least in general terms, to first instance hearings.

60. The power to exclude an issue is expressly provided for in CPR Part 3.1:

"**The court's general powers of management**

> 3.1 (1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.
>
> (2) Except where these Rules provide otherwise, the court may –
>
> … (k) exclude an issue from consideration;…"

61. I am in no doubt therefore that, where appropriate for the purposes of achieving the overriding objective, the court has the power to exclude an issue for consideration if it has not been identified adequately (or, as in this case, at all) in the skeleton argument of the party purporting to raise it.

62. The exercise of this salutary power connotes no confusion whatsoever between a pleading and a skeleton argument and the suggestion that such an inference could be drawn in this case is unfounded. Accordingly no point of principle arises.

63. The claimants concede, as they must, that the defendants' documentary evidence upon which the Samarco issue was based had already been served well before the skeleton arguments had been drafted. The suggestion in this Ground that the new issue was raised "in response to the defendants' oral submissions" at the hearing is, however, surprising. Mr Hollander's stated justification to me for seeking to introduce the new issue was that it had been my interventions on the preceding day which had prompted this initiative. The defendants' oral submissions had been concluded three days earlier and, if the Samarco issue had been raised in response to these, it is inexplicable why the point had not been flagged up more promptly. Equally significant is the fact that the claimants do not now seek to allege in the Grounds of Appeal that the reason the Samarco issue arose was, as Mr Hollander had repeatedly and exclusively put it in oral submissions, because of my interventions on the previous day.

64. In short, I remain of the view that it was far, far too late for the claimants to seek to raise the Samarco issue and the suggestion that the delay in articulating it can be excused as a response to the defendants' "full redress" argument is little more than a fig leaf. If there were any merit in the point, the claimants should have raised it long before this.

65. **Ground (2): Failure to appreciate that evidence relied on was Defendants' own evidence**

4. The Judge proceeded on a false basis, because he did not review the evidence on which the Claimants sought to rely before making the ruling. The evidence primarily relied on was the Defendants' own evidence filed

in support of the application (including the Defendants' own published accounts). It is apparent from the terms of his ruling that the Judge did not appreciate this. Had he done so, he could not properly have held that the Claimants should be precluded from relying on the evidence, or that if they were permitted to do so the Defendants would be entitled to adduce further evidence. Moreover, there was no factual basis for the Judge's finding that the Defendants had chosen not to adduce evidence in response because they had assumed that the point was not in issue.

66. The suggestion that I did not appreciate that the evidence relied upon was that of the defendants is wholly untenable. The point was repeatedly made by Mr Hollander during the course of his submissions to which I, at least, was listening attentively.

67. It is not without irony, in this context, that it was certain members of the claimants' legal team who, rather than paying attention to what Mr Hollander was saying on the Samarco issue, were running the risk of undermining his attempts to develop his oral arguments by preferring instead to run a persistent, noisy and undignified sideshow with those sitting on the other side of the court. At one stage, the background hubbub became so intrusive that I had to intervene. As the transcript reveals:

> "MR JUSTICE TURNER: I think this might be better…for this matter to be determined by counsel and myself, not as between rival tribes on either side of the court. So I would prefer that people remained quiet whilst I'm listening to Mr Hollander's representations. Thank you"

68. Furthermore, I had read the documents to which Mr Hollander had referred me and had highlighted the relevant passages. It is clear from the exchange between Mr Hollander and myself, that one of my particular concerns was that a huge quantity of documentation had been deployed by both sides and that I was entitled to "know in advance what the issues are, not for there to be a treasure hunt at the last minute for documents in evidence to support a case that … has not previously been articulated in written argument."

69. After I had circulated a draft of this judgment, but before handing it down, the claimants' solicitors emailed me observing that "the Claimants were not seeking to suggest that the judge was unaware that the material referred to by Mr Hollander emanated from the Defendants in the Brazilian litigation. The point which the Claimants were seeking to make is that the judge was not taken to the material referred to in the note handed up to him, and it was not pointed out to him that the material primarily relied on in that note was material served by the Defendants themselves in support of their application to strike out the proceedings. The material referred to by Mr Hollander was not the same as the material relied on in the note."

70. I do not regard the question as to whether or not the relevant documents were deployed by the defendants in support of their applications as being of any real significance. The point was, and remains, that, particularly bearing in mind the vast numbers of documents involved regardless of their provenance, the Samarco issue could and should have been raised much earlier. I am, of course, unable to determine whether the egregious delay in seeking to raise the issue was attributable to ambush or oversight but, whatever the explanation, it left the defendants with no adequate opportunity to respond. In the final analysis, the fact that the claimants were seeking to rely on evidence deployed by the defendants fell far short of justifying the introduction of a new issue at the eleventh hour. If, contrary to my own view, the distinction was considered by the claimants to be so important then it ought to have been fully articulated by Mr Hollander at the time he was seeking to introduce it.

71. I reject the claimants' contention that there was no factual basis for my finding that the defendants had chosen not to adduce evidence in response because they had assumed that Samarco's solvency was unchallenged. Not only did the claimants' point make no appearance in the claimant's gargantuan skeleton argument but the pleaded case relating to the Samarco issue had been abandoned expressly and in writing. Mr Gibson's submissions on the point during the course of the hearing make this plain:

> "MR GIBSON: My Lord, just so my learned friend can deal with it, it goes deeper than that, because the concession was made in correspondence saying they would be withdrawing that part of their claim. It was then expressly referred to in our own evidence that we would therefore proceed on that basis and of course relied on as a point in our skeleton… could I take you to M8. It is page 5. Paragraph 14 {B2/1/5}:
>
> > "On 19 March 2020, PGMBM wrote to my firm that the claimants will not be pursuing their claims against the defendants arising from the allegations in respect of Samarco's liability and inability to pay ... These paragraphs are formally withdrawn."
>
> It was in evidence. There was no application or request to change that position. Our entire presentation of our case has proceeded on that basis as is clear from our skeleton."

72. Indeed, the defendants' skeleton, served a week before the hearing, contended:

> "No issue is taken (rightly) as regards Samarco's ability to pay…The pleaded allegation that Samarco was unable to pay has been expressly withdrawn."

73. There could be no clearer evidence that the defendants had assumed that the point was not in issue. If the claimants had been taken by surprise by this proposition then their failure forthwith to correct it is indefensible.

74. **Ground (3): Failure to consider why point not referred to in skeleton argument**

5. The Judge did not consider whether there were understandable reasons why the evidence had not been referred to in the Claimants' skeleton argument. There were in fact such reasons, because of the way in which the Defendants' case was presented at the hearing. The Defendants' primary case as originally formulated was that the Claimants had an established right to full redress in Brazil against various parties. However, at the hearing, the Defendants' primary case was that, whether or not such right had been established, in practice the Claimants would be able to obtain full redress from Samarco in Brazil.

75. If the claimants had been able to substantiate their contention that the defendants had significantly changed their case in their oral submissions then I would have expected that:

(i) the point would have been flagged up and pursued by Mr Hollander during or, at the very latest, at the conclusion of those submissions. It was not;

(ii) Mr Hollander would have made at least some reference to the alleged change of case in his oral submissions. He did not;

(iii) Mr Hollander would not have based his oral submissions entirely upon the suggestion that it was my intervention on the previous day which had catalysed the attempt to introduce the point.

76. In fact, there had been no relevant change of direction on the part of the defendants who had consistently asserted their understanding that Samarco's ability to pay was not in dispute. I am driven to the conclusion that the claimants' "change of case" explanation is wholly untenable.

77. Ground (4): Failure to consider importance of evidence to the case

6. The Judge failed to consider the importance of the evidence to the fair determination of the case and the prejudice to the Claimants if they were not permitted to rely upon it. Given that the Defendants' submission at the hearing was that it was pointless and wasteful to sue the Defendants in England rather than suing Samarco in Brazil, evidence that Samarco might be unable to pay any judgment against it was obviously highly material to the Court's decision. Preventing the Claimants from relying on evidence to that effect which had been placed before the Court by the

Defendants themselves was therefore potentially seriously prejudicial to the Claimants' case.

78. Having read thousands of documents and heard six days of oral submissions I was in a good position to consider the relative importance of the Samarco issue in the case. The following points fall to be made:

    (i) The defendants had been presented with the issue with virtually no notice and, had I not excluded it, would have been entitled to be given adequate time within which to respond. I formed the view that, if I had granted such time, it would be very likely indeed that the hearing would be derailed;

    (ii) It is entirely through the claimants' default that the Samarco issue was not raised much, much earlier. If it were as significant as is now suggested then the failure to raise it earlier was all the more egregious;

    (iii) Fairness requires the court to consider the position of both parties and of the Court itself. Failing to allow the defendants the opportunity to respond would be to prejudice them for a situation brought about entirely by the default of the claimants. Allowing the defendants to respond would have almost certainly caused significant further delays, expense and even heavier drawings on the scarce and valuable commodity of court time.

79. **Ground (5): Failure to consider if evidence in fact in dispute and whether there was in fact any risk of prejudice to the Defendants**

    7. The Judge did not consider the question whether the evidence sought to be relied on was in fact in dispute, or whether there was in fact any prejudice to the Defendants if the Claimants were permitted to rely on it. Given that the evidence was the Defendants' own evidence filed in support of the application, and was derived from the Defendants' own published accounts, there was no basis on which it sensibly could have been disputed by the Defendants. Moreover, even if the evidence had been referred to in the Claimants' skeleton argument, the Defendants would have had no right to adduce further evidence on the point.

80. It was obvious that, in the absence of any adequate warning, the defendants would be unable confidently to meet the new point in the very limited time available to them; particularly bearing in mind the fact that they would inevitably be working overnight on their oral submissions which had been scheduled to be made over the next and final day of the hearing.

81. Furthermore, this ground of appeal fails to draw an important distinction between primary facts and secondary inferences. Even if, for the sake of

argument, the contents of the documents relied upon by the claimants were not in dispute as a matter of primary fact, the defendants would be entitled to demonstrate that they did not present the whole picture and would be entitled to seek to introduce further evidence or, at the very least, to formulate further submissions to seek to redress the balance.

82. **Ground (6): Failure to consider what the overall justice of the case required**

"8. The Judge failed to consider what the overall justice of the case required, in particular having regard to (a) the risk of serious prejudice to the Claimants if they were precluded from relying on the evidence in question and (b) the possibility of alleviating any prejudice to the Defendants, if such prejudice existed at all (for example by permitting them an opportunity to make further submissions or put in further evidence on the point after the conclusion of the hearing). Had he done so, he could not have reached the decision he did, which was plainly wrong."

83. As is customary, the final ground of appeal comprises little more than a potpourri of themes which have already been given an earlier outing in its predecessors. Thus it is that I have already dealt with the argument concerning the strong risk of prejudice to the defendants and the likely expense, delay and encroachment upon the resources of the court in the event that the defendants were to have been afforded more time in which to respond to the point.

84. A broader point, however, emerges. The ruling from which the claimants seek to appeal involved the exercise of discretion in reaching a pure case management decision. It is one to which I adhere and from which none of the grounds of appeal incline me to depart.

85. It follows that, for the reasons given above, I decline to accept the claimants' invitation to reconsider my original ruling. I regret that I have found it necessary to descend into unconventional and, I suspect, unpalatable detail on this issue in this long judgment. However, the claimants' failure either to seek permission to appeal from me and/or request fuller reasons would otherwise have put the Court of Appeal at a very significant disadvantage which it is, at least in part, the purpose of this judgment to offset.

THE WAY AHEAD

86. I turn now to the issue of the timing of the application for permission to appeal.

87. Having finally had my attention drawn to the application, I realised that the claimants had defaulted to the assumption that it should not be considered

at an appellate level until after I had handed down the substantive judgment on the defendants' applications. I was not satisfied that this was the most appropriate order of events and emailed the parties to express my concern.

88. I have now received written submissions from the parties on this issue. The defendants advocate that the Court of Appeal should determine the application for permission to appeal (and, if permission is given, the appeal itself) before I hand down substantive judgment. The claimants adhere to their original strategy to have the Court of Appeal proceedings delayed to await my judgment.

89. I consider that the defendants' approach is the correct one.

90. In my email of 27 August I noted:

> "**Appeal first: Judgment second**
>
> If permission to appeal were to be given and the Court of Appeal were thereafter to reach the view that my decision was wrong then one option would be for the matter to be remitted back to me for specific consideration of the evidence relating to the financial status of Samarco so that my assessment of the same could be incorporated into, and given due consideration in, my judgment but only assuming that it had not already been handed down. In the absence of any suggestion of bias or systemic mishandling of the hearing, and in the light of the extravagant additional costs and delays which would be involved, I would not expect that the case would be remitted thereafter to another judge.
>
> If, on the other hand, the Court of Appeal were to refuse permission or find against the claimants on the appeal then there is no reason why I should not then promptly distribute my judgment in draft in the expectation of a hand down shortly thereafter.
>
> However, handing down the judgment before the appeal process has exhausted could give rise to problems.
>
> **Judgment first: Appeal second**
>
> I cannot, in advance, hypothetically adjudicate in my judgment on whether (and, if so, in what respects) I would have reached different conclusions had I taken into account evidence said to undermine the financial position of Samarco. Having ruled that I would not entertain argument on the point during the course of the hearing, it would be wrong for me to speculate as to the impact such arguments would otherwise have had.

> If, therefore, the Court of Appeal were to allow the appeal, this Court would then face the invidious prospect of grafting onto an already perfected judgment an ex post facto reshuffling of the factual findings upon which the flawed original had been based. Bearing in mind the complexity of the issues with which I would have to deal, I would not find this to be an attractive proposition."

91. I remain unattracted by the claimants' suggestion that the Court of Appeal should defer consideration of the application for permission until after my substantive judgment has been handed down. I propose to deal with each of their arguments in turn.

92. They point out that the terms of the substantive judgment may render the application academic. This, however, is a matter of speculation. It is frequently the case that a party loses an interim application. An appeal against the decision of the court on such an issue is not then to be put into storage only to be dusted off later in the event that judgment in the final hearing might also go against the losing party. The parties and the court are normally entitled to know upon what basis final judgment will be given and not be subject to the risk that the material upon which such judgment has been founded is retrospectively vitiated by an appellate court.

93. It is further argued that the only circumstances in which the application for permission to appeal would be pursued is in conjunction with a further application to appeal the substantive judgment itself. Thus the Court of Appeal would run the risk of having to deal with two separate but closely related appeals in the same matter. I disagree. If the present appeal process were to be resolved in favour of the claimants then this Court would, of course, dutifully proceed in accordance with the directions of the Court of Appeal. If the substantive judgment to follow were to be further challenged then the basis of such challenge would inevitably be distinct from the question of my original ruling on the consideration of the Samarco argument. Similarly, if the present appellate challenge were to be unsuccessful then any ground of appeal against my substantive judgment would have to exclude the Samarco issue because the claimants would already have lost on that point.

94. The suggestion that the Court of Appeal would wish to form its own view on the consequences of admitting the evidence relating to the Samarco issue rather than to remit the case to me for reconsideration borders, in my view, on the fanciful. Any consideration of the consequences of considering the issue would have to take into account the whole of the evidence in the case and not just the documentation relating to the issue itself. It would be unrealistic (and, indeed, inhumane) to expect the Court of Appeal to embark on this course.

95. The claimants complain about the delay which is likely to ensue from pursuing the present permission application first. I am not entirely satisfied that the delay would be any shorter if the present application for permission were disposed of first. There are a number of possible procedural permutations upon which it would be tedious and disproportionate to speculate further. The way forward is to seek to expedite the determination of the application. Such an approach would have my full support. If the permission application were to fail, which I consider to be very likely, then my substantive judgment can be handed down promptly thereafter.

96. On the other hand, if the permission application were to succeed, then the claimants retain the option, at that stage, of seeking to persuade the Court of Appeal, contrary to my own view, to postpone its substantive adjudication on the appeal until after I have handed down my judgment.

CONCLUSION

97. I decline to change my mind about my ruling on the Samarco issue and consider that the Court of Appeal should adjudicate on the matter before I hand down my substantive judgment. I have, accordingly, circulated a draft order for consideration by the parties. I invite the parties to make any ancillary applications in writing.