Neutral Citation Number: [2020] EWHC 2930 (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: 09/11/2020

Before :

THE HON. MR JUSTICE TURNER

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Between :

MUNICÍPIO DE MARIANA (and the Claimants identified in the Schedules to the Claim Forms)	**Claimant**
- and -	
(1) BHP GROUP PLC (formerly BHP BILLITON PLC)	**First Defendant**
(2) BHP GROUP LTD	**Seventh Defendant**

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Charles Hollander QC (until August 2020), Graham Dunning QC (since 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: 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 13:00 on 09 November 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 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.

4. The defendants not only deny liability but now seek to persuade the court, on four distinct grounds, that the case against them should be allowed to proceed no further. This judgment is my determination of those issues.[1]

SOME PRELIMINARY OBSERVATIONS

5. The amount of documentary material which has been deployed by the parties to date is vast.

6. In particular, much of the evidence relates to the question of whether full and timely redress is available to these claimants in Brazil and what impediments stand in their way of achieving it. The following factors, among others, have played a part in explaining (but not wholly excusing) the quantity of material which the parties have chosen to deploy:

   (i) The huge number of claimants;

   (ii) The disparate nature of the claims which they bring;

   (iii) The significant contrasts between Brazilian procedural law and the English Civil Procedure Rules;

   (iv) The complex history of proceedings to date in Brazil and competing predictions as to their likely future.

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

[1] At the risk of being accused of self-plagiarism, I must admit that some of the introductory material in this judgment has been taken from my earlier judgment to be found at Município de Mariana v BHP Group Plc [2020] EWHC 2471 (TCC). I have incorporated this material in order to save the reader the inconvenience of otherwise having to cross-refer to the earlier case.

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.

8. In this context, I am reminded of 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:
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>> "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."

9. During the course of the hearing, I expressed concern to Mr Gibson QC, representing the defendants, about the quantity of material which had been deployed by both sides. His explanation relied partly upon the complexity of the proceedings in Brazil and partly upon the need to respond to the submissions raised and evidence submitted on behalf of the claimants in what, to my mind, had deteriorated into a forensic arms race.

10. The first case management conference to be listed before me 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 limit 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.

11. Notwithstanding the superabundance of material before me, the claimants sought, close to the end of the hearing, to raise an entirely new issue. I refused to entertain the point and my ruling to this effect was challenged by way of an application to the Court of Appeal for permission to appeal. This application was subsequently abandoned but not before it was necessary for me to respond further to an application by the claimants that I should revisit my decision and change my mind. The resulting judgment, to which I have already referred in passing above, itself extends to 97 paragraphs and is to be found at ***Município De Mariana v BHP Group Plc*** [2020] EWHC 2471 (TCC).

12. I will say no more about the accumulation of documentation in this case, or the recent procedural distractions, and will not seek, at this stage at any rate, to allocate responsibility or blame for the state of affairs which has arisen. Nevertheless, I must (and will) resist the temptation to enter the lists of competitive prolixity with a substantive judgment of commensurate length. If I were to reproduce the detail of all the materials presented for my consideration and attempt to resolve every disputed issue of primary fact or secondary inference, the result would be a paradigm of the law of diminishing returns.

13. As the Court of Appeal held in ***Customs and Excise Commissioners v A and Another*** [2003] Fam. 55:

> "82 A judge's task is not easy. One does often have to spend time absorbing arguments advanced by the parties which in the event turn out not to be central to the decision-making process…
>
> 83 However, judges should bear in mind that the primary function of a first instance judgment is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. The longer a judgment is and the more issues with which it deals the greater the likelihood that: (i) the losing party, the Court of Appeal and any future readers of the judgment will not be able to identify the crucial matters which swayed the

> judge; (ii) the judgment will contain something with which the unsuccessful party can legitimately take issue and attempt to launch an appeal; (iii) citation of the judgment in future cases will lengthen the hearing of those future cases because time will be taken sorting out the precise status of the judicial observation in question; (iv) reading the judgment will occupy a considerable amount of the time of legal advisers to other parties in future cases who again will have to sort out the status of the judicial observation in question. All this adds to the cost of obtaining legal advice.
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> 84 Our system of full judgments has many advantages but one must also be conscious of the disadvantages."

14. Where, therefore, I have omitted reference to any aspect of a party's case it is because I have considered that its importance is not sufficient to impact upon my central conclusions and that it would be disproportionate to include reference to it in my judgment. It does not mean, by such omission, that I have either not understood it or have failed to consider it. As I put it in similar circumstances in ***Kalma v African Minerals Ltd*** [2018] EWHC 3506:

> "63…for the sake of proportionality, I have had to leave a very considerable number of these points on the cutting room floor. This does not mean that I have failed to consider them or that I have discarded them as being entirely redundant but merely that the inclusion of their analysis or resolution in an already lengthy judgment would not have had a material impact on the determination of the central issues."

THE PARTIES

The Claimants

15. The vast majority of the claimants are individuals. Some, however, are businesses, Municipalities and other institutions. The numbers in each category are as follows:

    (i) 201,897 individuals;

    (ii) Around 517 small or micro sized businesses;

    (iii) Thirteen larger businesses;

    (iv) 145 members of the indigenous Krenak community;

    (v) 25 Municipalities comprising administrative divisions of the states covering the geographical areas in which 96% of the claimants live;

    (vi) Fifteen churches; and

    (vii) Five utility companies.

16. The rights and procedural routes to redress in Brazil which are open to these various groups of claimants are not identical.

17. Brazilian law, which, it is agreed, applies to all of these claims, distinguishes between moral and material damages which are broadly equivalent to general and special damages respectively in English law. Thus the individuals claim, for example, moral damages for personal injuries and interruption of water supplies and material damages for financial losses. Businesses are claiming material damages including loss of profit and damage to property. The claims of the Municipalities include compensation for increased public expenditure, loss of tax revenue and the like.

18. The only redress which the claimants seek in this jurisdiction is in the form of damages; as opposed to declaratory, injunctive or any other type of relief.

The Defendants

19. The owner and operator of the dam was, and is, Samarco Mineração SA ("Samarco") which is a Brazilian mining company. 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").

20. Brazilian environmental legislation provides for categories of direct and indirect polluters. Samarco, as owner and operator of the dam, and Vale, which was responsible for storing its waste behind the dam, are both alleged to have been a direct polluters. BHP Brasil, is alleged to have been an indirect polluter, None of these, however, is a party to these proceedings.

21. Where, therefore, do the two defendants come into this?

22. 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.

23. The central substantive question on liability in these English proceedings, is as to whether, as a matter of Brazilian law, these two defendants are liable to the claimants, as indirect polluters or otherwise, in respect of the consequences of the failure of the dam. There are arguments both ways and so this issue is not susceptible to summary determination.

PROCEEDINGS IN BRAZIL

The broad framework

24. As I have already noted, the evidence deployed in respect of the Brazilian procedural position has been extremely extensive with lay and expert

evidence from both sides covering virtually every nuance of the issues as to what has occurred, what is occurring and what is likely to occur in future.

25. The defendants' experts are (i) Justice Rezek who was twice a Justice of the Supreme Court, a Judge of the International Court of Justice, and a Judge of the Permanent Court of Arbitration; and (ii) Professor Didier, an academic in Brazilian Civil Procedure Law. He is the author of a leading textbook on civil procedure and was responsible for co-ordinating the translation into English of the 2015 Brazilian Civil Procedure Code.

26. The claimants' experts are Professor Rosa and Dr Janot, both of whom are former distinguished Public Prosecutors with considerable experience of the operation of multi-party claims in Brazil.

27. Inevitably, in the context of these interim applications, none of these experts was cross-examined and it is important that I do not undertake a too finely grained approach to determining the relative merits of their respective opinions. This is not a trial.

28. Against the background of the sheer volume of material which has been generated on the topic, the greatest challenge faced by this Court is to see the wood for the trees. With this aim in mind, and at the risk of repetition, I will summarise the position but will not attempt to identify (or adjudicate upon) every point in dispute.

29. Under Brazilian law, any given claimant, being one of a group alleged to have suffered recoverable loss, has a choice as to how to proceed to bring her claim. One option is simply to bring an individual claim to be resolved by the court in the usual way. Alternatively, she may seek to take advantage of a CPA, which is the Brazilian procedural mechanism for facilitating group litigation. So far, both options continue to be pursued in Brazil by persons or institutions claiming to have suffered loss as a result of the dam collapse.

30. A CPA may, for example, be commenced by one of a number of qualifying public bodies with a view to establishing the right to redress of a group of individuals and smaller businesses. The remedies potentially available include, but are not limited to, compensation for what, in England, would be categorised as general and special damages. Where liability has been made out, the court will make a "generic sentence" which enables those falling within its scope to bring "liquidation proceedings" in respect of their loss and damage. There is a dispute between the experts, which I do not consider it necessary for me to resolve, as to the extent to which a CPA judgment is subsequently binding in respect of, for example, matters of causation and damage.

31. CPA proceedings can be resolved by settlement, a decision of the court or a combination of the two. Any agreement may be homologated by the court with the effect of ratifying its terms with formal approval. In the event of a favourable outcome for the group, any given claimant need only prove that she is a member of the class of persons on behalf of whom those proceedings were brought and that she has suffered causatively consequent loss. In contrast to GLO proceedings in England, it is not necessary for any given claimant to commence proceedings and be identified on a register before the proceedings are concluded. Where proceedings have been settled, the parties may enter into Conduct Adjustment Agreement ("TAC") under the provisions of which the members of the relevant class may claim compensation. There is a further dispute between the experts in this case as to whether it is only upon homologation that a TAC becomes legally binding and may then be relied upon by victims for the purpose of bringing liquidations. Again, this is a point which I do not consider it necessary to resolve.

32. Decisions in the context of CPAs may be appealed pending which the proceedings may be stayed but, even where stayed, potential unfairness to claimants may be mitigated by provisional liquidation of the generic sentence in the interim.

Proceedings relating to the dam failure

33. On 30th November 2015, within four weeks of the dam collapse, CPA proceedings had been launched. These proceedings, brought by several public bodies including the Federal Government of Brazil, came to be known as the "20bn CPA" because the fund to be established was expected to be in the region of 20 billion Brazilian reals (R$). A Brazilian real is presently worth about £0.15. The 20bn CPA was brought on behalf of the communities and individuals who had suffered loss and damage as a result of the dam collapse. The proceedings were assigned to the 12th Federal Court of the State of Minas Gerais under the management of Judge Mario de Paula Franco Jr ("Judge Mario"), of whom more later.

34. The 20bn CPA was duly settled under the terms of a TAC called the Transaction and Conduct Adjustment Agreement ("TTAC"). Under the TTAC, Samarco, BHP Brasil and Vale signed up to an arrangement involving the creation of an entity known as the Renova foundation ("Renova") the purposes of which included, and continue to include, the mitigation of the environmental consequences of the incident and the compensation of individuals (and some small businesses) claiming to have suffered loss and damage as a result of the collapse of the dam. Under the TTAC, it was intended that Renova should provide full redress to all those eligible under the scheme.

35. Matters, however, did not end there.

36. On 2 May 2016, the Federal Prosecutor's Office, which was not one of the public bodies which had launched the 20bn CPA, initiated a second CPA claiming, in particular, that the environmental damage which was intended to have been covered by the 20bn CPA was greater than that which had been allowed for under the terms of the TTAC and that the Federal Government itself, together with other public bodies, was liable for the consequences of the collapse. This CPA, for reasons which are too obvious to require further explanation, has been referred to as the 155bn CPA.

37. The 155bn CPA has been stayed since January 2017 but, in the interim, although the ratification of the TTAC was very heavily criticised and consequently annulled by the appellate court, compensation continues to be paid under the TTAC structure under the terms of a second agreement referred to as the GTAC which acknowledge the continuing commitment of Samarco, BHP Brasil and Vale to make full redress to those affected through the Renova mechanism. The GTAC was ratified by Judge Mario on 8 August 2018. The 155bn CPA has been stayed to allow for further negotiations to take place. It is likely that the stay will remain in place for another two years or more. In the meantime, experts, instructed by the prosecutors, have been appointed to address the environmental and economic damage caused by the dam collapse and to evaluate and monitor the various Renova programs.

38. The terms of the GTAC provide for a process of renegotiation failing which any outstanding issues within the scope of the 155bn CPA may be adjudicated upon by the 12th Federal Court.

39. It is to be noted that both the 20bn and 155bn CPAs cover the claims of a wide range of potential claimants but that neither includes within its scope: Municipalities, large businesses, utility companies or churches. Falling within these excluded categories are 58 (or 0.03%) of the claimants in this case. The potential value of such claims is likely, however, to be significantly higher than the average of the claimants as a whole. Nevertheless, although excluded from the scope of these two CPAs, these bodies are not thereby precluded from bringing conventional individual claims in the Brazilian courts and, indeed, Municipalities are able to initiate their own CPAs. Ten of the Municipality claimants have already brought claims against Renova. The Archdiocese of Mariana and two of the utility companies have also brought claims in Brazil.

40. The task of ensuring that fair reparation is made to the victims covered by the CPA umbrellas is a vast one. One purpose of Renova is to meet this challenge and to this end it has made payments in response to a very

considerable number of claims for reparatory relief including, in the terminology of English law, both general and special damages. Nearly half of the claimants in this case have already received financial payments from Renova. Nevertheless, serious criticisms of its constitution and its speed and fairness of operation have been levelled against it from many quarters. These concerns, to which I pay full regard, are set out in detail in section C.4 of the claimants' skeleton argument. In particular, it is suggested that Renova is not sufficiently independent from Samarco, Vale and BHP Brasil. The claimants also rely on the fact many criticisms are levelled at Renova from reputable and high-level national and international sources.

41. About 70 other CPAs were also commenced in the aftermath of the dam collapse. Examples include claims on behalf of: members of the community of the municipality of Mariana and other geographical areas; members of the fishing communities; and many others. The Mariana CPA, for example, has been concluded by a final settlement agreement the terms of which apply to all those living in that Municipality and under which the Brazilian companies have acknowledged their liability to provide full redress. A full list of CPAs was appended to the defendants' skeleton argument and I do not consider that it would be helpful to reproduce it in this judgment.

42. Notwithstanding the existence of the CPAs, individuals are not precluded from bringing their own claims outside their structure. As at the beginning of 2019, no fewer than 67,316 of the claimants in the instant litigation had admitted to having already brought individual lawsuits in Brazil. About 20,000 claimants have conceded that these cases have been resolved in Brazil.

43. The defendants contend that for all of the claimants in the instant case the combination of available remedies, whether arising under the CPAs (including the Renova scheme) and/or via individual claims, provides a satisfactory means of redress which renders the claimants' involvement in litigation in England pointless. The claimants strongly disagree.

PROCEEDINGS IN ENGLAND

44. Initially, the claimants brought proceedings in this jurisdiction against six defendants. These included BHP Plc, Samarco and BHP Brasil but not BHP Ltd. A further claim was later made against BHP Ltd but proceedings against Samarco, BHP Brasil and the three other defendants were formally discontinued. The claimants' generic case was set out in Master Particulars of Claim ("MPoC") and particulars of each individual claim in Additional Particulars of Claim ("APoC"). In response, the defendants declared an intention to apply to the court for an order that the proceedings should be stayed or struck out.

45. The defendants mount a four-pronged attack. They contend:

(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 Regulation ("the Recast Regulation");

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

(iv) Alternatively, both claims should be stayed on case management grounds.

46. I propose to deal with each ground in turn.

ABUSE OF PROCESS

The legal starting point

47. The classic statement of the law with respect to striking out a claim as an abuse of the process of the court is to be found in the speech of Lord Diplock in ***Hunter v Chief Constable of the West Midlands Police*** [1982] A.C. 529 at p.536:

> "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

48. A working definition of abuse of process was formulated by Lord Bingham, in ***Her Majesty's Attorney General v Barker*** [2000] 1 F.L.R. 759. At paragraph 19, he defined an abuse of the process as:

> "…a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

49. In ***Johnson v Gore Wood & Co*** [2002] 2 A.C. 1, Lord Bingham held at p22C-E:

> "The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court… This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward."

Particular caution to be exercised before striking out "first time" litigation

50. One recurrent theme, which has been articulated in a number of the decided cases, is the reluctance of the court to deprive a claimant, on procedural grounds, of a platform upon which to prosecute a claim of adequate substantive merit where she has not ventilated such a claim in earlier proceedings. For example, in **Johnson**, Lord Millett held, at page 59D, that refusing to allow a citizen to litigate for the first time required particular justification because it was, on the face of it, a denial of the citizen's right of access to the courts.

51. In ***Summers v Fairclough Homes Limited*** [2012] 1 W.L.R. 2004 Lord Clarke said:

> "46. The right to a fair and public hearing in the determination of civil rights is enshrined in Article 6 of the European Convention on Human Rights ("ECHR"). The right includes a right of access to a court: Golder v United Kingdom (1975) 1 EHRR 524. The court must act compatibly with Article 6: Human Rights Act 1998 section 6(1). The court is of course itself a public authority: section 6(3). The right of access is not absolute: Golder at para 38. In Ashingdane v United Kingdom (1985) 7 EHRR 528 the European Court of Human Rights accepted at para 57 that the right might be subject to limitations. Contracting States enjoy a margin of appreciation. However, the essence of the right of access must not be impaired, any limitation must pursue a legitimate aim and the means employed to achieve the aim must be proportionate.
>
> 47. In the instant case the claimant obtained judgment on liability for damages to be assessed. We accept that that judgment is a possession within the meaning of Article 1 Protocol 1 of the ECHR and that the effect of striking out his claim for damages would be to deprive him of that possession, which would only be permissible if "in the public interest and subject to the conditions provided for by law …" The State has a wide margin of appreciation in deciding what is in the public interest, but is subject to the principle of proportionality: Pressos Compania Naviera SA v Belgium (1995) 21 EHRR 301 at paras 31-39.

> 48. It is in the public interest that there should be a power to strike out a statement of case for abuse of process, both under the inherent jurisdiction of the court and under the CPR, but the Court accepts the submission that in deciding whether or not to exercise the power the court must examine the circumstances of the case scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly."

52. I bear all of these observations fully in mind when approaching the arguments relating to abuse in this case.

Henderson v Henderson

53. The courts have shown less reticence in finding that there has been an abuse of process in circumstances in which a claimant has already taken (or forgone) the opportunity to bring her claim in other proceedings. An early and familiar example of a case in which such an abuse was found to have arisen was ***Henderson v Henderson*** (1843) 3 Hare 100 the modern significance of which was summarised with characteristic clarity by Lord Bingham in ***Johnson v Gore Wood & Co*** [2002] 2 A.C. at p 31 A-F:

> "…Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the

> court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not…While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

54. Seen in this light, the "rule" in ***Henderson v Henderson***, as interpreted and applied in later cases, provides the court with a flexible guide to the sort of circumstances in which, for example, attempts to run the same case twice may properly be categorised as an abuse of court. It is not, as May LJ pointed out in ***Manson v Vooght (No.1)*** [1999] B.P.I.R. 376, to be "picked over semantically as if it were a tax statute".

55. A helpful generic summary of the principles to be applied is to be found in ***Dexter Limited v Vlieland-Boddy*** [2003] EWCA Civ 14 in which Clarke L J said:

> "49. The principles to be derived from the authorities, of which by far the most important is Johnson v Gore Wood & Co [2002] 2 AC 1, can be summarised as follows:
>
> i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.
>
> ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.
>
> iii) The burden of establishing abuse of process is on B or C or as the case may be.
>
> iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.
>
> v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.
>
> vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.

> 50. Proposition ii) above seems to me to be of importance because it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C (let alone against B, C, D, E, F and G) in one action. There may be many entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary) against others.
>
> 51. Those reasons include, for example, the cost of proceeding against more than one defendant, especially where B is apparently solvent and the case against B seems stronger than against others. More defendants mean more lawyers, more time and more expense. This is especially so in large commercial disputes. It by no means follows that either the public interest in efficiency and economy in litigation or the interests of the parties, including in particular the interests of C, D and E, is or are best served by one action against them all.
>
> 52. It seems to me that the courts should be astute to ensure that it is only in a case where C can establish oppression or an abuse of process that a later action against C should be struck out. I could not help wondering whether the defendants in this case would have given their lawyers the same instructions on the question whether they should have been sued in the first action if they had been asked before that action began as they have given now that a later action has been begun.
>
> 53. It is clear from the speeches of both Lord Bingham and Lord Millett that all depends upon the circumstances of the particular case and that the court should adopt a broad merits based approach, but it is likely that the most important question in any case will be whether C, D, E or any other new defendant in a later action can persuade the court that the action against him is oppressive. It seems to me to be likely to be a rare case in which he will succeed in doing so."

56. I see no reason in principle why ***Henderson*** considerations should not be relevant in circumstances in which a claimant seeks to run two sufficiently related actions in two different jurisdictions whether sequentially or in parallel. Of course, the issue as to whether such circumstances amount to an abuse will inevitably turn on the particular facts of the case.

Group actions and the impact on the court

57. The various factual backgrounds to the authorities dealing with the scope and content of the inherent jurisdiction of the court in respect of the abuse of its process are, predictably, many and varied and there lies a danger in attempting to infer generic guidance from those cases in which the conclusions of the court are necessarily very fact sensitive. More

specifically, the flexibility of the application of the inherent jurisdiction is such that its deployment in the context of group actions, whilst preserving the essence of the purpose for which the power to strike out for abuse is to be deployed, must inevitably take particular account of the exigencies of multi-party proceedings.

58. For example, claims involving very considerable numbers of parties and issues inevitably place a burden on the court which may be very much greater than that which would be assumed in the context of a unitary action. Thus considerations of the allocation of court resources and the procedural practicability of accommodating the ambitions of the parties are liable to come more strongly into play.

59. In ***AB v John Wyeth & Brother (No.4)*** [1994] P.I.Q.R. P109 thousands of plaintiffs (as they then were) claimed damages for personal injuries against the manufacturers and distributors of benzodiazepine drugs.[2] In a relatively small number of cases, those who had prescribed the drugs had also been joined in the proceedings as alternative defendants. The prescribers applied to strike out the claims against them as an abuse of the process of the court.

60. The application succeeded at first instance and the Judge's decision was upheld by the Court of Appeal. Stuart-Smith LJ observed at p. 114:

> "Nor do we accept Mr. Scrivener's analysis that the plaintiff must be guilty of unreasonable or blameworthy conduct before his action is struck out. In none of the cases is this the test. Quite plainly, unreasonable or blameworthy conduct in the course of litigation is not by itself sufficient to constitute an action as an abuse of process. There is nothing unreasonable in a plaintiff wishing to sue the police for assault (Hunter's case) or to sue a solicitor for negligently advising a plea of guilty (Somasundaram v. Julius Melchior & Co. [1988] 1 W.L.R. 1394) or in seeking to recover damages for personal injuries which should have been, but were not, claimed in earlier proceedings (Talbot v. Berkshire County Council [1993] 3 W.L.R. 708). The principle in those cases is that it is contrary to public policy that the same issues should be relitigated, thereby wasting the time of the courts, running the risk of inconsistent verdicts and because it is vexatious to a defendant to have to face the same or similar issues twice, even where he may obtain an order for costs if the relevant litigation is unsuccessful (see: Ashmore's case at p. 348H–349C)."

[2] It may be recalled that the benzodiazepine litigation ran over the course of about a decade (from 1986 to 1996) and, at one stage, had been pursued by about 17,000 plaintiffs. By the time the Legal Aid Board had withdrawn its support, each side had spent more than £35 million on costs and not one of the substantive issues in the case had by then been resolved.

And, in particular:

> "It is the effect on the courts themselves and the defendant that is important."

61. Furthermore, group litigation may also give rise to greater complexity in the nature of the challenges facing the claimants as Stuart-Smith LJ later went on to note at p.116:

> "There was a good deal of evidence in the case of the general practitioner prescribers which pointed to difficulties faced by the plaintiffs in their actions. For example, in over 90% of the cases there is a Limitation Act defence, which the plaintiffs will have to overcome by obtaining a direction under section 33 of the Limitation Act 1980 or showing that their date of knowledge was within three years of action brought. There are very considerable problems on causation; these involve distinguishing between the effects of the drug and the underlying condition for which it was prescribed, the problems caused by previous addiction to benzodiazepine drugs other than those prescribed by the defendants, and distinguishing between symptoms due to the drugs or, in some cases, other drugs or excess alcohol, and the fact that many plaintiffs may suffer at least some withdrawal symptoms in any event. There is the difficult question of balancing the benefit of the drug against the undesirable consequences of taking it. We accept Mr. Scrivener's submission that the judge did not take these matters into account in reaching his decision. He did not need to do so because there was ample other material upon which he could act. But, in our judgment, he would have been entitled to take them into consideration had he wished to. This would not involve considering the merits of each individual case; that would have been quite inappropriate. But any judge experienced in this type of litigation, and especially Ian Kennedy J. with his knowledge of these cases, would be able to appreciate that these considerations may present real problems in many, if not all, of the cases, quite apart from the modest quantum of the claims if successful."

62. In the instant case, the claimants make two general categories of complaint about the option of suing in Brazil. In broad summary, they say that getting full and timely redress in Brazil against any potential defendant or through Renova is little short of impossible. Secondly, they contend that there are very significant, if not insurmountable, procedural hurdles in the way of bringing claims against these two defendants in Brazil.

63. The second objection would, in my view, carry far more force if the claimants had any compelling reason to seek to sue these two defendants in Brazil rather than, or in addition to, the present Brazilian defendants. In this regard, the claimants are in a similar position to the plaintiffs in ***AB*** who, by

and large, had no understandably personal or objectively sustainable reason to sue the practitioners rather than, or in addition to, the manufacturers or distributors of the drugs. Usually, as I readily accept, a claimant can choose to sue whom she wants to but the claimants in this case appear to have wrongly purported to elevate this proposition into an absolute right. Where, as in ***AB***, the choice of defendant brings no benefit to a claimant but the pursuance of a claim against such a defendant would result in the oppression of that defendant and/or would take a disproportionate toll on the court's resources the court is entitled to intervene. In this case, the claimants have simply no interest in, or intention of, suing these two defendants in Brazil and I regard the conflicting evidence of the respective experts as to how this could (or could not) be theoretically procedurally achieved to have given rise to a largely sterile debate. This is a civil claim for damages in the Queen's Bench Division of the High Court and not a public inquiry. Put simply, even if I were to proceed hypothetically on the basis they could not practicably sue these two particular defendants in Brazil, this would not change my conclusion on the issue of abuse of the process of this Court.

64. The challenges which are alleged to face the claimants in getting redress from any source in Brazil (as opposed to just these two defendants) give rise to a different issue and one to which I will turn in due course.

65. ***AB*** was decided before the introduction of the CPR but I find no basis upon which it could be argued that the present procedural regime would be expected to give rise to a narrower approach to the way in which courts are expected to deal with abuse of process applications in the context of multi-party litigation. On the contrary, and in particular, the need to take into account the resources of the court has been accorded specific weight in the overriding objective. In the context of this application, I do not apologise for setting out CPR Part 1.1 in full:

> "**The overriding objective**
>
> 1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
>
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate –
>
> (i) to the amount of money involved;

> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly;
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
>
> (f) enforcing compliance with rules, practice directions and orders."

66. Under Part 1.2, the court must seek to give effect to the overriding objective when exercising any power given to it by the Rules.

67. The power to strike out a statement of case is set out in CPR 3.4 the relevant parts of which provide:

> "3.4(2) The court may strike out a statement of case if it appears to the court-
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings…"

68. I will, of course, have the substance of these rules in the forefront of my mind when adjudicating on the issue of abuse.

Proof and discretion

69. The question arose during the course of oral submissions as to whether the decision of this court on the issue of abuse should involve either (i) an adjudication in respect of which there is only one right answer or (ii) one which involves the exercise of a discretion.

70. In ***Aldi Stores Ltd v WSP Group Plc*** [2008] 1 W.L.R. 748, Thomas LJ (as he then was) said:

> "16. In considering the approach to be taken by this court to the decision of the judge, it was rightly accepted by Aspinwall that the decision to be made is not the exercise of a discretion; WSP were wrong in contending otherwise. It was a decision involving the assessment of a large number of factors to which there can, in such a case, only be one correct answer to whether there is or is not an abuse of process. None the less an appellate court will be reluctant to interfere with the decision of the judge where the decision rests upon balancing such a number of factors…"

71. On the issue of proof, in ***Alpha Rocks Solicitors v Alade*** [2015] 1 W.L.R. 4535, Vos J (as he then was) observed:

> "24…litigants should not be deprived of their claims unless the abuse relied upon has been clearly established. The court cannot be affronted if the case has not been satisfactorily proved."

72. There will, however, arise cases in which, even though an abuse has been proved, the court retains a discretion in choosing the appropriate response thereto.

73. In ***Cable v Liverpool Victoria Insurance Co Ltd*** [2020] EWCA Civ 1015 Coulson LJ held:

> "63. In the recent case of Asturion Foundation v Alibrahim [2020] EWCA Civ 32, [2020] 1 WLR 1627 , this court was considering a unilateral decision by the claimant not to pursue its claim for a period of time whilst maintaining an intention to do so at a later date. The court found that this may well constitute an abuse of process, but did not necessarily do so (see paragraph 61 of the judgment of Arnold LJ). More importantly for present purposes, the court set out the correct approach to an application to strike out for an abuse of process. It said that it was a two-stage test. First the court has to determine whether the claimant's conduct was an abuse of process. Secondly, if it was, the court has to exercise its discretion as to whether or not to strike out the claim (see paragraph 64). It is at that second stage that the usual balancing exercise, and in particular considerations of proportionality, becomes relevant.
>
> 64. Furthermore, it seems to me that applying this two-stage test in circumstances like this not only provides clarity and simplicity, but it also avoids the sort of confusion that was identified by Turner J in Liddle v Atha. In that case the judge noted at paragraph 20 of his judgment that, in the lower court, the parties had agreed that, if there was an abuse of process, the application to strike out would automatically succeed. The judge was not satisfied with that, saying that he remained to be persuaded that the finding of abuse automatically gave rise to the striking out of the claim. As Asturion has subsequently demonstrated, Turner J was right to be doubtful: they are different questions and the finding of abuse of process does not lead inexorably to the striking out of the claim."

74. In those cases in which the court has appeared to treat the question of its adjudication upon an application to strike out for abuse of process as admitting to only one answer, one may readily infer that it has taken this approach because the nature of the abuse is such that, once found, there can be no real question but that only a strike out is appropriate. For example, in cases in which the court has decided that the very pursuance of the

proceedings under consideration amounts to an irredeemable abuse it is likely to be that no response short of striking out can be justified. However, in cases in which a less draconian response may be appropriate, the court has room thereafter within which to exercise a discretion.

75. I would add, for the sake of completeness, that my decision on the issue of striking out in this case would have been the same regardless as to what, if any, part of the decision had rested upon matters in respect of which there is only one right answer and which had involved the exercise of a discretion. I have, however, in my analysis later in this judgment drawn the line where I believe it to lie.

General points

76. From the above, I derive the following non-exhaustive propositions of particular relevance to this case:

(i) The hallmark of an abuse of process is a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process;

(ii) Although plainly a relevant factor, bad faith on the part of the party against whom the point is taken is neither a necessary nor sufficient condition for the finding of an abuse of process;

(iii) Litigants should not be denied the right to bring a genuine subject of litigation before the court save upon a scrupulous examination of all the circumstances which leads the court to the conclusion that the claim should, nevertheless, be struck out;

(iv) Cases in which a claimant has already taken (or forgone) the opportunity to bring her claim in other proceedings may, depending very much upon the facts, properly be categorised as giving rise to an abuse of court whether as a standalone consideration or when taken into account with other material factors;

(v) The court is entitled (and indeed duty bound) to take into consideration the likely impact upon the business of the courts themselves in the event that the claims were permitted to go ahead;

(vi) The court must take a two stage approach. Firstly, it must address the question of whether or not an abuse has been clearly proved. If it has not, then, subject to its residual, free-standing case management powers, that is an end of the matter. If it has, then it must thereafter exercise its discretion in determining what, if any, procedural consequences should follow. There may be some cases in which it is plain that striking out is the only appropriate response.

Grounds

77. I will now proceed to examine the various features of these claims upon which the defendants rely in support of their case that they amount to an abuse and the claimants' response thereto. For convenience, I have approached the task by categorising the central contentions under individual headings but recognise that the value of taxonomy lies mainly in convenience of presentation and orderly analysis and that, ultimately, the Court must stand back and take a broad view which takes into account the balance of the competing arguments as a whole.

The practicability of managing the claims in England

78. The present case is not merely unusual but unique in a number of respects. One of its most distinctive features is that, if it were allowed to proceed, the action in England would involve closely related group claims moving forward in parallel in two different jurisdictions with many of the same claimants in each seeking identical remedies in England and Brazil concurrently. The challenge of managing a GLO, even in the most favourable of forensic conditions, is often by no means straightforward. How the English court would be able to cope, if at all, with the problems likely to be generated by the simultaneous progress of its Brazilian counterpart is an issue which warrants particular scrutiny.

Irreconcilable judgments, collateral attack and cross-contamination of issues

79. The defendants contend that allowing this action to proceed would give rise to the risk of irreconcilable judgments in Brazil and England. The claimants reject this assertion but argue further that it is a factor which the court is required to disregard against BHP Plc in the context of the abuse argument on the basis that the scope of its relevance should be confined to the consideration of BHP Plc's reliance upon the Recast Regulation. I will deal in greater detail with the application of the Recast Regulation later in this judgment but, in summary, the court has jurisdiction under Article 34 thereof to stay proceedings brought against a defendant in the court in the jurisdiction in which it is domiciled in certain defined circumstances in which there arises a risk of irreconcilable judgments between the courts of a member and a non-member state.

80. Furthermore, ***<u>Owusu v Jackson</u>*** [2005] QB 801 established that it was not open to the United Kingdom (or any other contracting state) to bypass the regime imposed by the Brussels Convention on the ground that, although the defendant was domiciled in the UK, jurisdiction could be declined by the application of the English common law principle of forum non conveniens.

81. I would thus readily accept, and the defendants concede, that it would be impermissible to deploy an abuse of process argument in order to achieve through the back door that which the Recast Regulation bars through the

front. Nevertheless, in cases in which the risk of irreconcilable judgments is just one of a number of factors relevant to the exercise of the abuse jurisdiction it should not be ignored.

82. As 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."

And as Lord Briggs held in ***Vedanta***, on the appeal in the same case:

> "17. This does not, of course, prevent any defendant from seeking to have a claim struck out as an abuse of process or as disclosing no reasonable cause of action, or from seeking reverse summary judgment upon the basis that the claim discloses no triable issue against that defendant."

83. I respectfully agree with these observations and can see no basis upon which a court should be required, by the application of ***Owusu*** or otherwise, to wave through what would otherwise be an abusive claim on the basis that the application to dismiss is based partly upon matters which overlap with considerations of the risk of irreconcilable judgments or, for that matter, the doctrine of forum non conveniens. In any event, it would normally be very difficult, if not impossible and artificial, to attempt to distil out the Recast Regulation and forum non conveniens considerations arising in any given case and to analyse the residue alone for signs of abuse.

84. Furthermore, the risk of irreconcilable judgments is merely one of the mischiefs to which the aim of avoiding a multiplicity of litigation is directed. As Potter LJ observed in ***Divine-Bortey v Brent London Borough Council*** [1998] I.C.R. 886:

> "The basis of the rule in Henderson is the avoidance of multiplicity of litigation in relation to a particular subject or set of circumstances in order to avoid the prejudice to a defendant which inevitably results in terms of wasted time and cost, duplication of effort, dispersal of evidence and risk of inconsistent findings which are involved if different courts at different times are obliged to examine the same substratum of fact which gives rise to the subject of litigation."

85. To this I would add only that the prejudice identified in this passage may, in any given case, impact not only upon the defendant but also upon the court.

86. Having closely considered the evidence relating to the issues likely to be adjudicated upon in both Brazil and England, I am satisfied that the risk of inconsistent judgments would be acute in this case in the event that these proceedings were permitted to go ahead in England.

87. An important example relates to the alleged status of BHP Brasil as an indirect polluter. This is an issue which has a potentially significant bearing on the controversial question of whether or not the defendants in the present proceedings owe the claimants what, in English legal terminology, would amount to a duty of care.

88. In Brazil, BHP Brasil continues to deny that it is an indirect polluter. Under the 20bn CPA, it accepted, without prejudice, an obligation to fund Renova but only to the level of 50%; with Vale being under a several liability to provide the balance. One of the issues in the 155bn CPA, however, is whether BHP Brasil should, as the Public Prosecutor asserts, be jointly liable with Vale for the whole of the funding. This question remains, as yet, unresolved. If BHP Brasil is liable as an indirect polluter then this provides an important stepping stone in one of the potential routes to establishing the existence of the Brazilian equivalent of a duty of care on the part of the defendants in this jurisdiction. Both sides in the hearing before me accept that if the matter were to proceed in this jurisdiction then this point would very likely fall to be determined as a preliminary issue.

89. The wasted time, costs and duplication of effort involved in advancing the same case simultaneously in the two jurisdictions would be considerable and liable to give rise to incompossible findings. It would take little creative imagination to foresee many similar issues arising of which this is only one example. This is a matter to which I will return in due course with respect to the Article 34 issue.

90. Furthermore, the prospect of attempting to manage the claims of over 200,000 claimants where such a high proportion of them are taking (or have taken, or reserve the right to take) steps to achieve compensation in Brazil for the same losses as those in respect of which they wish to establish a right to damages against the defendants in England is nothing short of alarming.

91. By early 2019, no fewer than 154,766 of claimants in this case disclosed that they had already received money from Renova or had brought their own private proceedings. Significantly, although they concede that they must give credit for compensation already received, they have not, with one exception, relinquished their right to pursue further any claims they may have in Brazil. In an FAQ sheet distributed to potential claimants by the claimants' solicitors is to be found the following:

> "Can the clients file lawsuits in Brazil and in England?

> Yes. Customers will not be at a disadvantage in pursuing claims in England and Brazil. Customers cannot be compensated twice. If clients receive compensation in England, the judge in Brazil will probably take this into account when awarding compensation in the same way a judge in England will take into account the compensation granted in Brazil."

92. It can safely be predicted that this unremitting cross-contamination of proceedings would lead to utter chaos in the conduct of litigation in both jurisdictions the procedural position of each of which would be in a near constant state of flux. In particular, the utility of the selection of lead cases would be seriously imperilled by the risk that the issues to which they were directed would, as the litigation progressed, be undermined, made redundant or transmogrified by developments in Brazil.

93. The task facing the managing judge in England would, I predict, be akin to trying to build a house of cards in a wind tunnel.

94. During the course of submissions, counsel for the claimants floated the suggestion that in the event that these claims were allowed to continue (but not before) then consideration could be given to requiring some or all claimants to relinquish proceedings in Brazil as a condition of proceeding further in England. However, this, in my view, provides no adequate solution to the broader problem of jurisdictional cross-contamination not least because many claimants have already recovered some level of damages in Brazil. Questions are bound to arise as to whether (and to what extent) damages already received in Brazil relate to, or are distinct from, heads of damage which are later pursued in England. Furthermore, in circumstances in which awards have already been made under certain heads of loss in Brazil and the same claim is brought in England, but seeking a higher level of compensation, the English Court is effectively being asked to mark the homework of the judges of a foreign sovereign power.

95. Moreover, as I have already noted, potential claimants were reassured in the FAQ sheet distributed to them by the claimants' solicitors that, by joining the group, they would remain entitled to pursue their remedies in Brazil. The implications of later seeking to row back on this important incentive could well, regardless of all the other challenges which it faces, threaten the integrity and future viability of the whole group.

96. It is not necessary, in my view, to pronounce upon whether or not the invitation to the English court to adjudicate on any or all of the claimants' claims is capable of falling into the category of "collateral attack" on decisions in Brazil. It is the practical implications of parallel proceedings which are important. In effect, the Brazilian and English judges would constantly be stepping on each other's toes regardless of the aptness of the

label of “collateral attack”. For example, the Brazilian proceedings have undergone a considerable number of potentially significant new developments over the last year which have prompted both the claimants and defendants significantly to revise and add to their evidence and written submissions in the run up to this hearing. The very considerable challenges which this presented both to the Court and to the parties give only a flavour of the magnitude of the (in my view, insuperable) problems which would be generated in the event that these claims were allowed to proceed in England.

97. Furthermore, the English court would have to face further challenges, if any such were needed, beyond even those that I have already outlined.

98. In particular, it is confidently predicted that if these proceedings were allowed to go forward in England then the ranks of those presently seeking to make a claim would be swollen still further by many others thereby encouraged to throw in their lot with the existing cohort. But that is not all. Since proceedings were commenced, the claimants’ solicitors have lost contact with no fewer than 37,000 of those on whose behalf they have already commenced proceedings.[3] The risk of claimants dropping out of the litigation is increased by the fact that, in the event of future success in Brazil, they may be tempted to disengage from further prosecution of the English claims. This they may do without adequately or promptly informing their own solicitors of the position. Of course, there will be a degree of ebb and flow of claimants in the context of any group action but the level and rate of turnover in this case would, in practice, be likely to be unmanageable.

99. Of course, the claimants are right to point out that, generally speaking, a claimant is entitled to choose to sue who she wants in the event that more than one party may be liable in respect of the same losses. It is not normally for the court to dictate where such choice must fall. This rule, however, is not absolute as is illustrated by the decision *in **AB v John Wyeth & Brother (No.4)*** to which I have referred earlier. And as Lord Phillips MR said in ***Jameel v Dow Jones & Co Inc*** [2005] Q.B. 946 at para 54:

> "An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice."

[3] This is, to put the figure in perspective, roughly equivalent to the entire population of Bletchley or Port Talbot.

100. There is no reference at all to ***AB*** in the claimants' skeleton argument and this might go some way towards explaining how they came to misunderstand and understate the extent to which the impact on the Court is a relevant factor. As paragraph 8 of their skeleton argument boldly declares:

> "Moreover, any suggestion that the burden on the Court itself is a ground on which the Court can refuse to entertain properly arguable claims for substantial sums is also wrong in principle; the answer is simply that the Court can and should devise appropriate procedures to deal with the claims proportionately."

101. In this context, it is to be noted just how thin were the claimants' suggestions as to "appropriate procedures to deal with the claims proportionately". Little more was predicted than the need for the formation of a GLO and the determination of a preliminary issue relating to the existence of the defendants' alleged status as indirect polluters and the selection of lead cases. Beyond that, I was airily assured that, particularly if I were to be appointed to be the managing judge, any difficulties would be readily surmountable. I was as flattered as I was unconvinced. Robust case management is a tool not a magic wand.

102. Of course, it may be speculated that, if the claims were permitted to proceed, then the defendants could seek to bring them to a conclusion by offering, for example, a lump sum by way of settlement. However, this is by no means guaranteed and, in any event, it would be wrong, in the circumstances of this case, to permit an abusively unmanageable claim to proceed in the hope that its abusive unmanageability would catalyse a compromise.

103. It is simply not good enough in the context of group actions generally to seek to outsource all or most of the responsibility for devising a workable procedural mechanism for resolving the claims to the court. In any event, had the claimants attempted to provide more assistance on this point, I am satisfied that such detail would have fared badly under scrutiny. It is not, however, an option to avoid such scrutiny through silence.

104. 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.

105. Even if, contrary to my findings above, proceedings in England were practically workable, they would still have a very significantly deleterious impact indeed upon the scarce resources of the English courts. The serious further collateral complications arising from the practical consequences of the fact that very many similar or identical claims are proceeding in Brazil would pile Pelion on Ossa. I will, however, deal with the remaining practical

challenges, albeit briefly, for the sake of completeness. They should, however, not be underestimated.

106. Management of the group would be allocated to a High Court Judge. The selection of lead cases would not be from a homogeneous group but from an immense pool of claimants with grossly disparate interests. To reflect this, the number of such lead cases would be likely to be far in excess of those selected in any GLO to date. Repeated visits to the Court of Appeal generating further costs, delays and uncertainties would be almost inevitable. There has already been one such expensive and abortive initiative in this case which was launched even before I had handed down this substantive judgment. In the meantime, developments in Brazil over the time which it would be likely to take for any given appeal to reach the Court of Appeal would be liable to complicate matters still further with applications by the parties to rely on fresh evidence. The prospect of almost interminable transatlantic iteration is both stark and real.

107. Attempts may be made to mitigate these consequences but I am wholly satisfied that they would achieve very little, if anything. For example, a scheme of compensation (the very formation of which would, in any event, depend upon the doubtful cooperation of the parties) would run the risk of either significantly duplicating the work of Renova or of generating mutually irreconcilable methods of claim resolution.

108. Then there is the challenge of language.

109. Almost all of the claimants and many of the potential witnesses for both sides speak Portuguese as their first or only language. Proceedings would be inevitably and very significantly lengthened and rendered more expensive by the need for the extensive involvement of interpreters.

110. Moreover, there can be no question that litigation in England would require the translation of a very considerable quantity of documents from Portuguese into English. The costs of translation would be bound to be very high and the delays generated significant.

111. There also arises the very real danger of mistranslation leading to error. The existence of such a risk, which I do not seek to exaggerate, is illustrated by the following extract from the transcript of proceedings on the morning of the last day of the hearing before me:

> "MR HOLLANDER QC Your Lordship asked about the translation of the bit in the 155bn CPA, where the words "strictly affected" were used.
>
> We have -- the translation is completely wrong.

> It means something quite different. We haven't raised that with the other side yet. We need to do that. We will write to your Lordship, perhaps early next week, once we've had a chance to show what we think it means."

112. In short, had I not raised the issue directly, the construction of an important part of a potentially significant document in the case would have been based on a translation which was "completely wrong" and the inaccuracy of which had remained undiscovered until the Court had already heard seven days of submissions. It is fortunate, in the event, that my decision does not turn upon the meaning of this passage.

113. The English court would be further disadvantaged in having to apply Brazilian law with which it had had no previous familiarity whereas the courts in Brazil are fully acquainted with, and experienced in, its scope and application. If the expert evidence deployed for the purposes of this hearing, which sprawls dispiritingly over 600 pages of reports (not counting appendices), is anything to go by, then the chances of complete agreement between the parties as to what the law of Brazil might be in any given circumstances are remote indeed.

114. Furthermore, it is very unlikely, under Brazilian law, that any claimant or witness would be permitted to give evidence to an English court remotely from Brazil. Even less likely is it that an English judge would ever be permitted to sit in Brazil. It must follow that the time and expense involved in transporting claimants and witnesses to England, accommodating them here and flying them back is likely to be very high. The real possibility of quarantine restrictions arising from the Covid 19 pandemic has the potential, at least in the short term, to exacerbate these challenges.

115. Moreover, whatever the chances of any given claimant obtaining full redress in Brazil it is almost a certainty that she will not achieve it in England. With limited exceptions, the claimants have agreed to pay their solicitors a success fee of up to 30% out of any damages recovered in these proceedings. There is nothing improper (by modern standards) in such an arrangement and the claimants obviously and seriously believe that it is a sacrifice worth making. However, even taking into account any shortcomings of the Brazilian processes, of which more later, there is no need for any claimant there to forfeit a high proportion of her damages in order to fund her claim. Legal aid is available for individual claims and engagement in the Renova scheme gives rise to no costs liability.

116. On the face of it, these factors might lead the casual observer to wonder what perceived advantages could lure 202,600 claimants into agreeing to participate in proceedings in England. The defendants claim that much of their enthusiasm is likely to have been kindled by misunderstandings arising

from over-optimistic claims made either by their solicitors or those purporting to speak on their behalf.

117. It has been reported, for example, that suggestions have been made that awards of damages will be very much more generous in England than in Brazil. This is notwithstanding the fact that the damages would, in fact, be calculated here by the application of Brazilian law. It has also been said that, conveniently, the English judge would come to sit in a hotel in Minas Gerais to hear evidence from claimants and witnesses when, as an encroachment on national sovereignty, this is simply not permissible under Brazilian law.

118. It has even been suggested (but on what possible basis I know not) that, in general, claimants are likely to get a more sympathetic hearing in Liverpool than in London.

119. I indicated at an early stage of the hearing that I did not consider that it would be a proportionate use of my time to seek to draw any relevant conclusions from these allegations. Accordingly, having noted them, I do not take them into account in my adjudication. Nevertheless, whatever the source of the claimants' enthusiasm for the prospect of litigation in England, which I assume to be genuinely felt, I consider their collective optimism to be deeply and irredeemably flawed.

120. It follows that I am satisfied that it has been clearly proved that these claims amount to an abuse of the process of the court. In the words of Lord Bingham in ***Barker***, they amount to "a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

Full redress

121. A central plank of the claimants' case in response to the defendants' applications is that they will not, or are most unlikely to, get full redress in Brazil. A huge volume of evidence and argument on both sides has been devoted to the challenges which face any individual or organisation seeking compensation in Brazil. It is a topic upon which no cul-de-sac has remained unexplored.

122. There are, however, two points of overarching significance:

(i) Regardless of the level of the problems alleged to face the claimants in Brazil, these will not be alleviated by the opening up of a second front in England where any proceedings would be expensive, almost interminable, unfocussed, unpredictable and unmanageable;

(ii) So far, I have concentrated on the likely impact which proceedings in England would be likely to have on the courts of this jurisdiction. However, I ought not to overlook the consequences in Brazil. There

would be an inevitable and fearful symmetry about the disruption caused by proceeding with the two processes in parallel. Decisions of this Court would inevitably be fed back into the Brazilian resolution mechanisms. They would not, of course, be binding in Brazil but the risk of inconsistency is acute. Furthermore, were a claimant to benefit from any sum awarded in England, the Brazilian assessment of quantum would have to be adjusted accordingly. This may not simply be a question of subtracting one figure from another. Issues are likely to arise about whether any award in England is referable to a particular head of loss still outstanding in Brazil and thus as to whether any or some credit needs to be given at all. In cases in which the number of claimants is much lower, such adjustments and recalculations might be more straightforward but with tens of thousands of potential conflicts, the impact is likely to be significant. Furthermore, the Brazilian courts and lawyers would face similar translation challenges in determining what was happening in England as the English courts would in respect of developments in Brazil.

123. I do not doubt that very many people have experienced considerable challenges in obtaining what they consider to be just and prompt compensation through the procedures available in Brazil but it would be difficult to exaggerate the enormity of the task which any jurisdiction would face in achieving this object to the satisfaction of all. The 12th Federal Court to which the 20bn and 155bn CPAs have been allocated is, through the efforts of Judge Mario, seeking to devise and deploy several procedural innovations in order to improve and streamline the process. These include the implementation of what have been described as Priority Axes under which, as their name suggests, certain categories of outstanding matters under the 155bn CPA are intended to be fast tracked. The most relevant of these is Priority Axis No.7 which is concerned with compensation. Furthermore, Local Commissions, to be assisted by Technical Advisers, have been formed to represent the interests of the populations of the geographical areas to which they apply. Within this context, Judge Mario has recently sought to introduce the concept of "rough justice" under which claimants, who do not have the necessary documentation to prove, for example, their loss of earnings, can still be compensated on a broad brush basis rather than risk losing their claims for want of strict proof. It has been estimated that about 96% of the English claimants fall within geographical areas potentially covered by Local Commissions. Judge Mario seeks to insist that any claimant wishing to take advantage of the rough justice scheme must give up any claims which they have brought in England. He is clearly very concerned that running the claims in parallel would have a deleterious

impact on the fair and just resolution of claims in Brazil. I share those concerns.

124. There are issues between the experts as to whether the Priority Axes fall to be categorised as separate proceedings and, if not, whether they are to be regarded as part of the 20bn CPA or the 155bn CPA. I do not intend to resolve this dispute because the result would not make any difference to my conclusions on the central issues.

125. Predictions as to the likely progress of the Brazilian compensation claims (including those falling within the scope of the Priority Axes and Local Commissions) have generated a huge amount of evidence in this case. It would be inappropriate for me to attempt to adjudicate on the detail of the issues arising. I repeat, this is not a trial. Suffice it to say that the claimants' case is that the satisfactory resolution of outstanding claims in Brazil, if ever achieved, will take a very long time and the defendants take a much more sanguine view. Nevertheless, it is, in my view, permissible to make a number of observations.

126. Firstly, the suggestion that the various Brazilian routes to compensation are effectively broken or stalled is contradicted, at least in part, by the evidence of the number of claimants who have already received compensation many of whom now seek to have a second bite of the cherry in England. By the end of 2019, no fewer than 27,000 claims had been adjudicated upon in the state of Minas Gerais in an average of 414 days. On the evidence presently available, just under half of the claimants have already accepted payments from Renova.

127. It is the case that a considerable number of individual claims in Brazil have been stayed but in very many cases this is because they relate to compensation for interruption to the water supply. As may be expected in the aftermath of an environmental disaster leading to pollution of watercourses on a vast scale, a large number of victims claim compensation under this head either alone or in conjunction with other types of claim. The attractions of providing for a generic means of evaluating water interruption claims are thus obvious and the Brazilian court has deployed a mechanism called an IRDR in an attempt to make binding rulings in this regard. The IRDR in respect of Minas Gerais has been stayed pending an appeal upon which the quantification of no fewer than 43,742 claims depend. There is a dispute as to the likely outcome of the appeal and the length of time it may take for the issue to be resolved but litigating in England is most unlikely to provide a prompter or more effective solution. Either the English court would await the resolution of the issues in Brazil in which case no time would be saved or it would reach separate conclusions on the same issues prior to or simultaneously with the Brazilian courts with potentially chaotic

consequences. It is to be noted that no fewer than 192,000 claimants in the English proceedings are bringing claims in respect of water interruption.

128. The claimants also point to Article 104 of the Brazilian Consumer Protection Code (Law 8078/1990) which purports to provide for any individual action to be stayed in favour of a related CPA. My enquiries during the course of the hearing revealed, however, that the claimants were unable to point to a single claimant in the present action whose individual claim had been stayed on this basis. Nor was I provided with any persuasive evidence that this position was likely to change.

129. Secondly, regardless of the scale of the problems in Brazil, the solutions are not to be found in England where, as I have already concluded, the further progress of proceedings would make matters worse not better for all concerned.

130. Thirdly, where complaints are made that Renova and/or Samarco are repeatedly taking points in Brazil on (as an English lawyer would put it) issues such as duty of care, causation and quantum, I am aware of no basis upon which it could safely be assumed that similar points would not also be taken, with equal persistence and enthusiasm, by the defendants to the English proceedings.

131. Fourthly, it is apparent that Judge Mario is doing his utmost to progress the process of compensating victims. His task is indeed challenging but his persistence and determination is evident both from the tone, content and timing of his judgments and the procedural initiatives he is seeking to introduce. He is intolerant of delay and his approach is a cause for confidence that the impetus he is giving to the process will continue. I agree with the defendants' point that a very high proportion of the complaints made by the claimants, especially in respect of the operation of Renova, are historical and that the evidence, taken as a whole, justifies the inference that lessons are being learnt in Brazil and improvements are being implemented.

132. Fifthly, without adjudicating upon the accuracy of their strictly legal conclusions, I perceive a tendency on the part of the claimants' experts to rely upon fears for the future which are more pessimistically speculative than can reasonably be sustained by the evidence upon which they may comfortably rely. For example, one argument enthusiastically advanced by the claimants is that, on a close examination of the documentation, Renova is under no express obligation to compensate those who seek to participate in its scheme. As a matter of strict legal interpretation, I will assume this to be correct but the reality of the matter is that there is no recorded case of Renova ever having refused to provide compensation on the ground that it is not bound to provide full redress to those who qualify for it. The practical

operation of the Renova scheme is heavily criticised by the claimants but not because it has ever denied a legal liability to pay out on what it has otherwise accepted to be a legitimate claim. It is also the case that the Public Prosecutor, who has taken the strong and determined initiative to intervene in the 155bn CPA, has not, to date, articulated any concerns about this hypothetical lacuna.

133. By way of another example of undue pessimism, it has been argued on behalf of the claimants that Samarco has, at least for the most part, avoided explicitly accepting legal liability for the consequences of the collapse of the dam[4]. Again, however, the reality of the position is that Samarco's liability is undeniable. As Mr Hollander QC said during the course of his submissions:

> "…Samarco actually owns and operates the dam and therefore there is no issue that they have personal liability as direct polluters… So there is no question of any liability so far as Samarco is concerned."

Furthermore, there is no evidence that any claimant who has brought an individual claim in Brazil has faced a denial of liability on the grounds that Samarco is not a direct polluter. This position is, of course, to be contrasted with the likely defences of these two defendants in the event that proceedings in England were permitted to continue.

Renova

134. Judge Mario feared that the process of compensation via Renova had been slow and bureaucratic and much criticism of the foundation has been levelled by witnesses whose statements have been served for use in resisting these applications. Nevertheless, the following points may be made:

(i) The Public Prosecutor who has been astute to protect the interests of victims of the disaster and who initiated the 155bn CPA has not sought to dismantle the Renova scheme. Of course, this does not mean that the scheme is, or was, regarded as meeting all reasonable expectations and an element of fait accompli inevitably arises. Nevertheless, the scheme was not considered so deeply flawed that scrapping it and starting again was seen as an outcome to be preferred to the carrying out of improvements;

(ii) The task of compensating victims and mitigating the damage caused by the failure of the dam was, and continues to be, a vast undertaking. It would be astonishing if, along the way, problems,

[4] An exception is to be found in the agreement resulting from the CPA launched by the Municipality of Mariana in which liability was expressly acknowledged by the Brazilian defendants.

even serious problems, were not to arise in managing the scheme in a fully coherent and effective way;

(iii) Complaint is made that Renova is effectively controlled by Samarco and its corporate relations. Nevertheless, the evidence demonstrates that internal governance comprises: a Board of Trustees; an Advisory Council; a Fiscal Council; the Ombudsman; and Compliance. External governance includes: an Inter-Federative Committee and an independent auditor. Local Commissions, Regional Chambers and a Forum of Observers are in the process of being established. There may be room for argument as to where the right balance should lie but it is apparent that a number of public and independent stakeholders now have a significant role to play in guiding the work of the foundation;

(iv) Inevitably, some steps must be taken to ensure, in so far as is fair and practicable, that claims are genuine. There is some evidence that not all claims have been so. Those with bona fide claims may well be understandably resentful of the requirement to demonstrate good faith with proof;

(v) Matters of disputed factual causation arise. Claimants may, for example, be convinced that some damage to their business may be traced back to the failure of the dam and may be frustrated by this being called into question;

(vi) A balance must be struck between providing compensation which accurately reflects the losses suffered but without overburdening the claimants with bureaucratic demands for documentary proof and disproportionate form filling. Renova has sought to achieve this balance by applying a damage matrix the application of which is intended to provide consistency and manageability. The claimants do not appear to challenge the suggestion that, at least conceptually, this is an appropriate mechanism to deploy in order to set about the calculation of the quantum of loss although they do make specific criticisms of the length of the forms, the scope of the categories of relief provided for and the adequacy of the figures paid at the end of the process;

(vii) There is some dispute as to whether the categories of claim falling within the scope of the Renova programme are broad enough to cover every single potential category of legitimate claim arising out of the dam failure. However, I am satisfied, in the absence of compelling and concrete examples, that any such discrepancy is more apparent than real and, in any event, any claimant dissatisfied

with an offer made by Renova is free to pursue her remedy for full redress in the courts.

135. Permitting the claimants to bring proceedings against these defendants in England would not provide a panacea. None of the concerns identified on behalf of the claimants are liable to be significantly obviated. Indeed, English proceedings would, on balance, generate even greater challenges. I note:

(i) The claimants would have no chance of any redress until the issue of the liability of these defendants had been resolved as a matter of Brazilian law. This question, of itself, would take a considerable time to resolve. If they were to fail then the whole process would have given rise to a massive waste of time and money;

(ii) Even if they were to succeed on this preliminary point, they would not thereby emerge onto the sunlit uplands of swift redress. On the contrary, they would find themselves embroiled in what I am satisfied would be a GLO the management of which would almost certainly be fatally impracticable for the reasons I have already given and which would foul the progress of parallel proceedings in Brazil.

Hiving off the 58

136. As an alternative to striking out the whole of the claims, the claimants invite me to allow the 58 institutions which are unable to benefit from Renova and the 20bn and 155bn CPAs to proceed in England alone.

137. I am not attracted by this suggestion. I do not doubt that the average potential value of these claims is very likely to be higher than those of the majority of other claimants. Nevertheless, to allow them to proceed in this jurisdiction would still give rise to the acute risk of irreconcilable judgments and, in a broader sense, conflicting developments in the parallel jurisdictions.

138. By way of example, many of the Municipalities and utility companies stand to benefit from the Renova programmes of infrastructure and environmental works. The defendants have assisted me with a schedule of such programmes linking them to the claims which are sought to be advanced in the English proceedings. It reveals a significant overlap.

139. In any event, the 58 are not precluded from seeking redress on their own account in the courts of Brazil outside the scope of the 20bn and 155bn CPAs.

Stepping back

140. I pay full regard to the challenges which face those wishing to bring claims in Brazil. It would not be appropriate in the context of an application in which the calling and cross-examination of witnesses, both lay and expert,

is precluded to descend into any detailed adjudication upon the precise extent of such challenges but I do not underestimate them. As I have already noted, for the purposes of this judgment, I am prepared to accept that the subjective concerns of the witnesses are genuine. On the other hand, I am entirely satisfied that their confidence that anything of value is to be achieved in England is illusory.

Discretion

141. My primary conclusion, on all of the evidence, is that these proceedings amount to a clear abuse of process. In particular, the claimants' tactical decision to progress closely related damages claims in the Brazilian and English jurisdictions simultaneously is an initiative the consequences of which, if unchecked, would foist upon the English courts the largest white elephant in the history of group actions.

142. In addition, it would, in my view, be manifestly unfair to the defendants to be required to engage in massively expensive and protracted litigation devoid of any realistic promise of substantive advantage to the claimants.

143. In these circumstances, it is difficult to conceive of any way to exercise the discretion of the court other than to bring about the immediate curtailment of these proceedings whether by a strike out or stay.

144. One option might be to stay the claims pending resolution of the 155bn CPA and for further consideration thereafter. I am not, however, attracted by this solution. I note the following:

(i) Even upon the settlement or adjudication of the 155bn CPA there would still remain the risk that earlier findings of causation and quantum in any given claim in Brazil would be liable to give rise to cross-jurisdictional contamination. I am satisfied that, even after the resolution of the 155bn CPA, proceedings in England would remain unmanageable;

(ii) When the 155bn CPA has been concluded, it is inevitable that the background circumstances, particularly in Brazil, will have undergone considerable change. Any application to lift the stay at that stage would almost certainly be met with the same level of determined resistance as in the hearing before me but on different material;

(iii) The conclusion of the 155bn CPA is not likely to mark the end of relevant litigation in Brazil in any event with a strong risk that a rump of individual claims will still fall to be resolved;

(iv) There is significant merit in providing the parties with finality rather than to cause both sides to proceed with the uncertainty which would

follow from a stay which would, in any event, be likely to be in place for two years or longer;

(v) Whilst the proceedings remained stayed in England, the potential for resurrecting them in future would serve potentially to distort the progress of proceedings in Brazil by the deployment of tactical decisions prioritising the hope of reengaging with claims in this jurisdiction rather than concentrating on making the best of what the Brazilian routes to redress can offer;

(vi) All of the practical issues which I have already identified concerning, for example, language and Brazilian sovereignty would remain.

145. It must follow that, having adjudged these claims to amount to an abuse of the process of the court, I have further determined that the only proper procedural consequence of this is that they should be struck out. In reaching this view, I cannot emphasise too strongly that I am not in any way whatsoever seeking to trivialise the hardships suffered by the many victims of the collapse of the dam. But what they need and deserve is a mechanism by which to obtain a fair and just outcome. I am entirely satisfied that this would not be served up at the table of an English Barmecide feast.

THE REMAINING GROUNDS

146. My decision to strike out all of the claims in these proceedings for abuse of the process of the court means that it is strictly unnecessary for me to consider, in the alternative, what approach I would have otherwise taken to the defendants' applications under the remaining Article 34 Recast, forum non conveniens and case management stay grounds respectively. Nevertheless, out of deference to the industry of the legal teams who have assisted me on these topics and lest, on appeal, my findings on the question of abuse should be overturned, I will go on to resolve these issues in the alternative.

ARTICLE 34 RECAST

147. By the operation of a series of instruments, collectively referred to as the Brussels Regime and starting with the Brussels Convention (1968), participating nations are bound by a set of rules governing which courts have jurisdiction in legal disputes of a civil nature between individuals resident in different states. These instruments include Brussels I Regulation (EC) No 44/2001 and the Lugano Convention 2007.

148. In 2012, the EU institutions adopted a Recast Brussels I Regulation which replaced the 2001 Regulation with effect from 10 January 2015. The Recast Regulation includes, for the first time, provisions relating to parallel proceedings in a Member State and non-Member State respectively. It is this Regulation which applies to the proceedings against BHP Plc in this case.

Although the UK has formally left the European Union, the Regulation continues to apply under the transitional arrangements provided for under the Withdrawal Agreement.

149. The more recent instruments comprising the Brussels Regime often replicate, or at least follow closely, the wording of rules set out in the texts of their predecessors. Accordingly, it is permissible in such instances to have regard to authorities which relate to those instruments which pre-date the Recast Regulation as a guide to interpretation.

150. The jurisdictional default position is set out in Article 4 of the Recast Regulation which provides:

> "The general principle of the Regulation is that individuals should only be sued in their member state of domicile."

151. This general principle is designed not only for the protection of EU domiciliaries but also to enable any given claimant to know, with reasonable certainty, where she may sue.

152. Prima facie, therefore, England is the proper jurisdiction in which to commence proceedings against BHP Plc because it is domiciled here. BHP Ltd, however, is domiciled in Australia and thus, by the application of Article 6(1) of the Recast Regulation, the jurisdiction of England is to be determined by the application of English law.

153. Article 4 may therefore be seen as promoting considerations of certainty over those of flexibility. Nevertheless, there are exceptions to the general rule. One of these is provided by Article 34 and it is this exception which is relied upon by BHP Plc. It provides:

> "1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:
>
> (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
>
> (b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
>
> (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.
>
> 2. The court of the Member State may continue the proceedings at any time if:

> (a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments;
>
> (b) the proceedings in the court of the third State are themselves stayed or discontinued;
>
> (c) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
>
> (d) the continuation of the proceedings is required for the proper administration of justice.
>
> 3. The court of the Member State may dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.
>
> 4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion."

154. The broad object of Article 34 is identified in Recital 23:

> "This Regulation should provide for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States, considering in particular whether a judgment of a third State will be capable of recognition and enforcement in the Member State concerned under the law of that Member State and the proper administration of justice."

155. 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.

156. It is to be noted that, where Article 34 is found to apply, the proceedings in the Member State are to be stayed. The court is not afforded the option of declining jurisdiction.

157. Accordingly, the analysis with respect to the application of Article 34 in this case may be considered in the following stages all of which must result in a determination in favour of the defendants in order for a stay to be granted:

    (i) Are the English proceedings related to the 155bn CPA?

(ii) Is the 155bn CPA pending in Brazil?

(iii) Is it expedient to hear and determine the 155bn CPA and the claim against these two defendants together to avoid the risk of irreconcilable judgments resulting from separate proceedings?

(iv) Would a Brazilian judgment in the 155bn CPA be capable of recognition and enforcement in England?

(v) Is the stay necessary for the proper administration of justice?

(vi) Ought the court to exercise its discretion in favour of a stay?

158. I will deal with each factor in turn.

Related action

159. The defendants pray in aid the wording of Article 30 of the Recast Regulation. This Article deals with actions in two different member states as opposed to those between a member state and a third party state. Nevertheless, in so far as is relevant to the issue of relatedness, the terminology deployed is nearly identical.

160. Article 30 provides:

> "1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
>
> 2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
>
> 3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

161. In this context, it can be seen that the concept of relatedness is inextricably bound up with the risk of irreconcilable judgments.

162. I note that the words "so closely connected" which are found in Article 30(3) do not appear in Article 34(1)(a)). However, in my view, they do not give rise to any relevant interpretative distinction between the two Articles. The concept of "so closely connected" in Article 30.3 is no more than a descriptive consequence of the risk of irreconcilable judgments and not a freestanding and additional criterion which must be fulfilled. As Bean LJ observed in ***EuroEco Fuels (Poland) Ltd v Szczecin*** [2019] 4 W.L.R. 156:

> "44. I turn to the wording of article 30(3). "Closely connected" is a phrase which looks forward to the rest of the sentence and does not require separate analysis."

163. On this basis, I conclude that the issue of "relatedness" may properly be subsumed into that concerning the risk of irreconcilable judgments and thus requires no further or separate consideration.

Pending

164. There is no doubt that the Brazilian court had already been seised of the 155bn CPA by the time that the relevant proceedings in England had been commenced. The defendants have now accepted that it is the 155bn CPA alone which is relied upon under Article 34. Accordingly, as I have already observed, there is no need to consider the other CPAs in this context.

165. Furthermore, it is clear to me that the 155bn CPA remains pending. Many issues arising under that claim remain to be resolved and until they are, whether by agreement or by judgment of the court, it cannot be credibly asserted that the action is not pending. Even in circumstances in which an action has been dismissed, it is still pending whilst it remains subject to appeal (***PJSC Commercial Bank Privatbank v Kolomoisky*** [2020] 2 W.L.R. 993) and so too when it has been suspended or stayed (***In re Alexandros T*** [2014] 1 All E.R. 590).

Is it expedient to hear and determine the 155bn CPA and the claim against these two defendants together to avoid the risk of irreconcilable judgments resulting from separate proceedings?

166. The starting point in formulating the proper approach to assessing the risk of irreconcilable judgments is to be found in the case of ***Sarrio S.A. v Kuwait Investment Authority*** [1999] 1 A.C. 32. The dispute to be resolved involved the interpretation of Article 22 of the Brussels Convention (1968). Article 22 was the precursor to Article 30 of the Recast Regulation.

167. In that case, the Court of Appeal had taken a narrow view of those features of proceedings in the pending action which could properly give rise to the risk of irreconcilable judgments. Evans LJ sought to distinguish between, on the one hand, primary issues of fact and, on the other, issues of fact which the court in the pending proceedings may or may not decide and which are not essential to its conclusion.

168. This approach was robustly rejected by the House of Lords. Lord Saville observed at p40 C-E:

> "…it seems to me that the words of the article itself militate against the suggested limitation. The actions, to be related, must be "so closely connected that it is expedient to hear and determine them together" to avoid the risk of irreconcilable

> judgments resulting from separate proceedings. To my mind these wide words are designed to cover a range of circumstances, from cases where the matters before the courts are virtually identical … to cases where although this is not the position, the connection is close enough to make it expedient for them to be heard and determined together to avoid the risk in question. These words are required if "irreconcilable judgments" extends beyond "primary" or "essential" issues, so as to exclude actions which, though theoretically capable of giving rise to conflict, are not sufficiently closely connected to make it expedient for them to be heard and determined together. The words would hardly be necessary at all if the article was to be confined as suggested. Indeed, in that event, it seems to me that quite different words would have been used."

169. He went on to conclude at p41 F:

> "…I am of the view that there should be a broad commonsense approach to the question whether the actions in question are related, bearing in mind the objective of the article, applying the simple wide test set out in article 22 and refraining from an over-sophisticated analysis of the matter."

170. I note, in passing, that in ***In re Zavarco Plc*** [2016] Ch. 128, the Deputy High Court Judge observed of Article 34.1 (a):

> "35. The premise of the first pre-condition is that the actions are related in the sense that they may result in irreconcilable judgments if allowed to proceed in parallel. Though that may arise from findings of fact as well as decisions of law: see Gascoine v Pyrah [1994] IL Pr 82 , para 42, they would have to be points which would or might form an essential part of the basis of the judgments, effectively part of their res judicata effect, absent which they would not be irreconcilable."

171. With all due respect, the analysis in this passage is irreconcilable with the decision in ***Sarrio*** and would appear to follow the ratio of decision of the Court of Appeal in that case as if had not been reversed. I note in this regard that, according to the official law report, although the decision of the House of Lords was referred to in argument it did not find its way into the judgment of the Court.

172. In ***Jalla v Royal Dutch Shell Plc*** [2020] EWHC 459 Stuart-Smith J said:

> "223. Because Articles 30 and 34 do not require the proceedings to involve the same cause of action and to be between the same parties, it is plain that the "risk of irreconcilable judgments" to which Articles 30(3) and 34(1)(a) refer cannot require that there be a risk that one judgment may give rise to an issue estoppel affecting the other. I am not aware of any binding authority that

defines what would and would not amount to "irreconcilable judgments" for the purposes of Articles 30 and 34. In Blomqvist v Zavarco [2016] Ch 128, Mr David Donaldson QC (sitting as a Deputy High Court Judge) said obiter that:

> "The premise of the first pre-condition is that the actions are related in the sense that they may result in irreconcilable judgments if allowed to proceed in parallel. Though that may arise from findings of fact as well as decisions of law: see Gascoigne v Pyrah [1994] IL Pr 82 para 42, they would have to be points which would or might form an essential part of the basis of the judgments, effectively part of their res judicata effect, absent which they would not be irreconcilable."

224. I think this passage means that not all points of difference would render judgments "irreconcilable" within the meaning of the Article; rather, the points of difference (whether arising from findings of fact or of law) would have to "form an essential part of the basis of the judgments", such as would (if all other prerequisites were satisfied) be capable of giving rise to an issue estoppel by operation of res judicata. Although I would not exclude the possibility that there might at least in theory be points of difference which do not meet this standard but which would be so significant as to make it expedient to hear the related actions together, I would adopt the approach advocated in ***Zavarco*** as a useful starting point when considering whether there is a risk of irreconcilable judgments within the meaning of the article. What appears clear from the different language used for Articles 29 and 33 on the one hand and for Article 30 and 34 on the other is that there may be a risk of irreconcilable judgments within the meaning of Article 34 even though the parties and the causes of action are not the same in the separate proceedings being considered on an application to stay."

173. It would appear that Stuart-Smith J had not been referred to ***Sarrio***. Certainly, no mention of it appears in his judgment. I would propose, therefore, to follow the approach of ***Sarrio*** and, with respect, decline to follow ***Zavarco*** to the extent that it would appear to depart from the "broad commonsense approach" advocated by Lord Saville.

174. Even if I were to have taken the narrower view, I would still have been satisfied that if the claim against BHP Plc were heard in England, there would arise the risk of irreconcilable judgments.

175. In this regard, I have already referred, in the context of the abuse of process issue, to the question of BHP Brasil's alleged status as indirect polluter.

176. In short, the Federal Prosecutor has explicitly asserted in the 155bn CPA that BHP Brasil is an indirect polluter and therefore should be jointly liable with Vale to fund Renova. BHP Brasil has denied, and continues to deny,

this. The matter was dealt with in an exchange between Mr Hollander QC and myself on the final day of the hearing:

> "MR JUSTICE TURNER: He might say that I want BHP [Brasil] to put its hands up and say whatever funds are required they will be jointly liable regardless of Vale's contribution.
>
> MR HOLLANDER: He could do that."

177. Of course, one may speculate that the issue may not be pursued by the Federal Prosecutor after all but, as matters presently stand, this is a question which, unless settled, will be the subject matter of a judgment of the Brazilian court.

178. In the English proceedings, at paragraph 275 of the Master Particulars of Claim, the claimants seek to trace the alleged liability of BHP Plc through the conduit of BHP Brasil. The point is made explicitly in paragraph 325 of the claimants' skeleton argument:

> "if it was [sic.] possible for there to be a combined trial in Brazil of the liability of BHP Plc along with the liability of the Brazilian Companies, that trial could never result in a generic sentence holding that BHP Plc was liable to pay compensation without the court also holding that the Brazilian Companies were also liable to pay compensation."

179. The claimants later submitted that there were other arguable bases on which the liability of BHP Plc could be founded without the same being parasitic upon a finding that BHP Brasil was also liable and to which earlier reference had been made in the Master Particulars of Claim. At no stage, however, was it contended that the status of BHP Brasil was not a relevant consideration to at least one way in which BHP Plc could be held liable to the claimants.

180. It would thus appear to be inevitable that the alleged status of BHP Brasil as an indirect polluter would fall to be determined as part of a preliminary issue in English proceedings and the risk of irreconcilable judgments is both real and acute. As the claimants accept in their skeleton argument:

> "484. It is accepted, however, that it is very likely that the first question for the Court in the English action will be the liability of the Defendants. That investigation will require a detailed examination of the knowledge and involvement of BHP's English and Australian senior management team in the activities of Samarco and the events leading to the Collapse over a period of several years. It will also involve an examination of the financial support given to, and derived from, Samarco's operations by the BHP Group as a whole, and an investigation into allegations of negligence and breach of duty by BHP executives."

The resolution of such an issue would thus need to address the issue of whether or not BHP Brasil (as part of "the BHP Groups as a whole") was an indirect polluter.

181. This feature alone is, in my view, sufficient to demonstrate the risk of irreconcilable judgments even on what I regard to be an impermissibly narrow approach to the interpretation of the Article. On a broader interpretation, the list of areas in which potentially irreconcilable judgments are liable to arise is almost endless. By way of example only:

(i) What health consequences can and cannot be attributed to the pollution?

(ii) What heads of damages are permissible as a matter of Brazilian law?

(iii) What geographical areas were affected by the pollution?

(iv) What is the appropriate quantum of damages in any individual case?

182. There is an issue between the parties as to whether factual findings in the 155bn CPA would be binding in the Brazilian jurisdiction. However, even if they were not, the claimants concede that, in the context of claims for in-kind relief, such findings could be taken into account by other courts in England or Brazil.

183. In any event, a Brazilian judgment does not have to be theoretically binding on an English court in order for it to be irreconcilable. As Stuart-Smith J observed in ***Jalla***:

> "241… It seems to be the Defendants' working assumption that the Nigerian Court should deliver judgment first, with a view to then lifting the Article 34 stay on the English proceedings. That will not avoid the risk of irreconcilable judgments because, although the English court would afford due attention and respect to the findings of the Nigerian courts, the findings of the Nigerian courts in the FEA and the other actions would not bind the English court to make equivalent findings even on the most basic matters such as whether the December 2011 Spill reached land. In practice, therefore, the risk of irreconcilable judgments would remain, though it might be somewhat reduced if the English court waited until after the Nigerian courts had given judgment."

184. Furthermore, whether or not the findings in a judgment in the 155bn CPA would be legally binding as to matters of fact arising in consequent individual claims in Brazil does not mean that any such judgment may not be still irreconcilable with a finding of fact on the same issue made by an English court. The argument that the risk of irreconcilable judgments on factual issues in Brazil mitigates the adverse impact of further irreconcilable

judgments in England does not, in my view, carry significant weight in the circumstances of the instant case. I will turn later in this judgment to those matters which led me to a different conclusion, on the distinct and particular facts of this case, than that reached by the court in ***Jalla***.

185. The claimants sought to advance a case suggesting that it was all but inevitable that there would be no judgment arising from the outstanding disputes under the 155bn CPA. The reasoning behind this approach was, I have to say, elusive.

186. In this regard, I was invited to treat Judge Mario as fulfilling, by analogy, the role of an arbitrator doing no more than adjudicating upon matters the parties had been unable to agree. I found this approach to be unhelpful. In the event that agreement were not reached on any aspect of the 155bn CPA then Judge Mario would be acting as a judge and would be expected to deliver a judgment on the issue. On any view, this state of affairs justifies the conclusion that there remains a chance that, if the claims were to proceed in England, then there would arise the risk of irreconcilable judgments.

187. Furthermore, on the eighth and final day of the hearing, Mr Hollander QC conceded that, even on the evidence of his own expert, the possibility that Judge Mario would adjudicate on matters not agreed in the renegotiation process was not fanciful. This was an important and realistic concession. The prospect of irreconcilable judgments relates to a risk and not a likelihood. There will arise the chance of settlement in most civil claims but this does not, of itself, preclude the operation of Article 34. The remedy lies in a later application under Article 34(2) for the proceedings in the Member State to continue in the event of a compromise (or imminent compromise) of the claim in the third state.

188. I further took the view, although it is not necessary for my determination of this case and indeed was not a position advanced by the defendants, that the process of homologation (or ratification) by the Brazilian court of any agreement under the 155bn CPA would be, in itself, a judgment falling within the scope of Article 34. In this regard, the entirety of the issues arising under the 155bn CPA, whether or not subject to agreement between the parties, would fall within the range of potentially irreconcilable judgments.

189. As to what is meant by "expedient to hear and determine the related actions together", two schools of thought have emerged. One requires there to be a practical procedural means by which the two actions could, in fact, be tried together. The other requires only that it be established that such a solution would be theoretically desirable regardless as to whether it would be achievable in practice. The defendants sought to persuade me that their case was so strong that, whichever strand of authority were to be followed, it

would be unnecessary for me to attempt to resolve the outstanding tensions between the two. However, having heard full argument on the question, I remain minded to explore the legal issue and reach a conclusion.

190. The broader view is that which is articulated in **Kolomoisky** in which the Court of Appeal concluded:

> "191. …The word "expedient" is more akin to "desirable"…that the actions "should" be heard together, than to "practicable" or "possible", that the actions "can" be heard together. We also consider that there is force in Ms Tolaney's point that, if what had been intended was that actions would only be "related" if they could be consolidated in one jurisdiction, then the Convention would have made express reference to the requirement of consolidation, as was the case in article 30(2) of the Recast Brussels Regulation.
>
> 192. Accordingly, on this threshold issue, we consider that the judge was right to conclude that the actions were related, even if they could not be consolidated, so that the judge did have jurisdiction to grant a stay in the present case. However, the fact that the actions could not be consolidated was relevant to the exercise of discretion… to which we now turn."

191. This decision was referred to with approval by the Court of Appeal in ***EuroEco Fuels (Poland) Ltd v Szczecin and Swinoujscie Seaports Authority*** [2019] 4 W.L.R. 156:

> "45. "Expedient" is a word whose meaning has been the subject of discussion in decisions of the Commercial Court in this jurisdiction as to whether it means "desirable" or "possible". In JSC Commercial Bank Privatbank v Kolomoisky [2019] EWCA Civ 1708 , a decision handed down the day before the hearing in the present case, this court held at para 191 that "expedient" is more akin to "desirable" than to "practicable" or "possible". The court approved the approach of Rix J in Centro Internationale Handelsbank AG v Morgan Grenfell Trade Finance Ltd [1997] CLC 870 that the question is not whether the actions can be brought together but rather whether they should be brought together.

192. Nevertheless, the court went on to find that:

> "48. Ms Page was right to remind us that the question is whether it is expedient that the two actions be "heard and determined" (not just "heard") together. This must in my judgment mean at least that, even if the two actions cannot be consolidated (which would bring article 30(2) into play), they will be tried by the same judge or panel of judges in the same court and that judgment will be given in both actions at the same time. It would no doubt be a question for the civil procedural law of the relevant

> member state how the evidence was handled. But I do not think that it can be said that two actions are "heard and determined together" if one takes place before Judge A, who gives a decision in (say) March, and the other takes place later before Judge B, who gives judgment in October."

193. In support of this approach, the Court of Appeal compared the background circumstances of ***Kolomoisky*** and those of the case before them:

> "49. In Kolomoisky, at paras 209–210, this court drew a distinction between two Ukrainian courts: a district court with defamation jurisdiction and the country's commercial court. Mr Kolomoisky, the first defendant in a fraud claim of very high value brought in the Business and Property Courts of England and Wales, sought a stay on the grounds that a defamation claim was proceeding in the Ukrainian district court and that the two actions were related. This court noted the expert evidence that the district court before which the defamation claims were proceeding did not have jurisdiction to hear the claimant Bank's fraud claim which would have to be brought before the Ukrainian commercial court. The court held, at para 210, that: "absent some strong countervailing factor, the fact that proceedings cannot be consolidated and heard together will be a compelling reason for refusing a stay."
>
> 50. In the present case Nicol J noted at para 91(iv) of his judgment:
>
> > "The defendants' Polish lawyers accept that it is very unlikely that there would be consolidation of the present proceedings for nuisance and any claims which the claimants were to bring for libel and/or malicious falsehood. Unless those expectations are wrong, there will, in any case, be two sets of proceedings even if they are continuing in the same jurisdiction."
>
> 51. It seems equally unlikely that the two actions could be tried in the same court before the same judge. The claimants' expert stated that a libel claim in Poland must be brought in the civil division of the general court, whereas the emissions lawsuit had to be brought in the commercial division. She stated that she had never in her professional experience seen such proceedings joined and she believed that it would be very rare for such joinder to occur. The defendants' expert agreed.
>
> 52. If the judge's decision to decline jurisdiction is upheld or even if the English claim for libel and malicious falsehood is stayed the claimants could, of course, start similar proceedings in Poland. But on the material before us there appears to be no real possibility of such a claim and the existing claim for

nuisance brought by the defendants being "heard and determined together".

53. In these circumstances I consider that the judge had no discretion to decline jurisdiction nor to order a stay under article 30 of the RBR, and that the appeal must be allowed."

194. To my mind, and with all due deference, there are two related sources of tension between ***Kolomoisky*** and ***EuroEco***:

(i) The Court of Appeal in ***Kolomoisky*** held that what is "expedient" is more akin to "desirable" than to "practicable" or "possible". The Court in ***EuroEco*** held that "the question is whether it is expedient that the two actions be "heard and determined" (not just "heard") together." It went on to interpret the phrase "heard and determined" as if it were not qualified by the concept of what is "expedient" as defined in ***Kolomoisky***.

(ii) The Court in ***EuroEco*** recognised that the position in ***Kolomoisky***, had the English claim been heard in the Ukraine, would have involved separate proceedings "in a district court with defamation jurisdiction and the country's commercial court". On this basis, it went on to hold that "the judge had no discretion to decline jurisdiction nor to order a stay". However, in ***Kolomoisky*** it is clear that the Court did not regard this state of affairs as one which went to jurisdiction but rather to discretion:

"192. Accordingly, on this threshold issue, we consider that the judge was right to conclude that the actions were related, even if they could not be consolidated, so that the judge did have jurisdiction to grant a stay in the present case. However, the fact that the actions could not be consolidated was relevant to the exercise of discretion, the final issue on ground 2 to which we now turn."

Indeed, the Court in ***Kolomoisky*** only went on to consider the significance of the separate proceedings in the Ukraine expressly under the heading "discretion" and after it had accepted that the judge otherwise had jurisdiction to grant a stay.

195. I note also that the court in **Kolomoisky** expressly approved the approach of Eder J in **Nomura International plc v Banca Monte Dei Paschi Di Siena SpA** [2014] 1 W.L.R. 1584. In that case, it would have been impossible for the related actions to be either heard or determined together because the pending proceedings were ongoing in Italy and the related proceedings were subject to an exclusive English jurisdiction clause the

effect of which would have precluded the latter from being litigated in Italy at all.

196. The tension between these two Court of Appeal authorities was referred to in ***SCOR SE v Barclays Bank Plc*** [2020] EWHC 133. The Deputy High Court Judge observed:

> "11. Finally, the Claimant pointed out that there had been a debate in the authorities as to what was meant by "expedient" in the Article, with some authorities taking the line that this meant possible or capable, and others suggesting that the relevant synonym was "desirable". At the hearing before me, both parties were agreed that this debate has now been resolved by the Court of Appeal in Privatbank v Kolomoisky [2019] EWCA Civ 1709…
>
> 12. However, following the hearing, my attention was drawn to the more recent Court of Appeal decision in Euroeco Fuels (Poland) Limited and others v Sczezin and Swinoujscie Seaports and others [2019] EWCA Civ 1932. In that case, the Court of Appeal referred, without apparent disapproval, to the decision in Privatbank. However the Court went on to hold that, on the facts of that case, the fact that the English action in issue could not be tried together in the same court by the same judge meant that the first instance judge in England had had no jurisdiction either to decline jurisdiction or to stay jurisdiction…
>
> 13. It was suggested by the Claimant that this case was authority for the proposition that if the two claims could not be heard and determined together in the same Court, then they could not be related. Accordingly, the suggestion was that this later Court of Appeal decision had reverted to the proposition that in order to be related actions, it must actually be possible for the actions to be heard and determined together, and that, in the event that this is not so, the English Court has no jurisdiction either to decline jurisdiction or to stay its own proceedings. The Claimant suggested various bases on which the later judgment could be read as consistent with the earlier one, even though it was accepted that each of these was not made explicit.
>
> 14. The Defendant, for its part, submitted that the Court of Appeal in Euroeco could not be regarded as disapproving Privatbank, since it referred to the earlier decision without any disapproval and indeed relied on it as setting out the relevant principle. Alternatively, the Defendant submits that if the later case is inconsistent with the earlier, it was decided per incuriam and is wrong."

197. The judge went on to conclude:

> "15…(c). It is uncertain whether expediency in this context is to be treated as meaning desirability, or whether it is a jurisdictional requirement of the grant of a stay that the two cases can in fact be heard together: see Privatbank and cases cited therein, on the one hand, but compare the Euroeco decision on the other. I do not need to decide this question in this case, since my decision would be the same whichever test is applied, and I propose to consider the matter by reference to the test as set out in Privatbank."

198. In ***The Federal Republic of Nigeria v Royal Dutch Shell Plc*** [2020] EWHC 1315, Butcher J observed:

> "77. As the FRN submits, it may not therefore greatly matter as to whether that stay is pursuant to the Court's case management powers or under Article 30. I would impose a stay under either or both. I say this on the following basis: (1) I consider that Article 30 is in principle potentially applicable. Though it was not suggested that the present proceedings could be consolidated with the Italian proceedings, in my judgment this is not of itself a complete bar to the application of Article 30.
>
> (2) In this regard, there was some debate as to the status of the decision of the Court of Appeal in JSC Commercial Bank Privatbank v Kolomoisky [2019] EWCA Civ 1708, [2020] 2 WLR 993 in relation to the circumstances in which Article 30 is potentially applicable, in light of the subsequent decision of the Court of Appeal in EuroEco Fuels (Poland) Ltd v Szczecin and Swinoujscie Seaports [2019] EWCA Civ 1932, [2019] 4 WLR 156. In the Kolomoisky case, it was decided that the word 'expedient' in the phrase 'it is expedient to hear and determine them together' which appears in Article 28.3 of the Lugano Convention (as it does in Article 30.3 of the Regulation), is more akin to 'desirable' that the actions 'should' be heard together, than to 'practicable or possible' that the actions 'can' be heard together: paras. [182]-[192]. In the EuroEco Fuels case, having referred to the Kolomoisky case, the Court of Appeal nevertheless appears to have proceeded on the basis that the court had no discretion to order a stay under Article 30 when there was no real possibility of the two claims being heard together in the same foreign court: paras. [52]-[53], [61].
>
> (3) The Court of Appeal in EuroEco Fuels did not suggest that it disagreed with the reasoning on this point in Kolomoisky or that it was not bound by it. I consider that it was not deciding that Kolomoisky was wrong. In any event, I consider that I am bound by the carefully-reasoned decision on this point in Kolomoisky, and would in any event, if I were at liberty and had to decide between the two, have followed it, as I am in respectful agreement with it."

199. I agree that, had the Court of Appeal in ***EuroEco*** intended to depart from the approach in ***Kolomoisky***, then it would have made that plain. On the contrary, it identified it to be good law. I would not necessarily go so far as to say that, had I been free to decide the issue in a vacuum of case law, I would have reached the same conclusion. I recognise, in particular, that the concept of a course of action which is expedient but not possible may not be free of all interpretive discomfort but I am unable to escape the conclusion that, as matters stand, I am bound to recognise its forensic legitimacy. Accordingly, I would, with due deference, treat ***Kolomoisky*** as representing binding authority on the issue which it purported to resolve.

200. Taking this approach, I am satisfied that whatever theoretical procedural hurdles may lie in the path of those seeking to have these claims against these defendants consolidated with the claims in the 155bn CPA in Brazil, it remains expedient to hear and determine the related actions together.

Would a Brazilian judgment in the 155bn CPA be capable of recognition and enforcement in England?

201. The issue at this stage is a conceptual one which does not require this court to determine whether the Brazilian court will, in fact, give such a judgment in future. As Fancourt J observed in ***Kolomoisky*** at first instance at [2018] EWHC 3308:

> "150. Under Article 34, the next question is whether it is expected that the Ukrainian courts will give a judgment capable of recognition and — where applicable — enforcement in England and Wales. This criterion relates to the recognition and enforceability of a judgment of the third State in principle. The court of the Member State cannot be expected to decide one way or the other whether the court in the third State will in fact give a judgment in future, though the apparent likelihood of its doing so or not doing so would be relevant to the exercise of discretion or the question of whether it was necessary in the interests of the proper administration of justice to grant a stay. At this stage of analysis, however, the question of recognition and enforcement is one of principle."

202. In this case, the claimants argue that any CPA judgment could not be recognised or enforced because it would not be final and conclusive to the extent that it could not bind the individuals on whose behalf it has been brought if the result were to be adverse to their interests.

203. However, if any claimants were to win in Brazil there is no reason why any judgment in their favour would not be capable of recognition and enforcement in England. Accordingly, and particularly in the absence of any authority to the contrary, I find this requirement to be fulfilled.

Is the stay necessary for the proper administration of justice?

204. Recital 24 of the Brussels Regulations provides:

> "When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time."

205. The claimants seek to argue that, even at this stage of the analysis, it is inappropriate for the court to consider factors which would overlap with a hypothetical application of the doctrine of forum non conveniens. I disagree.

206. The decision in ***Owusu***, to which I have already made reference in the context of the strike out application, was directed, at least in part, against the risk that the application of the broad discretion afforded by the common law doctrine of forum non conveniens was liable to undermine the predictability of the rules imposed by the Brussels Convention and its successors. It follows that a defendant cannot circumvent the requirements of Article 34, simply by taking a forum non conveniens shortcut however cunningly disguised. It does not mean, however, that, provided the jurisdictional prerequisites have been satisfied, the court is required when considering the proper administration of justice criterion to jettison any consideration of factors thereunder which might also have been theoretically relevant to a forum non conveniens argument. Such an approach would achieve the object only of throwing the baby out with the bathwater.

207. In this regard, I agree with the authors of chapter 11 of "The Brussels I Regulation Recast" Dickinson and Lein, Oxford Legal Research Library (2015) who observe at paragraph 11.78:

> "…Recital 24 gives some indication as to the factors that the courts of Member States should take into account to determine the proper administration of justice. These include what are recognizable to English lawyers as factors taken into account in the doctrine of *forum non conveniens*."

208. One of the central points raised on behalf of the claimants on the issue of what is necessary for the proper administration of justice relates to their contention that, as formulated in England, their claims could not be consolidated with the 155bn CPA in Brazil. A vast amount of material including expert evidence had been generated on this issue. It will be noted that I have already reached the conclusion that the practical availability of

procedural consolidation is not, of itself, a pre-requisite to the application of Article 34. It is a factor, however, which will normally weigh heavily in the balance against the application of the Article.

209. In this regard, the Court of Appeal in ***Kolomoisky*** said:

> "209. We consider that the judge also erred in his exercise of discretion in relation to the fact that the two sets of proceedings could not be consolidated and heard together in Ukraine. The expert evidence of Ukrainian law from Mr Beketov was that the Pechersky District Court, the court of first instance before which the defamation claims are proceeding, does not have jurisdiction to hear the bank's claim, which would have to be brought before the Ukrainian commercial court. That evidence was challenged by Mr Kolomoisky's expert who referred to certain cases where Ukranian civil courts had apparently heard claims for which they did not in fact have jurisdiction. We were not persuaded by any of that evidence and consider that the better view is that expressed by Mr Beketov that the claims could not be consolidated for the reasons he gives.
>
> 210. Whilst Ms Tolaney is no doubt correct that neither Rix J nor Eder J was laying down a rule of law, what para 45 of Eder J's judgment demonstrates is that, absent some strong countervailing factor, the fact that proceedings cannot be consolidated and heard together will be a compelling reason for refusing a stay. The problem here is that the judge seems to have considered the exercise of discretion from the wrong end of the telescope: he concluded that the availability of consolidation would be a strong reason to grant a stay, but its unavailability would not in itself be a reason not to grant a stay. He thus erroneously failed to consider that, as Eder J had held, unavailability of consolidation will usually be a compelling reason to refuse a stay. There was certainly no strong countervailing factor in this case pointing in favour of a stay."

210. In my view, one has to ask why the availability of consolidation, per se, is usually significant. The answer is to be derived from the broad purpose of Article 34 to avoid the risk of irreconcilable judgments. If a claim can be consolidated with another claim in the third party state then the prospects of achieving a consistent and coherent outcome ought to be assured. Where there is no consolidation then the risk of inconsistent judgments is more likely to arise, albeit within the same third party jurisdiction. As the Court of Appeal noted in ***Privatbank***:

> "211. In our judgment, although the appeal of Mr Kolomoisky in Ukraine has been allowed and the matter remitted to the court of first instance, so that this court should proceed on the basis that the proceedings in Ukraine will continue and be pursued to judgment, the unavailability in the Ukrainian court of

> consolidation of the bank's current claim with Mr Kolomoisky's defamation claim remains a compelling reason for refusing to grant a stay. In particular, the fact that the bank's claim would have to be brought before the Ukrainian commercial court rather than before the Pechersky District Court in which the defamation proceedings are being heard means that if a stay were granted, the risk of inconsistent findings in these different courts would remain."

211. However, no risk of irreconcilable judgments within a third party state arises where claimants have no intention of ever bringing their claims in that state in the event that a stay were to be granted in England.

212. In this case, the claimants have made it clear that they are not interested in trying to consolidate their claims against these two defendants with the 155bn CPA. Thus it is that the claimants' evidence on the option of consolidation with the 155bn CPA amounts to little more than a paper exercise. No steps have been taken to test whether or not, for example, any public body would be willing to initiate such proceedings on behalf of the individuals and small businesses. I further note in this context that the defendants have conceded that if they were to succeed in these applications then they would not contest the jurisdiction of the Brazilian courts in the event that a new CPA were commenced against them by these claimants in Brazil.

213. The central reason why the claimants will not commence proceedings against these two defendants in Brazil is that they would there face the additional hurdle of having to prove that they were liable as indirect polluters or otherwise but with no attendant advantage. It would be pointless to assume such an additional burden when all the other means of redress in Brazil provide, in practice, no such challenge. This explains why, out of the many tens of thousands of actions commenced in Brazil, no more than a dozen or so have been commenced against BHP Plc or BHP Ltd.

214. If this court were to stay the proceedings in England, it is a matter of speculation as to what, if any, further action any given claimant might be tempted to take in Brazil against the Brazilian defendants (particularly when so many have already brought claims there). It can reasonably be expected, however, that any such action would be processed in accordance with the procedures which have already been there devised and that the risk of irreconcilable judgments within Brazil (even taking into account the level of procedural fragmentation there) is far lower than that which would arise in the event that matters were now permitted to proceed in England.

215. This is not to say that a claimant could not rely upon disproportionate challenges in obtaining a prompt and fair hearing in the third party state as

part of the "proper administration of justice" criterion but the availability or otherwise of consolidation does not, of itself, provide the answer in the circumstances of this case.

216. Accordingly, I do not find it necessary to resolve the highly contentious issue as to whether any or all of the English claims could theoretically be consolidated, either as a matter of Brazilian procedure or broader practicability, within the 155bn CPA. I will assume, for the sake of argument, that such consolidation could or would not take place even if the claimants were interested in pursuing the option.

217. Despite the fact that the unavailability of consolidation is generally to be treated as a very strong factor against the exercise of a discretion to stay, it is not determinative in all cases.

218. On the very particular, if not unique, facts of this case I am satisfied that the strongly countervailing factors I have identified are more than sufficient to justify the exercise of my discretion in favour of a stay.

219. An example of the kinds of factors that may outweigh the unavailability of consolidation is to be found in ***The Federal Republic of Nigeria*** in which Butcher J observed:

> "(4) While I recognise that the impossibility of these proceedings being consolidated with the Italian proceedings is a factor militating against a stay under Article 30, I consider that in the present case it is outweighed by other considerations, and in particular by: (i) the degree of relatedness of the two proceedings; (ii) the reality of the risk of inconsistent decisions; (iii) the fact that the Italian proceedings are now considerably more advanced than the English proceedings; and (iv), which is connected with (iii), the fact that the Italian Courts and Italian legal teams are now immersed in the facts of the matter."

220. Similar considerations apply to the facts of the instant case.

221. Save, in particular, for the identity of the defendants (a factor which I do not overlook) the degree of relatedness between the Brazilian and English proceedings is very close indeed.

222. The risk of inconsistent decisions is, at the very least, a real one for reasons which I have already articulated earlier in this judgment.

223. The Brazilian proceedings are considerably more advanced than the English proceedings.

224. The Brazilian Courts and legal teams are now immersed in the facts of the matter.

225. I do not overlook the considerable body of evidence relied upon by the claimants to establish that they will not receive full or timely redress in Brazil. I have already dealt with this assertion in detail under the heading of full redress above.

226. Furthermore, it is idle in these circumstances to characterise any stay imposed as a "consolidation stay". There will be no consolidation and so any stay to facilitate consolidation would be pointless. The real purpose of any stay would be to allow proceedings in Brazil to take their course until the risk of irreconcilable judgments had sufficiently attenuated or there had been some other development which justified lifting the stay.

227. As Recital 24 provides:

> "When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it."

228. The breadth of this statement comfortably reflects the very large number of permutations which litigation may follow. In this case, particular weight must be given to the factors I have already identified with respect to the abuse of process argument as militating against any chance that proceedings in England running in parallel to the Brazilian proceedings would be procedurally manageable. At the risk of repetition, dealing with these 202,600 cases would be challenging enough even if untrammelled by the litigation proceeding in Brazil. The combination of the two would, I predict, lead to pandemonium. This would be the very antithesis of the proper administration of justice.

229. The claimants seek to derive some comfort from the decision of Stuart-Smith J in ***Jalla***. In that case, more than 27,500 individuals and 450 communities located close to the coast of Nigeria claimed damages in respect of losses alleged to have arisen as a result of pollution caused by an oil spill. Proceedings were brought in England which, following the customary procedural choreography as to the identity of the defendants, were ultimately directed against two defendants within the Shell group of companies. Of these two companies, STASCO was domiciled in England and SNEPCO was domiciled in Nigeria.

230. STASCO denied that it owed a duty of care to the claimants but the court concluded that the issue was not capable of being resolved summarily. The court, therefore, went on to consider whether the claim against it should be stayed by the application of Article 34. In this regard, STASCO relied upon a number of pending proceedings in Nigeria the most salient of which was the FEA brought by the Nigerian state (and others) pursuing the imposition of a compensatory and punitive "fine" on SNEPCO. To this extent, there

are, at least, some parallels with the position of BHP Plc in the instant case. In ***Jalla*** the court declined to order a stay against STASCO.

231. Nevertheless, there remain a number of important distinctions to be drawn between the two actions. These include the following:

(i) There was no suggestion in ***Jalla*** that if the claims were permitted to proceed in England then they would prove to be unmanageable;

(ii) Resolution of the FEA was not likely to involve any consideration of the role of STASCO. This is to be contrasted with the position in Brazil in which the liability of BHP Brasil is strongly linked to the potential liability of BHP Plc;

(iii) STASCO did not invite the claimants to bring their claims against it in Nigeria. BHP Ltd, on the other hand, has volunteered to submit to the jurisdiction of Brazil on the terms which I have already identified;

(iv) SNEPCO was maintaining a "root and branch" opposition to the validity of the FEA and denying all liability thereunder. This is not the position in Brazil where, in all practical respects, no issues on liability arise;

(v) No overlap was discernible between the individuals' claims in England and the FEA. Such overlap was limited to the community claimants. Unlike the CPA procedure in Brazil, the FEA was not directed towards achieving a generic sentence which could be liquidated by the victims to achieve redress;

(vi) The claimants in ***Jalla*** had sought expressly to disavow the FEA action. Although there was a legal issue as to the effectiveness of such a move, their stance is in stark contrast to that of the claimants in this case many of whom aim to ride both jurisdictional horses at the same time.

232. I ought also to refer, once more, to the need to exercise caution in seeking to place too much weight upon cases the outcome of which is significantly dependent upon making a judgement or exercising a discretion in the context of an inevitably different factual background. On examination, the factual background to the instant case is very unusual indeed and bears little resemblance to the context in which other Article 34 applications have been founded. Stepping back from the detail of the competing contentions, I am satisfied that a stay is necessary for the proper administration of justice.

Discretion

233. The use of the word "may" in Article 34 connotes an overriding discretion to be exercised even when all other factors expressly set out in the Article, and with which I have already dealt, have been determined in favour of a stay. Nevertheless, the practical scope for the application of such a discretion is inevitably limited by the fact that the court must already have concluded that a stay is necessary for the proper administration of justice. I struggle to conceive of any circumstances in which it would be appropriate to decline to order a stay where the consequences would be contrary to the proper administration of justice. Whatever hypothetical circumstances might arise to square this circle, I am confident that they are not to be found in the instant case. Accordingly, I decline to exercise any residual discretion in favour of refusing the application.

CONCLUSION ON THE APPLICATION OF THE RECAST REGULATION

234. It will be recalled that my finding that the claims in this case should be struck out as an abuse of the process of the court have rendered it strictly unnecessary for me to consider the Recast Regulation. Indeed, in my view, a strike out is more appropriate than a stay for the reasons I have already given. Nevertheless, if I were to be found to have erred in reaching my conclusions on the abuse issue, I would, in any event, consider that a stay under the Recast Regulation would be the appropriate default conclusion. Any stay, at least in broad terms, would be defined so as to expire when the 155bn CPA had been concluded. Of course, it would remain open to the claimant to return to the court at any time to seek to persuade it to allow the proceedings to continue in the event that any of the other grounds under Article 24(2) could be made out. I would also accept that if any findings underpinning my conclusion on the issue of abuse were successfully challenged on appeal then, in so far as they may also form the basis of my Recast Regulation conclusion, the discretion to be exercised under the latter could fall to be exercised afresh.

FORUM NON CONVENIENS

235. As I have already noted, BHP Plc is domiciled in England and is precluded by the operation of the Recast Regulation, as interpreted in ***Owusu***, from deploying any freestanding argument to the effect that Brazil is the more convenient jurisdiction in which the claim against it in these proceedings should be brought. BHP Ltd, however, which is domiciled in Australia, faces no such constraint and is thus entitled to rely on the principle of forum non conveniens in seeking to persuade the court that the claims against it should be stayed. Further consideration of this issue only becomes relevant to the extent that I am found to have been wrong on the question of abuse of process. Nevertheless, for the sake of completeness, I will proceed on the hypothesis that this is the case.

236. The leading case on forum non conveniens is ***Spiliada Maritime Corp v Cansulex Ltd*** [1987] AC 460 which identifies what is often referred to as the two stage test:

(a) At stage one, the court's task is to analyse whether the foreign forum is an available forum that is clearly or distinctly more appropriate for any trial of the dispute (i.e. the 'natural' forum). This typically requires analysis of the competing connecting factors as between England and the foreign forum. The burden of persuasion is on the applicant.

(b) If, following the first stage, it is established that the foreign forum is the natural forum, then the court will grant a stay subject to the second stage. At this second stage, the claimant may seek to establish that "there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this enquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction". The claimant bears the burden on stage two.

237. When this matter came before HHJ Eyre QC on 13 September 2019, counsel for the claimants conceded (or all but conceded) that stage one of the ***Spiliada*** test had been satisfied. One can well understand why.

238. The following features are cumulatively significant:

(i) The tort (or Brazilian legal equivalent) took place in Brazil. As Lord Mance observed in ***VTB Capital Plc v Nutritek International*** [2013] 2 A.C. 337:

> "51. The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to a presumption are in my view unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors."

(ii) The governing law would be that of Brazil. In ***VTB*** Lord Mance said:

> "46. The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum…"

(iii) The court in England would be far less accessible to the majority of parties and witnesses for whom there would also be linguistic challenges. In ***Vedanta*** Lord Briggs observed:

> "66. The best known fleshed-out description of the concept is …as follows: "the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice …" That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence."

(iv) Judge Mario has acquired a detailed knowledge of the complexities of the claims made in Brazil. In contrast, the English court would be virtually starting from scratch. As the authors of Dicey, Morris and Collins on The Conflict of Laws, (16th Edition) note at §12-035:

> "…if a court has acquired a special expertise in the resolution of a particularly complex species of dispute, so that it would be in the interests of justice to allow it to resolve the present case also, this may, in exceptional cases, affect the identification of the natural forum."

239. An issue, however, arises in cases in which a claimant may take advantage of the fact that a co-defendant of the party relying upon forum non conveniens is unable to escape the jurisdictional consequences of the operation of Article 4 of the Recast Regulation. The foreign defendant is thus exposed to the risk of being jurisdictionally tethered to the domiciled defendant to avoid the risk of irreconcilable judgments. Lord Briggs in ***Vedanta*** explained:

> "40. Two consequences flow from that analysis. The first is that, leaving aside those cases where the claimant has no genuine intention to seek a remedy against the anchor defendant, the fact that article 4 fetters and paralyses the English forum conveniens jurisprudence in this way in a necessary or proper party case cannot itself be said to be an abuse of EU law, in a context where

> those difficulties were expressly recognised by the Court of Justice when providing that forum conveniens arguments could not be used by way of derogation from what is now article 4 . The second is that to allow those very real concerns to serve as the basis for an assertion of abuse of EU law would be to erect a forum conveniens argument as the basis for a derogation from article 4, which is the very thing that the Court of Justice held in Owusu v Jackson to be impermissible. In my view, if there is a remedy for this undoubted problem, it lies in an appropriate adjustment of the English forum conveniens jurisprudence, not so as to permit the English court to stay the proceedings against the anchor defendant, if genuinely pursued for a real remedy, but rather to temper the rigour of the need to avoid irreconcilable judgments which has, thus far, served to disable the English court from concluding that any jurisdiction other than its own is the forum conveniens or proper place for the litigation of the claim against the foreign defendant. As will appear, I consider that there is a solution to this difficulty along those lines, where the anchor defendant is prepared to submit to the jurisdiction of the domicile of the foreign defendant in a case where, as here, the foreign jurisdiction would plainly be the proper place, leaving aside the risk of irreconcilable judgments."

240. In ***Vendanta*** Lord Briggs went on the expand upon his proposed solution in the following terms:

> "66. I have found this to be the most difficult issue in this appeal. It does raise an important question of law. CPR r 6.37(3) provides that: "The court will not give permission [to serve the claim form out of the jurisdiction] unless satisfied that England and Wales *is the proper place in which to bring the claim*" (my emphasis). The italicised phrase is the latest of a series of attempts by English lawyers to label a long-standing concept. It has previously been labelled forum conveniens and appropriate forum, but the changes in language have more to do with the Civil Procedure Rules' requirement to abjure Latin, and to express procedural rules and concepts in plain English, than with any intention to change the underlying meaning in any way. The best known fleshed-out description of the concept is to be found in Lord Goff of Chieveley's famous speech in the Spiliada case [1987] AC 460 , 475–484, summarised much more recently by Lord Collins JSC in the Altimo case [2012] 1 WLR 1804 , para 88 as follows: "the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice …" That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense

and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred.

67. Thus far, the search for these connecting factors gives rise to no difficult issues of principle, even though they may not all point in the same direction. The problems thrown up by this appeal all arise from the combination of two factors. The first is that the "case" involves multiple defendants domiciled in different jurisdictions. The second is that, following Owusu v Jackson [2005] QB 801, the court is disabled from the exercise of its traditional common law power to stay the proceedings against the domiciled anchor defendant by reason of article 4: see paras 23–41 above.

68. There can be no doubt that, when Lord Goff originally formulated the concept quoted above, he would have regarded the phrase "in which the case can be suitably tried for the interest of all the parties" as referring to the case as a whole, and therefore as including the anchor defendant among the parties. Although the persuasive burden was reversed, as between permission to serve out against the foreign defendant and the stay of proceedings against the anchor defendant, the court was addressing a single piece of multi-defendant litigation and seeking to decide where it should, as a whole, be tried. The concept behind the phrases "the forum" and "the proper place" is that the court is looking for a single jurisdiction in which the claims against all the defendants may most suitably be tried…

69. An unspoken assumption behind that formulation of the concept of forum conveniens or proper place, may have been (prior to Owusu v Jackson) that a jurisdiction in which the claim simply could not be tried against some of the multiple defendants could not qualify as the proper place, because the consequence of trial there against only some of the defendants would risk multiplicity of proceedings about the same issues, and inconsistent judgments. But the cases in which this risk has been expressly addressed tend to show that it is only one factor, albeit a very important factor indeed, in the evaluative task of identifying the proper place. For example, in Société Commerciale de Réassurance v Eras International Ltd (formerly Eras (UK)) (The Eras Eil Actions) [1992] 1 Lloyd's Rep 570, 591, Mustill LJ said: "in practice the factors which make the party served a necessary or proper party … will also weigh heavily in favour of granting leave to make the foreigner a party, although they will not be conclusive."

70. In cases where the court has found that, in practice, the claimants will in any event continue against the anchor defendant in England, the avoidance of irreconcilable judgments has frequently been found to be decisive in favour of England as the proper place, even in cases where all the other connecting factors appeared to favour a foreign jurisdiction: see e g OJSC VTB Bank v Parline Ltd [2013] EWHC 3538 (Comm) at [16], per Leggatt J.

71. That is a fair description of the judge's reasoning in the present case. Having found that, looking at the matter as between the claimants and KCM, all the connecting factors pointed towards Zambia, the judge concluded that, factoring in the closely related claim against Vedanta, which he found as a matter of fact that the claimants were likely to pursue in England in any event, the risk of irreconcilable judgments arising from separate proceedings in different jurisdictions against each defendant was decisive in identifying England as the proper place: see paras 160–168. He said that: "The alternative—two trials on opposite sides of the world on precisely the same facts and events—is unthinkable."

72. It is obvious from his analysis (assuming that substantial justice could be obtained in Zambia) that, had the English court retained its jurisdiction to stay the proceedings as against Vedanta, as it was thought it did prior to Owusu v Jackson [2005] QB 801, the judge would have done so, and thereby ensured that the case was brought to trial against both defendants in Zambia…

75. I have however been much more troubled by the absence of any particular focus by the judge upon the fact that, in this case, the anchor defendant, Vedanta, had by the time of the hearing offered to submit to the jurisdiction of the Zambian courts, so that the whole case could be tried there. This did not, of course, prevent the claimants from continuing against Vedanta in England, nor could it give rise to any basis for displacing article 4 as conferring a right to do so upon the claimants. But it does lead to this consequence, namely that the reason why the parallel pursuit of a claim in England against Vedanta and in Zambia against KCM would give rise to a risk of irreconcilable judgments is because the claimants have chosen to exercise that right to continue against Vedanta in England, rather than because Zambia is not an available forum for the pursuit of the claim against both defendants. In this case it is the claimants rather than the defendants who claim that the risk of irreconcilable judgments would be prejudicial to them. Why (it may be asked) should that risk be a decisive factor in the identification of the proper place, when it is a factor which the claimants, having a choice, have brought upon themselves?...

79. After anxious consideration, I have come to the conclusion that … the judge, is wrong. At the heart of [his approach] lies the proposition that, because a claimant has a right to sue the anchor defendant in England, there is "no reason why the claimant should be expected or required to relinquish that right in order to avoid duplication of proceedings". In my judgment, there is good reason why the claimants in the present case should have to make that choice, always assuming that substantial justice is available in Zambia (which is a necessary but hypothetical predicate for the whole of the analysis of this issue).

80. There is nothing in article 4 which can be interpreted as being intended to confer upon claimants a right to bring proceedings against an EU domiciliary in the member state of its domicile in such a way that avoids incurring the risk of irreconcilable judgments. On the contrary, article 4 is, as was emphasised in Owusu v Jackson [2005] QB 801, blind to considerations of that kind. The mitigation of that risk is available in a purely intra-EU context under article 8(1) (where that risk is expressly recognised). But it is unavailable where the related defendant is (as here) domiciled outside any of the member states.

81. Looking at the matter from an intra-member states perspective, a person wishing to bring related claims against a number of defendants which, if litigated separately, would give rise to a risk of irreconcilable judgments, has a choice. The claimant may bring separate proceedings against each related defendant in the member state of that defendant's domicile, thereby incurring a risk of irreconcilable judgments. Or the claimant may bring a single set of proceedings against all the defendants in the member state of the domicile of only one of them, so as to avoid that risk. That choice is what article 8(1) expressly permits.

82. If the risk of irreconcilable judgments is one which, as in the present case, exists to the prejudice only of the claimants, I can see no possible reason why a right to sue in England under article 4 should not give rise to the same choice, where the alternative jurisdiction lies outside that of the member states, in a place where the claimant may sue all the defendants, not because of article 8(1), but because they are all prepared to submit to that jurisdiction. The alternative view…that the right conferred by article 4 should not expose the claimants to the need to make such a choice would appear to convert the right conferred by article 4 to an altogether higher level of priority, where the alternative forum lies outside that of the member states, than it does where the alternative forum lies inside, under article 8. In short, if the article 4 right is not a trump card for the purpose of avoiding irreconcilable judgments within the confines of the

> member states, why should it become a trump card outside those confines?
>
> 83. The recognition that claimants seeking to avail themselves of their article 4 rights to sue an anchor defendant are none the less exposed to a choice whether to do so at the risk of irreconcilable judgments, even in cases where article 8 is not available, but another proper, convenient or natural forum is available for the pursuit of the case against all the defendants is, to my mind, the answer to the conundrum posed in para 40 above. It does not in any way bring into play forum conveniens considerations as a reason for denying the claimants access to the jurisdiction of England as a member state, against the anchor defendant. It simply exposes the claimants to the same choice, whether or not to avoid the risk of irreconcilable judgments, as is presented by the combination of article 4 and article 8 in an intra-EU context.
>
> 84. That analysis does not mean, when the court comes to apply its national rules of private international law to the question whether to permit service out of the jurisdiction upon KCM, that the risk of irreconcilable judgments is thereby altogether removed as a relevant factor. But it does in my view mean that it ceases to be a trump card…"

241. In this case, both defendants have offered to submit themselves to the jurisdiction of Brazil. Thus the force of any suggestion that there may be a risk of irreconcilable judgements against each defendant is attenuated. Notwithstanding the conspicuously close corporate relationship between the two defendants, I am satisfied that the remaining arguments concerning the appropriate forum are, when taken as a whole, so strong as to lead to no other conclusion than that the first stage of ***Spiliada*** is made out.

242. I accept that if BHP Ltd were to succeed in its forum non conveniens argument then the strong likelihood is that the claimants would not be interested in attempting to bring proceedings against it in Brazil and would, if BHP Plc had been otherwise unsuccessful in its applications, proceed in England against BHP Plc alone.

243. I must now turn to the second stage of ***Spiliada***.

244. The burden now shifts from BHP Ltd to the claimants. In order to succeed they must establish that "there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this enquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact,

if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction."

245. It is not sufficient for the claimants to show that proceedings in Brazil would merely be less advantageous than proceedings in England. In ***Connelly v RTZ Corporation Plc (No 2)*** [1998] AC 854, 872G-873A, Lord Goff observed:

> "… if a clearly more appropriate forum overseas has been identified, generally speaking the plaintiff will have to take that forum as he finds it, even if it is in certain respects less advantageous to him than the English forum. He may, for example, have to accept lower damages, or do without the more generous English system of discovery. The same must apply to the system of court procedure, including the rules of evidence, applicable in the foreign forum. This may display many features which distinguish it from ours, and which English lawyers might think render it less advantageous to the plaintiff… But that is not of itself enough to refuse a stay. Only if the plaintiff can establish that substantial justice cannot be done in the appropriate forum, will the court refuse to grant a stay …"

246. Furthermore, the court must have regard to the strong desirability of achieving comity. As Lord Collins in ***AK Investment CJSC v Kyrgyz Mobil Tel Ltd*** [2011] UKPC 7 observed:

> "97 Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required."

In ***HRH Okpabi v Royal Dutch Shell Plc*** [2017] EWHC 89 (TCC), at para 121, Fraser J commented that the "the court has to be very careful before passing qualitative judgments on the legal systems of other sovereign nations".

247. I am of the view that the claimants' evidence falls far short of establishing, upon sufficiently cogent evidence, that substantial justice cannot be done in Brazil.

248. It is not in dispute that the Brazilian Courts would have jurisdiction to try an action brought against BHP Plc and BHP Ltd and which advanced the claims made in the Master Particulars of Claim. Much time and energy has been expended on analysing the relative ease or difficulty with which this could be accomplished and via what alternative procedural routes. For my own part, I found much of this part of the case to come close to generating a somewhat sterile debate. This is because no one is under any illusion that

the claimants would ever be likely to contemplate bringing the proceedings in Brazil in any event.

249. In most of the decided cases, there is one dispute between unitary parties which may be resolved in one of two jurisdictions. In such circumstances it is natural that the approach of the court will be formulated in a way that is limited to considering the likely consequences of the claimant being required to proceed in the foreign jurisdiction against the same defendant. I am not, however, convinced that such a narrow approach is justified in this case. After all, the second stage of ***Spiliada*** requires the court to consider "all the circumstances of the case". In my view, such circumstances may include the availability of redress against other defendants. This, of course, is a feature of the case to which I have already had regard with respect to the abuse application. Usually, of course, as I have already acknowledged, claimants may choose the identity of those they wish to sue but this does not afford them procedural carte blanche in all circumstances. In the instant case, the claimants, all other things being equal, have no particular reason to prefer that compensation should be paid by these two defendants rather than any other company within the relevant corporate structure. This is not a defamation case in which the aim of personal reputational vindication against any given party is a factor. Accordingly, I take the view that, in this context, the Court is entitled, in the exercise of its discretion under stage two of ***Spiliada***, to take into account any option which a claimant may have to achieve comparable redress in respect of the same loss and damage against another defendant in the foreign jurisdiction. In this case, the claimants do not seek to join the two defendants within the Brazilian jurisdiction because, for perfectly understandable reasons, they simply do not want to. Therefore, I would place little weight upon the alleged *additional* challenges which would face the claimants were they to choose hypothetically to proceed against the English defendants in Brazil.

250. Even if I were found to be wrong on this point, it would not lead me to a different conclusion on this issue. The experts are agreed that the Brazilian courts would have jurisdiction to try an action brought against BHP Plc and BHP Ltd, which made the same claims as those which have been brought in the Master Particulars of Claim. Much time has been devoted to speculation about what may or may not be procedurally achievable, under the umbrella of the 155bn CPA or otherwise, but no efforts have been made by the claimants to take active steps to test the waters in this regard whether by approaching the public prosecutor or otherwise. The evidence relied upon thus lacks the cogency to be expected under stage two of ***Spiliada***.

251. I turn now to the claim that the challenges facing the claimants in Brazil are, or are likely to be, of a magnitude sufficient to persuade the Court to exercise its discretion in their favour.

252. For example, complaints are made concerning the delays facing the claimants in obtaining redress. Delay is certainly a factor to be considered under the stage two ***Spiliada*** test. However, the authorities demonstrate that a considerable amount of leeway ought to be given to accommodate the challenges facing foreign courts in this regard.

253. In ***Konamaneni v Rolls-Royce International Industrial Power (India) Ltd*** [2002] 1 W.L.R. 1269, Lawrence Collins J observed:

> "177. Delay has been a factor taken into account in cases involving applications to stay on the ground that India is the appropriate forum… It is well known that in the past there were substantial delays in the Indian legal system, caused by the combination of an enormous population and an overworked and understaffed judiciary, but it is also well known that very great efforts have been made in recent years to reduce the backlog of cases. The evidence in this case goes nowhere near showing that it is so serious as to amount to a substantial injustice, and nowhere near showing that it is such as to deprive the claimants of any remedy at all. It is not seriously arguable that "substantial justice cannot be done" in India in relation to claims by Indian residents and NRIs (and their companies) in relation to an Indian company and its affairs, and it would be a substantial breach of comity to stigmatise the Indian legal system in that way. This is typically the situation in which the claimant will have to "take [the appropriate] forum as he finds it"…"

254. In that case predictions as to the length of time it would take for the claims to reach trial in India varied from between about four and ten years.

255. In the context of delay in the Brazilian jurisdiction, I am entirely unpersuaded that proceedings in England would be more promptly concluded than would proceedings in Brazil. In particular:

(i) It is by no means unusual for group litigation in England to continue for many years. By way of example only, the ***British Coal Coke Oven Workers' Group Litigation***, which was commenced over five years ago, has not yet been fully concluded (although it is hoped that it will be fairly soon). That case involves far fewer claimants and far less complex issues than would be engaged in attempting to deal with the instant claims[5];

[5] For what it is worth, Justice Rezek took a random sample of 100 Brazilian environmental CPAs and found that the median length of timing to judgment was two years and eight months. The median time for an appeal was

(ii) It is difficult to overestimate the sheer enormity of the task which would face the English court. Even if it were to be assumed (contrary to my view) that such proceedings could be managed at all, they would be beset and delayed by chronic practical problems relating to: difficulties in translation; constraints on witnesses accessing the court; and challenges involved in applying the law of an unfamiliar jurisdiction;

(iii) The progress of the English proceedings would be likely to be hobbled at every turn by parallel developments in Brazil;

(iv) Any claims in England would be required, probably by way of preliminary issue, to surmount the hurdle of demonstrating that the defendants owe the claimants the requisite duty as indirect polluters. This issue, which is likely to be contested, would inevitably involve a very complex and lengthy process and, even if it were to culminate in success for the claimants, would set back the consideration of issues of causation and quantum. No such fermata would impede proceedings in Brazil;

(v) Notwithstanding the undoubtedly sinuous path which the litigation in Brazil has so far taken, there are strong indications that Judge Mario is injecting a strong sense of forward momentum into the proceedings. It is not surprising that his initiatives have not yet been fully worked out and may be (and indeed in some cases are) subject to appellate challenge. However, on any objective assessment, the prospects of matters henceforth progressing in Brazil so slowly that it would become a significant factor under stage two of ***Spiliada*** are remote;

(vi) The complaint of delay is further undermined by the fact that so many claimants have already achieved at least some, if not full, redress in Brazil.

256. There are some cases in which the Court has been persuaded that the claimants could not get redress in the foreign jurisdiction because any litigation could not be funded, either adequately or at all. For example, in ***Vedanta***, at para 90:

> "…the claimants were at the poorer end of the poverty scale in one of the poorest countries of the world, that they had no sufficient resources of their own (even as a large group) with

around four years and eight months. Cases in which the Public Prosecutor was involved tended to be resolved in a little over half that time. The evidence from Dr Janot on this point lacked cogency to the extent that it would appear that the cases upon which he relied were not random samples but were selected on criteria which were never identified.

> which to fund the litigation themselves, that they would not obtain legal aid for this claim and nor could it be funded by a Conditional Fee Agreement ("CFA") because CFAs are unlawful in Zambia."

257. The unavailability of legal aid in the foreign jurisdiction will not, however, as a matter of course provide a trump card to any given claimant. As Lord Goff observed in ***Connelly***, at para 873:

> "I therefore start from the position that, at least as a general rule, the court will not refuse to grant a stay simply because the plaintiff has shown that no financial assistance, for example in the form of legal aid, will be available to him in the appropriate forum, whereas such financial assistance will be available to him in England. Many smaller jurisdictions cannot afford a system of legal aid. Suppose that the plaintiff has been injured in a motor accident in such a country, and succeeds in establishing English jurisdiction on the defendant by service on him in this country where the plaintiff is eligible for legal aid, I cannot think that the absence of legal aid in the appropriate jurisdiction would of itself justify the refusal of a stay on the ground of forum non conveniens. In this connection it should not be forgotten that financial assistance for litigation is not necessarily regarded as essential, even in sophisticated legal systems. It was not widely available in this country until 1949; and even since that date it has been only available for persons with limited means….
>
> Even so, the availability of financial assistance in this country, coupled with its non-availability in the appropriate forum, may exceptionally be a relevant factor in this context. The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available."

258. In this case, the evidence falls far short of establishing that impecuniosity would be a major factor in stifling legitimate claims. Legal aid is available in Brazil to support private claims and there are no costs implications of seeking redress through Renova. This is to be contrasted with the position in England in which the majority of claimants will be required to pay 30% of any winnings to their solicitors.

259. For the reasons given above, I am satisfied that the claimants have not discharged the burden of demonstrating that the second stage test of ***Spiliada*** has been met. Accordingly, even if I had found against the defendants on the abuse of process argument I would have refused jurisdiction in respect of the claims brought against BHP Ltd on forum non conveniens grounds.

A CASE MANAGEMENT STAY

260. Circumstances may arise in which the court may deploy its case management powers to further the overriding objective by staying a case.

261. The proper approach has recently been helpfully summarised by Bryan J, to whom I am duly grateful, in ***Mad Atelier International BV v Manes*** [2020] EWHC 1014 in the following terms:

> "82. The Court has a discretion to order a stay to await the outcome of foreign proceedings in the exercise of its case management powers pursuant to s.49(3) of the Senior Courts Act 1981 and/or CPR r.3.1(2)(f). The principles relevant to the exercise of this discretion can be summarised as follows: (1) The court has a discretion to stay an action pending the resolution of a claim pending in another forum, but a stay should only be granted in " rare and compelling circumstances ": Reichhold Norway ASA v. Goldman Sachs [2000] 1 W.L.R. 173 at 186 (C.A.).
>
> (2) "Exceptionally strong grounds" are required to justify a stay on case management grounds where the parties have conferred exclusive jurisdiction on the English court: Mazur Media Ltd v. Mazur Media GmbH [2004] 1 W.L.R. 2966 at [69]-[70] (Lawrence Collins J); Jefferies International Ltd v Landsbanki Islands HF [2009] EWHC 894 (Comm) at [26]. The danger of inconsistent judgments is not a legitimate consideration amounting to exceptional circumstances and does not justify a stay in a case where the court has jurisdiction under the Brussels I Regulation Recast ("BIR"), especially exclusive jurisdiction: Mazur, supra , at [71].
>
> (3) The court's power to stay proceedings cannot be used in a manner which is inconsistent with the Judgments Regulation: Mazur, supra, at [69]; Jefferies, supra, at [26]. A defendant should not be permitted "under the guise of case management, [to] achieve by the back door a result against which the ECJ has locked the front door": Skype Technologies SA v. Joltid Ltd [2009] EWHC 2783 (Ch) at [22] (Lewison J).
>
> (4) A stay will not, at least in general, be appropriate if the other proceedings will not bind the parties to the action stayed or finally resolve all the issues in the case to be stayed, or the parties are not the same: Klöckner Holdings GmbH v. Klöckner Beteiligungs GmbH [2005] EWHC 1453 (Comm) at [21] (Gloster J)."

262. In ***The Federal Republic of Nigeria*** Butcher J decided that the circumstances of that case would have justified the deployment of a case management stay even if the Recast Regulation argument had failed:

> "(5) In any event, even if not under Article 30, there should be a stay under the Court's case management powers, and in particular pursuant to s. 49(3) Senior Courts Act 1981 and CPR 3.1(2)(f) . Such a stay would not, in my judgment, be inconsistent with the Regulation, and is required to further the Overriding Objective in the sense of saving expense, ensuring that cases are dealt with expeditiously and fairly, and allotting to any particular case an appropriate share of the Court's resources. Given that the Italian proceedings are well advanced, and that after the determination of the Italian proceedings English proceedings may well either be unnecessary or curtailed in scope, there appear good grounds to consider that a stay of the English proceedings will result in savings in costs and time, including judicial time."

263. In the particular circumstances of the instant case, I am not wholly convinced that the factors material to the exercise of a case management discretion and the weight to be given to them differ in any material sense from those arising under the abuse application. For example, I am unable to identify any matters which it would be proper to take into account in the exercise of case management discretion which I have not already considered under the abuse heading; although I fully recognise that the abuse analysis is one which, at least in part, involves reaching a judgment rather than exercising a discretion.

264. Suffice it to say that if I were to be found to have fallen into error (i) in striking the case out (or, in the alternative, imposing a stay) for abuse of process and (ii) in respect of my adjudications on the Recast Regulation and forum non conveniens I would expect that my conclusion on imposing a case management stay would be unlikely to be sustainable thereafter. It is so heavily parasitic upon my findings in respect of the other applications that I would not expect it to survive the death of its host.

<u>CONCLUSION</u>

265. In summary:

(i) I strike out the claims against both defendants as an abuse of the process of the court;

(ii) If my finding of abuse were correct but my decision to strike out were wrong, then I would stay the claims leaving open the possibility of the claimants, or some of them, seeking to lift the stay in future but without pre-determining the timing of any such application or the circumstances in which such an application would be liable to succeed;

(iii) If my finding of abuse were wrong, then I would, in any event, stay the claim against BHP Plc by the application of Article 34 of the Recast Regulation;

(iv) If my finding of abuse were wrong, then I would, in any event, stay the claims against BHP Ltd on the grounds of forum non conveniens regardless of whether the BHP reliance on Article 34 of the Recast Regulation had been successful or not;

(v) If my findings on the abuse of process point were wrong, then a free-standing decision to impose a stay on case management grounds would probably be unsustainable.