Neutral Citation [2023] EWHC 2607 (TCC)

Case No: HT-2022-000304
Case No: HT-2023-000058

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 19 October 2023

Before :

MRS JUSTICE O'FARRELL DBE

- -

Between :

MUNICÍPIO DE MARIANA **(and the Claimants identified in the Schedules to the Claim Forms)**	**Claimants**
- and –	
(1) BHP GROUP (UK) LIMITED **(formerly BHP GROUP PLC)** **(2) BHP GROUP LIMITED**	**Defendants**
- and –	
VALE SA	**Third Party**

- -
- -

Alain Choo-Choy KC and **Russell Hopkins** (instructed by **Pogust Goodhead**, a trading name of PGMBM Law Ltd) for the **Claimants**
Shaheed Fatima KC, Victoria Windle KC, Nicholas Sloboda and **Veena Srirangam** (instructed by **Slaughter and May**) for the **Defendants**
Simon Salzedo KC, **Richard Eschwege KC** and **Michael Bolding** (instructed by **White & Case LLP**) for the **Third Party**

Hearing dates: 10th & 12th October 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 19th October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

Mrs Justice O'Farrell:

1. This hearing concerns consequential matters arising out of the court's judgment dated 7 August 2023, reported at [2023] EWHC 2030, pursuant to which the court dismissed Vale's two applications challenging jurisdiction.

2. The court delivered oral rulings in respect of an application by BHP to amend the Part 20 claims and an application by Vale for permission to appeal. The matters dealt with in this judgment are:

   i) Vale's application for an extension of time to file replacement acknowledgments of service;

   ii) Vale's application for a stay of the Part 20 claims pending final determination of Vale's appeal;

   iii) Vale's application to rely on expert evidence of Brazilian arbitration law in support of its application for a stay of the Part 20 claims under section 9 of the Arbitration Act 1996, and directions for that application;

   iv) directions for the Part 20 claims, without prejudice to Vale's appeal and the above applications.

Extension of time for AOS and Stay

3. Vale seeks an order under CPR 11(7)(b) extending the time for it to file further acknowledgements of service until 14 days after the final determination of Vale's appeal against the judgment on jurisdiction, and that it should not be required to take any other step in these proceedings until the final determination of its appeal.

4. BHP's position is that Vale should file replacement acknowledgements of service by 17 October 2023 and the defence as currently ordered by 10 November 2023, and that further directions should be given in the Part 20 proceedings.

5. The relevant provisions of CPR 11 are:

> "(1) A defendant who wishes to—(a) dispute the court's jurisdiction to try the claim; or (b) argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
>
> (2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.
>
> (3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

> (4) An application under this rule must—(a) be made within 14 days after filing an acknowledgment of service; and (b) be supported by evidence.
>
> (5) If the defendant— (a) files an acknowledgment of service; and (b) does not make such an application within the period specified in paragraph (4), he is to be treated as having accepted that the court has jurisdiction to try the claim.
>
> (6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including—(a) setting aside the claim form; (b) setting aside service of the claim form; (c) discharging any order made before the claim was commenced or before the claim form was served; and (d) staying the proceedings.
>
> (7) If on an application under this rule the court does not make a declaration— (a) the acknowledgment of service shall cease to have effect; (b) the defendant may file a further acknowledgment of service within 14 days or such other period as the court may direct; and (c) the court shall give directions as to the filing and service of the defence in a claim under Part 7 … in the event that a further acknowledgment of service is filed.
>
> (8) If the defendant files a further acknowledgment of service in accordance with paragraph (7)(b) he shall be treated as having accepted that the court has jurisdiction to try the claim."

6. Mr Salzedo KC, leading counsel for Vale, submits that Vale should not be required to file replacement acknowledgments of service before the final determination of its appeal on jurisdiction because doing so would be regarded as submission to the jurisdiction of the English court and thus defeat the purpose of any appeal.

7. Reliance is placed on the decision of Floyd LJ in *Deutsche Bank AG v Petromena ASA* [2015] 1 WLR 4225 at [35], rejecting the suggestion that an implied exception (where there is an application for permission or outstanding appeal) could be read into 11(8) as for 11(5):

> "The language of CPR r 11(8) is clear, and it is unlikely in the extreme that the draftsman intended the words in paragraphs (5) and (8) to have different meanings. The correct course for a defendant who has failed in a jurisdiction challenge and who wishes to appeal is to ask for an extension of time for filing the acknowledgement of service sufficient to enable his application for permission to appeal, or his appeal, to be determined. It is quite unrealistic to suppose that a sensible claimant, or if not the court, would refuse such an extension when the effect of such a refusal would be to render the appeal nugatory."

8. This was echoed by Longmore LJ at [52]:

> "The course to be followed by a defendant, who wishes to appeal from a judge's decision that the English court has jurisdiction to try a claim and does not wish a judgment in default to be entered while it is appealing, is to ask the judge to extend the time for acknowledgement of service pending an appeal or (if she refuses permission to appeal) pending an application for permission to this court and thereafter, if permission is given, the appeal."

9. Further, it is submitted that if it would be wrong in principle to order a defendant to file a new acknowledgement of service prior to the final determination of a jurisdiction appeal, then it follows that it would be equally wrong for the court to use its case management powers to require a defendant to file a defence prior to that stage.

10. Mr Salzedo KC submits that CPR 11 envisages that, following an unsuccessful jurisdiction challenge, the appropriate procedure to be adopted would be for the defendant to file a second acknowledgement of service (after the final determination of any appeal on jurisdiction) and then to file a defence to the claim. CPR 11(7)(a) makes it clear that an acknowledgment of service filed by a defendant before a valid jurisdiction challenge ceases to have any effect once that challenge has been dismissed. A defendant will therefore need to file a further acknowledgement of service after the conclusion of any jurisdiction appeal and the second acknowledgement of service will be treated as a submission to the jurisdiction of the English court pursuant to CPR 11(8). CPR 11(7)(c) provides for directions to be given for filing a defence in the event that a further acknowledgement of service is filed. It is said that such provision is inconsistent with any suggestion that the court might make directions for filing a defence prior to that stage.

11. Vale does not agree that the undertakings offered by BHP including an undertaking, not to contend that any steps taken by Vale to prepare a defence constitute submission to the jurisdiction, would adequately address the dilemma. In *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2012] EWCA Civ 169, Kitchen LJ considered this issue:

> "[38] … the non-domiciled defendants say, an order requiring them to file a further acknowledgement of service and defence before this court has considered the substantive appeal would deprive them of the very essence of the jurisdictional challenge.
>
> [39] The claimants seek to meet this concern by offering an undertaking that they will not contend that, by filing fresh acknowledgements of service and defences, the non-domiciled defendants have submitted to the jurisdiction. They have also offered, and remain willing, to consent to an order that such further steps by the non-domiciled defendants are subject to and without prejudice to their appeal.
>
> [40] The non-domiciled defendants respond that, whatever may have been the position before CPR Part 11, the position now is clear. Both under the Brussels Convention and CPR Part 11, once a challenge to jurisdiction has been considered and rejected by the court, the original acknowledgement of service lapses and the defendant has a further period in which to choose whether to

> file a fresh one. If he does so then, under CPR 11.8, he is to be treated as having accepted that the court has jurisdiction to try the claim. That is the end of the matter and the claimants' proposed undertaking is therefore worthless.
>
> [41] I am satisfied that there is, at the least, a very real risk that the concerns of the non-domiciled defendants are well founded. In my judgment they have established solid grounds for a stay in the form of irremediable harm if a stay is not granted. Moreover, I am satisfied that a stay would not cause any material prejudice to the claimants. I recognise that they are concerned that the litigation should be progressed as expeditiously as possible. However, I must also have regard to the fact that they waited almost six years from the date of the Commission decision before issuing proceedings."

12. Mr Salzedo further submits that even if the court has power to order a defendant to file a defence pending an extant jurisdiction appeal, it would not be appropriate to do so in this case and a stay should be ordered.

    i) The pleading exercise is a very substantial task. BHP were permitted five months to file a defence in the main proceedings after the Court of Appeal dismissed its jurisdiction appeal on 8 July 2022, based on BHP's explanation that the claims involve complex and serious allegations of fact stretching back many years, and propositions of Brazilian law (a number of which are novel and/or controversial) which require detailed input from Brazilian lawyers. In his sixth witness statement dated 25 September 2023, Mr Caisley's estimate is that Vale needs until the end of December 2023 to complete the Part 20 defence.

    ii) BHP intend to make amendments to its defence in the main proceedings in relation to the causes of the dam collapse.

    iii) Attempting to shoehorn the Part 20 claims into the October 2024 trial would create a near certainty of disruption to the existing timetable.

    iv) A further reason the Part 20 claims should be stayed pending Vale's appeal is that Vale is unable to file and serve the BHP Brasil claim until Vale has filed replacement acknowledgements of service.

13. It is said that Vale would suffer irremediable harm if no stay is granted pending the outcome of its appeal.

    i) There are thousands of claims against Vale ongoing in Brazil relating to the collapse of the dam; Vale has a relatively small in-house legal team and a limited pool of external Brazilian lawyers working on these matters.

    ii) If Vale is required to file a defence prior to the final determination of its appeal, any confidential information contained in that document will immediately become available to the public pursuant to CPR 5.4C(1)(a). That would be profoundly unfair if the Court of Appeal later concluded that the English court has no jurisdiction over the Part 20 claims.

iii) Such unfairness would apply equally if Vale is required to disclose hundreds of thousands of documents, many of which are likely to contain confidential information, pending its jurisdiction challenge.

iv) Vale would be at risk of incurring irrecoverable costs if it were required immediately to prepare a defence to the Part 20 claims and otherwise engage with the merits of those claims pending its appeal.

14. Ms Fatima KC, leading counsel for BHP, submits that Vale should be required to file the replacement acknowledgements of service by 17 October 2023. It is not accepted that Vale's intention to seek permission to appeal from the Court of Appeal amounts to a good objection.

15. BHP further submit that there is no risk to Vale that filing acknowledgments of service would prejudice any jurisdiction appeal. As explained in Mr Michael's twenty-first statement dated 2 October 2023, BHP offered undertakings by letter dated 31 August 2023 in the following terms:

> "The Defendants and BHP Brasil … confirm that, for the purposes of any appeal Vale may bring against the Judgment of Mrs Justice O'Farrell dated 7 August 2023, they will not contend that any step that Vale takes in the proceedings constitutes a submission to the jurisdiction of the English Courts…
>
> Further, the Defendants and BHP Brasil confirm that they will not contend that in taking steps in the Proceedings, Vale is taking a step to answer the substantive claim for the purposes of section 9 of the Arbitration Act 1996…
>
> … the Defendants are willing to (and do) undertake to indemnify Vale in respect of its reasonable and proportionate costs of participating in the Proceedings in the event that it seeks permission to appeal, which is granted, and its Appeal then succeeds…"

The undertakings were sought by Vale on 24 August 2023 and provided by BHP on 31 August 2023. Similar undertakings were offered earlier by BHP as set out by Mr Michael in his fifteenth witness statement dated 6 February 2023.

16. BHP's position is that such undertakings provide effective protection for Vale pending any appeal. In *Goldman Sachs International v Novo Banco SA* [2016] EWHC 346 (Comm.), following dismissal of the defendant's jurisdiction challenge, the Court of Appeal granted permission to appeal but remitted to the Commercial Court for determination the issues: (a) where a party to an application to dispute jurisdiction has permission to appeal against a decision dismissing its jurisdictional challenge, whether the English court has jurisdiction to make case management directions to take effect pending such appeal; and (b) if so, whether that power should be exercised in this case and in what way. The matter came back before Blair J, where it was agreed that the court had jurisdiction to make an order for directions but the defendants submitted that in principle it was wrong to do so where there was a pending appeal as to jurisdiction. The court rejected that submission and ordered procedural steps up to the close of

pleadings pending the appeal, so as to minimise delay should the appeal be unsuccessful:

> "[17] Often, perhaps usually, there will be no question of requiring the parties to do anything in the proceedings until the permission question or the jurisdiction appeal itself is disposed of. It may be a waste of time and money. But the appeal stage inevitably takes time, and there will be some commercial cases where it makes sense that the action does not (to use the phrase used by the claimants) "go into stasis".
>
> …
>
> [21] There are two important caveats. One is that nothing should prejudice the defendant's position if the appeal is successful. The other is that the defendant should not have to bear costs that will have been wasted on the pleadings stage if the appeal is successful.
>
> …
>
> [23] … it would be entirely reasonable in my view for a party challenging jurisdiction to insist on the inclusion of a term in the order to the effect that the steps in question are not to be taken as a submission to the jurisdiction, together with an undertaking by the claimants not to take any such point …
>
> [24] As to wasted costs should the appeal be successful, the order can specify that the claimants/respondents must indemnify the appellant against these costs …"

17. A similar approach was taken in *Conversant Wireless Licencing SARL v Huawei Technologies Co Ltd (No.2)* [2018] EWHC 1216 655 (Ch) by Henry Carr J:

> "[29] In my view, the structure of the rules is that the first acknowledgment of service does not constitute a submission to the jurisdiction, but once the court has rejected a jurisdictional challenge and the defendant chooses to file a second acknowledgment of service, that second acknowledgment of service does constitute a submission to the jurisdiction. The purpose of r. 11(8) is to give the second acknowledgment of service its normal effect in the absence of a jurisdictional challenge. It is not necessary to imply that the rule is intended to have the consequence that all other steps in the proceedings must be stayed.
>
> [30] Secondly, if [the defendants'] arguments were correct, then once permission to appeal was granted, there would be no choice but to grant a stay, even if that would lead to injustice. For example, in a case where the respondent would be irreparably prejudiced by a grant of a stay and the balance of justice would

> indicate that a stay should be refused, nonetheless the mere existence of an appeal on jurisdiction would mean the claim would have to be frozen. I would be reluctant to reach that conclusion, and I do not accept that I am required to do so.
>
> [31] Thirdly, Blair J. addressed a very similar question to that argued before me. He was, of course, a very experienced judge of the Commercial Court. He expressly addressed his mind to the question of whether the appeal in the case before him would be rendered nugatory, if further steps in the action (in the absence of an acknowledgment of service) were ordered, and decided this would not be the case. I agree."

18. BHP note that, in the face of BHP's similar application for a stay, following its unsuccessful jurisdiction challenge and with similar undertakings offered by the claimants, the Court of Appeal refused to grant BHP an extension of time to file a replacement acknowledgement of service or its defence, notwithstanding that their jurisdiction challenges had not been finally determined.

19. In response to Vale's submission that it would be improper for the court to order it to serve its defence pending the outcome of its jurisdiction appeal, Ms Fatima responds as follows.

    i) In the judgment handed down on 7 August 2023, the court gave directions for Vale to progress the Part 20 claims, including by filing and serving a defence, and invited submissions on additional directions. Insofar as the timetable is demanding on Vale, it is the author of its own misfortune. Vale did not seek the undertakings from BHP until 24 August 2023, or start work on its defence until after 31 August 2023. Vale did not engage with any directions until it served its application for a stay on 25 September 2023. Vale is not in the same position as BHP. Since December 2022, it has had BHP's defence and key documents, and it has been aware of the allegations made in these proceedings for many years.

    ii) The proposed amendments to BHP's defence in the main proceedings are that, whereas previously it reserved its position, now it will not dispute the key conclusions of the Panel Report as to the immediate causes of the collapse but will set out its case as to what the court can and cannot properly deduce or infer from such report.

    iii) The directions in BHP's draft order are realistic and should be adopted. Vale has had BHP's indicative timetable since July 2023 and the draft judgment since 2 August 2023.

    iv) It is not accepted that Vale is unable to make any claim against BHP Brasil pending the outcome of its jurisdiction appeal. BHP were in a similar position but issued the Part 20 claims against Vale.

20. It is said by BHP that, if a stay were granted, they would suffer irremediable prejudice in that, even if the appeal failed, it might be decided too late for Vale to participate in the October 2024 trial. In contrast, Vale would suffer no irremediable prejudice if a stay were not granted pending the outcome of its jurisdiction appeal.

i) The diversion of time and resources away from its existing Brazilian proceedings are no more than a temporary inconvenience that any appellant is bound to face. Vale is a well-resourced party and has been involved in litigation arising out of the dam collapse since 2015 in different jurisdictions, including Brazil and the US. There is no reason why it cannot allocate additional resources to its legal teams to ensure that it can comply with directions made by the court.

ii) Any legitimate concerns by Vale about the confidentiality of its pleading could be addressed by an order under CPR 5.4C(4) to restrict access to its defence, at least unless and until its avenues of appeal against the judgment have been exhausted.

iii) Vale has not explained the documents or classes of documents that it says would be prejudicial if referred to in open court, whether they have been disclosed by BHP or in the US proceedings, or why such documents would not be disclosable in Brazil if BHP brought the Part 20 claims there.

iv) The costs of taking procedural steps in these proceedings would not be wasted because even if Vale's appeal or section 9 challenge were successful, BHP would pursue its claim against Vale in whatever jurisdiction was appropriate.

21. In considering these applications I start with the potential difficulty presented by CPR 11(8). On its face the words are clear that the filing of a replacement acknowledgement of service would amount to a submission on the part of Vale to the jurisdiction of the English court. Certainly, this is the way in which the words were interpreted in *Deutsche Bank* and *Toshiba*.

22. In many cases this presents no practical difficulty because the claim can simply be stayed pending the outcome of the jurisdiction appeal. The tension arises in this case because it is common ground that a stay of the Part 20 proceedings pending the outcome of any appeal would adversely affect the feasibility of the October 2024 trial. A sensible and pragmatic solution appears to have been adopted in other cases, including BHP's jurisdiction challenge, by undertakings on the part of the claimant not to contend that such filing amounts to submission to the jurisdiction. In this case, the risk to Vale is remote in circumstances where clear undertakings have been offered by BHP and a suitable term to that effect can be incorporated into the court's order.

23. However, I note that there is no direct authority in which the efficacy of such undertakings has been tested. In those circumstances, it would not be right for this court to force Vale to risk submitting to the jurisdiction and thus defeating any jurisdiction appeal before it could be considered by the Court of Appeal, at least on the application for permission to appeal.

24. Therefore, the court will extend time for Vale to serve any replacement acknowledgements of service until 1 December 2023, giving it time to make an application to the Court of Appeal for permission to appeal. Subject to the outcome of such application, appropriate undertakings and orders can then be considered by the Court of Appeal.

25. I do not consider that the same risk attaches to other directions in the Part 20 proceedings. There is no similar provision to CPR 11(8) which would automatically

regard Vale as having submitted to the court's jurisdiction by filing a defence. Although CPR 11(7) contemplates that a defence will be filed after the replacement acknowledgement of service, there is no stipulation to such effect. In those circumstances, provided that Vale has issued an application for permission to appeal on jurisdiction and BHP have given the undertakings offered, there is no real risk that steps taken in compliance with directions given by the court will be treated as submission to the jurisdiction.

26. I reject Vale's contention that it would be wrong in principle for the court to order it to file its defence and take other steps in the proceedings pending the outcome of its application for permission or determination of its appeal. A number of authorities have been cited to the court in which different approaches have been taken: *Moloobhoy v Kanani* [2013] EWCA Civ 600 at [14], [17], [16], [17]; *Arcadia v Bosworth* [2016] EWHC 2527 at [9] – [14]; *Conversant* (above) at [29] – [31]. What emerges from those authorities is that the decision is not one of principle but depends on the circumstances in each case; including the stage at which the proceedings have reached, the nature and extent of the procedural steps yet to be undertaken, the imperative of making immediate progress in the case, and the interests of justice for all parties to the proceedings, pending final determination of any appeal.

27. The starting point is that this court has heard and determined Vale's jurisdiction challenge. It has refused permission to appeal. Of course Vale has a right to go to the Court of Appeal and seek permission to appeal but in the meantime Vale's jurisdiction challenge has been dismissed and the court has jurisdiction over the Part 20 claims. The effect of CPR 52.16 is that, unless the court orders otherwise, neither the commencement of an appeal nor the grant of permission to appeal shall operate as a stay of any order or decision of the lower court.

28. The court has a discretion to order a stay pending appeal. In *Hammond Suddards Solicitors v Agrichem International Holdings Ltd* [2001] EWCH Civ 2065 Clarke LJ stated at [22]:

> "Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay."

29. The grounds on which a stay pending appeal might be granted were considered by Sullivan LJ in *DEFRA v Downs* [2009] EWCA Civ 257:

> "[8] … solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.
>
> [9] It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the

> kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal."

30. I reject Vale's argument that a stay should be granted on case management grounds. Whilst it is accepted that the pleading exercise is a very substantial task, Vale is not in the same position as BHP regarding the length of time required to prepare its defence, for the reasons set out in the court's jurisdiction judgment at [102]. Vale was involved in the investigation that took place in the immediate aftermath of the dam collapse. It was one of the entities that commissioned the Panel Report on the cause of the collapse, published in August 2016. Since 2015, it has been involved in proceedings concerning Vale's responsibility for the dam collapse, in Brazil and the US, some of which are ongoing. Vale has had the benefit of the pleaded defence by BHP since December 2022. Given that BHP seek to pass on to Vale the allegations made by the claimants to the extent that the same succeed, it is likely that Vale will adopt most, if not all, of BHP's pleaded defence, subject to additional factual and legal arguments pertinent to Vale's position. BHP offered Vale initial disclosure on 8 June 2023, which was refused, but has since provided Vale with disclosure in tranches on 7 and 22 September 2023.

31. In recent correspondence, BHP have indicated that, for the purpose of the current proceedings, they do not intend to dispute the key conclusions of the Panel Report as to the immediate cause(s) of the collapse. It is accepted that Vale will need to see and consider BHP's proposed amendments to its defence and/or Part 20 claims, and have an opportunity to plead in response. Until the detailed pleadings are available, it would be futile for the court to speculate as to the impact, if any, on the timetable.

32. Vale's characterisation of the October 2024 trial as an expedited trial that would be disrupted by the inclusion of the Part 20 claims is rejected. The scale and complexity of these proceedings is not underestimated. It is for that reason that at the trial in October 2024 the court will not determine liability of the defendants to any named claimants; rather the court will determine the threshold liability issues as defined, including selected limitation and settlement defences. The revised date and increased estimate for the trial set at the March/April 2023 CMC were fixed, in part, to enable Vale to prepare for and participate in the hearing. Vale will have 22 months from the issue of the Part 20 proceedings, and 14 months from the judgment on jurisdiction, to prepare for trial. That is a demanding but achievable (and not expedited) timetable.

33. As for the potential claim by Vale against BHP Brasil, it is a matter for Vale whether and, if so, when it chooses to issue proceedings against BHP Brasil. Although the court will grant an extension of time as indicated above, it is open to Vale to file replacement acknowledgements of service and issue Part 20 claims now, relying on the undertakings offered by BHP and BHP Brasil. This is the procedure that was adopted by BHP when issuing its Part 20 claims against Vale. Alternatively, it can wait until the outcome of its application for permission to appeal and any appeal, before issuing any additional claims (if necessary and subject to permission of the court) in this jurisdiction or elsewhere.

34. That brings the court to consider the arguments on either side relating to irremediable harm and the interests of justice.

35. It is not accepted that Vale is overwhelmed by the Brazilian proceedings, or that it will suffer irremediable harm if forced to divert time and resources away from those proceedings. Vale is a very substantial global organisation, it managed to resource substantial litigation in the US at the same time as it faced proceedings in Brazil and there is no solid evidence that it is unable to allocate additional resources to this litigation.

36. Issues of confidentiality regarding pleadings can be dealt with by restricting access to the court file. CPR 5.4C(1) contains the general rule that a person who is not a party to proceedings may obtain from the court records a copy of a statement of case (but not any documents filed with or attached to the statement of case). CPR 5.4C(3) does not permit such access until the acknowledgement of service has been filed, or the claim listed for hearing. CPR 5.4C(4) empowers the court to restrict such access, requiring a non-party to make a formal application to the court, and to make such order as it thinks fit. Therefore, the court could make an order pursuant to CPR 5.4C(4), restricting non-party access to the defence, at least pending the outcome of any appeal.

37. Issues of confidentiality regarding disclosure can be dealt with by a confidentiality ring, restricting certain categories of confidential or commercially sensitive information to named individuals, subject to confidentiality undertakings.

38. BHP have offered an undertaking to indemnify Vale in respect of its reasonable and proportionate costs should Vale's application to the Court of Appeal meet with success. Although the undertaking does not amount to an unlimited indemnity, it is in accordance with the basis on which most orders for costs are made in litigation. It would be open to Vale to argue before the Court of Appeal that the circumstances of this case required an alternative, bespoke costs order.

39. Naturally, Vale has focused on the harm that it would suffer if forced to comply with procedural directions but succeed in its jurisdiction challenge on appeal. However, that must be balanced against the harm that would be suffered by BHP, and potentially the claimants, if proceedings were disrupted and delayed pending the hearing of an ultimately unsuccessful appeal. In particular, BHP would suffer severe prejudice if the Part 20 claims were tried separately from the main claims, potentially forcing it to re-litigate issues already determined between the claimants and BHP with the attendant duplication of costs, inefficiencies and stress of the proceedings for all participants.

40. Balancing all of those factors, the court considers that the appropriate course to adopt in this case is as follows:

    i) The time for Vale to file replacement acknowledgements of service is extended until 1 December 2023, to allow time for determination by the Court of Appeal of its application for permission to appeal. If permission is granted, the Court of Appeal can consider whether to grant any further extension of time pending any appeal regarding the jurisdiction challenge.

    ii) Vale's application for a stay of the Part 20 proceedings is dismissed.

Section 9 stay application

41. On 18 September 2023, Vale issued an application for an order pursuant to section 9 of the Arbitration Act 1996 that all further proceedings in the Part 20 claims be stayed. I observe that section 9(3) of the 1996 Act precludes any application for a stay prior to acknowledgement of the proceedings or after any step in the proceedings to answer the substantive claim. Both could be addressed by undertakings and suitable words in the court's order.

42. Vale's position is the Part 20 claims fall within the scope of an arbitration agreement contained in clause 11.1 of a shareholders' agreement dated 29 June 2000. Parties to the shareholders' agreement include Samarco, Vale and BHP Brasil but not the BHP defendants. The shareholders' agreement is governed by Brazilian law and was amended in March 2016 to include matters relating to the establishment of the Renova foundation following the collapse of the dam. Vale's case is that if, as alleged in the Part 20 claims, BHP and Vale participated actively in the performance of Samarco, as a matter of Brazilian law, BHP are bound by the arbitration agreement.

43. On 18 September 2023, Vale issued an application for an order pursuant to CPR 35.4 asking for permission to rely on Brazilian law expert evidence in support of the section 9 stay application. The application is supported by the fifth witness statement of Mr Caisley dated 18 September 2023.

44. Vale seeks to rely on an expert report from a new expert, Professor Joao Bosco Lee, on the following questions:

    i) What principles of Brazilian law are relevant to interpreting the scope of an arbitration clause?

    ii) Under Brazilian law, can an arbitration clause in a written contract signed by two companies bind non-signatory companies related to the direct signatories? If so, under what circumstances?

    iii) Would the circumstances alleged in the Part 20 Claims, RAMPOC and Amended Reply be sufficient under Brazilian law to bind BHP Group (UK) Ltd ("BHP UK") and BHP Group Ltd ("BHP Australia") (together, "BHP") to the arbitration clause contained in Clause 11 of Samarco's Shareholders' Agreement (the "Shareholders' Agreement")?

    iv) Under what circumstances would the Part 20 Claims fall within the scope of Clause 11.1 of the Shareholders' Agreement under Brazilian law? In particular: a. Are the Part 20 Claims "any dispute, controversy or claim regarding …breach" of the Shareholders' Agreement? Based on the matters alleged in the Part 20 Claims, what would be the breaches of the Shareholders' Agreement? b. Are the Part 20 Claims a "dispute, controversy or claim" relating to the technical matters mentioned in Clause 9.3.4?

45. Vale no longer seeks permission to adduce expert evidence in respect of question 4 but pursues its application in respect of the other three questions to be addressed by Professor Lee.

46. Mr Eschwege KC, leading counsel for Vale, acknowledges that Vale has already adduced expert evidence from Professor Abboud on questions 1 and 2 but he submits

that such evidence was permitted solely for the purpose of the jurisdiction challenge hearing. Therefore, Vale is required and entitled to seek permission to adduce fresh expert evidence for the purpose of its section 9 application. There is nothing objectionable about a party using an alternative expert if that is done in a transparent manner and there is no question of expert shopping. In this case both expert reports have been disclosed and Professor Abboud's opinions are consistent with those of Professor Lee. Vale wishes to rely upon Professor Lee's report because Professor Lee is an expert in Brazilian arbitration law whereas Professor Abboud is an expert in Brazilian civil procedure law.

47. Mr Eschwege submits that BHP are wrong to suggest that question 3 raises a question of contractual interpretation; rather, it relates to the circumstances in which a non-party can be bound by an arbitration agreement pursuant to rules of Brazilian law: *Lifestyle Equities CV v Hornby Street (MCR) Ltd* [2022] Bus.LR 619 per Snowden LJ at [35]-[38]:

> "Interpretation is the ascertainment of the meaning of a contract or other document. Identifying what the terms of an agreement mean is (of course) important, but the process of interpretation cannot, of itself, answer the question of whether that agreement has any effect on someone who is not a party to the contract."

And Lewison LJ at [111]:

> "I agree with Snowden LJ that this question is not properly characterised as the interpretation of the arbitration agreement. The rule as stated in Dicey, Morris & Collins is not a statute, and it would be wrong to apply it as if it were. But if it were necessary to shoehorn this question into the rule as stated in Dicey, Morris & Collins, I would prefer to characterise it as an aspect of the scope of the agreement. "

48. Mr Eschwege submits that the court's task is to predict how a court or tribunal in Brazil, applying Brazilian law, would determine that question. There is nothing inappropriate in Professor Lee providing his expert opinion on that question, based on an assumed set of facts (assuming that the allegations made by the Claimants against BHP are true).

49. The application is opposed by BHP on the ground that questions 1 and 2 simply replicate questions for which permission was given by the court's order dated 8 March 2023 in the context of the jurisdiction challenge:

   i) What principles of law inform a Brazilian Court in interpreting an agreement to arbitrate within a shareholders' agreement?

   ii) In what circumstances may an arbitration agreement bind a non-party? In particular, where an arbitration agreement is signed by one company, will it also bind other companies in the same economic group?

50. Ms Fatima submits that Professor Abboud has already answered these questions, as has Professor Schreiber, in their reports before the court for the jurisdiction challenge hearing. Pursuant to CPR 35.1, the Court has a duty to restrict expert evidence to that

which is reasonably required to resolve the proceedings. There is no need for the parties now to adduce fresh expert evidence on questions 1 and 2. The attempt to adduce expert evidence on the same topics is wasteful and adds unnecessary complexity to the proceedings. Although Vale now claims that Professor Lee is an arbitration specialist with greater expertise that Professor Abboud, it put forward Professor Abboud as an expert on these arbitration questions and relied on his expert reports.

51. BHP object to question 3 as seeking to adduce inadmissible and irrelevant expert evidence. Whilst evidence as to the content of foreign law is admissible, it is not the role of foreign law experts to opine on the meaning of a contract, because that is, impermissibly, to apply the relevant law to the facts, which is a matter for the court: *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2019] 1 CLC 822 per Hamblen LJ:

> "[45] The role of foreign law experts in relation to issues of contractual interpretation is a limited one. It is confined to identifying what the rules of interpretation are.
>
> [46] It is not the role of such experts to express opinions as to what the contract means. That is the task of the English court, having regard to the foreign law rules of interpretation."

52. I start by considering whether permission should be given for Vale to rely on the expert evidence of Professor Lee.

53. The court has a general discretion to permit a party to change the identity of the expert on which it relies, pursuant to its specific power to control the use of expert evidence under CPR 35.4 or as part of its general case management powers under CPR 3.1(2). Such general discretion should be exercised having regard to all the material circumstances of the case and in accordance with the overriding objective.

54. The usual rule is that the court should not refuse a party permission to rely on a new expert in substitution for an existing expert: *Edwards-Tubb v JD Wetherspoon plc* [2011] EWCA Civ 136 per Hughes LJ at [30]:

> "I certainly accept that there may be perfectly good reasons for a party to wish to instruct a second expert. Those reasons may not always be that the report of the first expert is disappointingly favourable to the other side, and even when that is the reason the first expert is not necessarily right. That means that it will often, perhaps normally, be proper to allow a party the option, at his own expense, of seeking a second opinion. It would not usually be right simply to deny him permission to rely on expert B and thus force him to rely on expert A, in whom he has, for whatever reason, lost confidence."

55. For whatever reason, in this case, Vale has lost confidence in Professor Abboud on these issues of arbitration law and wishes to rely on the evidence of a second expert, Professor Lee. Having regard to the size and value of the claims, and the importance attached to the application for a stay, I consider that it would be appropriate to allow Vale to adduce expert evidence on questions 1 and 2 from Professor Lee.

56. I turn to the application to adduce expert evidence on question 3. It is accepted that the section 9 stay application raises questions, not just as to interpretation of the arbitration agreement (including whether it covers the scope of the dispute), but also as to whether, under Brazilian law, BHP's activities regarding Samarco had the effect that BHP, non-signatories, are bound by the arbitration agreement. The function of the Brazilian law experts is to explain to the court the Brazilian rules of construction of arbitration agreements and the Brazilian law principles governing the circumstances in which a non-party can be bound by an arbitration agreement. It is not the function of the Brazilian law experts to apply those principles to the facts of this case; that is the task of the court.

57. To the extent that the expert evidence is said to relate to the circumstances in which a non-party can be bound by an arbitration agreement pursuant to rules of Brazilian law, that is already covered by the second part of question 2. To the extent that it seeks to go further and provide the court with Professor Lee's view as to the application of the Brazilian law principles to the facts in this case, it trespasses on the function of the court.

58. For those reasons, the court does not give permission for any party to adduce expert evidence on question 3.

59. In terms of directions for determination of the section 9 application, the court orders as follows:

    i) Vale has permission to rely on the expert report of Professor Lee dated 18 September 2023 on questions 1 and 2 (but not 3 or 4).

    ii) BHP have permission to file and rely on expert evidence from Professor Schreiber in response by 4pm on 6 November 2023.

    iii) Vale has permission to file and rely on expert evidence from Professor Lee in reply by 4pm on 17 November 2023.

    iv) There is already provision for the experts to commence discussions by 24 November 2023. Any agreements reached should be set out in a joint statement and filed by 4pm on 1 December 2023.

    v) Vale shall file an agreed bundle of documents with the court by 4pm on 5 December 2023.

    vi) BHP and Vale shall file and serve skeleton arguments by 4pm on 7 December 2023.

    vii) The hearing of the section 9 application is fixed for 12 and 13 December 2023 with an estimate of two days (plus a reading day on 11 December 2023).

Further Directions

Pleadings

60. In the jurisdiction judgment, the court ordered Vale to file and serve its Part 20 defence by 10 November 2023. Vale's position is that it could not be ready to file a complete

defence until the end of December 2023. For the reasons set out above, it is not accepted that Vale needs the same amount of time as BHP needed a year ago. However, having considered Mr Caisley's evidence, the court is prepared to extend time for Vale to file and serve its Part 20 defence to 4pm on 1 December 2023.

61. In consequence, BHP shall file any reply to the Part 20 defence by 22 December 2023.

Issues

62. Vale's defence will identify the matters relied on that are said to give rise to defences of limitation or settlement and release. The court orders that by 4pm on 15 December 2023, Vale shall provide to the claimants and BHP any comments on the agreed set of hypothetical scenarios (for the purposes of Issue 13) and the agreed set of sample settlement agreements (for the purposes of Issue 15) previously agreed between the claimants and BHP pursuant to paragraph 33 of the CMC Order.

63. BHP have already identified the issues said to arise on the Part 20 claims that overlap with the issues ordered to be tried at the first stage trial. Following service of BHP's reply on 22 December 2023, it will be possible for the parties to discuss and finalise the list of issues as between BHP and Vale for the first stage trial. The court orders that by 4pm on 12 January 2024, Vale and BHP shall seek to agree additions to the current list of issues for the first stage trial to include such issues arising on the additional claim as the parties consider should be determined at that trial.

Disclosure

64. By 4pm on 15 December 2023, Vale is to provide a draft Disclosure Review Document to BHP prepared in accordance with Practice Direction 57AD including any response to BHP's draft Section 1a DRD for the Additional Claim (as provided by BHP to Vale on 25 September 2023).

65. If agreed, the DRD may be approved by the court on the papers. If not agreed, the DRD (and any disputes on the same) will be considered by the court at the next CMC.

66. By 4pm on 12 January 2024, Vale shall give to the parties disclosure of documents referred to in Alexandre D'Ambrosio's Second Witness Statement in paragraphs 18-21, which were produced in securities class actions against Vale in the United States.

67. Further disclosure from Vale will be given in tranches, on dates to be agreed by the parties or determined by the court at the next CMC.

Experts

68. The court has already ordered the parties to identify expert issues and commence expert discussions as set out in paragraph [104] of the jurisdiction judgment. Vale's factual and expert evidence filed in the jurisdiction challenge identified issues of Brazilian law that were said to arise in the Part 20 claims. Indeed, the Brazilian law experts have already produced reports on key issues of joint and several liability and remedies available under Brazilian law. Mr D'Ambrosio has identified additional issues related to Vale's position as a shareholder in Samarco, including the 'disregard doctrine', corporate governance and antitrust laws, together with limitation and settlement

defences. On that basis, Vale must be in a position to comply with the limited directions for early engagement between the parties and their experts, where appointed, to identify and define the scope of the expert issues.

Further CMC

69. All parties should liaise to fix a further CMC to be listed on the first available date after 15 January 2024 with a time estimate of 2 days, at which any dispute as to the issues, disclosure or further directions are to be determined by the court.