



Neutral Citation Number: [2024] EWHC 23 (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: 11 January 2024

**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**

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**Alain Choo Choy KC, Nicholas Harrison, Jonathan McDonagh, Russell Hopkins and**  
**Grace Ferrier** (instructed by **Pogust Goodhead**, a trading name of PGMBM Law Ltd) for the  
**Claimants**

**Nicholas Sloboda and Maximilian Schlote** (instructed by **Slaughter and May**) for the  
**Defendants**

**Michael Bolding** (instructed by **White & Case LLP**) for the **Third Party**

Hearing date: 21<sup>st</sup> December 2023  
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# **Approved Judgment**

This judgment was handed down remotely at 10.30am on Thursday 11 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON MRS JUSTICE O'FARRELL DBE

**Mrs Justice O'Farrell:**

1. This hearing concerns the claimants' application dated 27 November 2023 for permission to make amendments to the Re-Amended Master Particulars of Claim ("RAMPOC") and the Amended Reply.
2. There is some measure of agreement between the parties but in large part the application is opposed by the defendants and the part 20 defendant ("Vale").

*Background*

3. The claims arise out of the collapse of the Fundão Dam in South East Brazil on 5 November 2015, releasing around 50 million cubic metres of tailings from iron ore mining and causing widespread destruction and environmental pollution.
4. The background to these proceedings is set out in earlier judgments by the Court of Appeal at [2022] EWCA Civ 951 and by this court at [2022] EWHC 330 (TCC), [2023] EWHC 1134 (TCC) and [2023] EWHC 2030 (TCC). It is not necessary to repeat it here and the following is limited to a brief overview of the claims.
5. On 2 and 5 November 2018, the claimants issued proceedings, seeking damages and other relief against the first defendant. On 3 May 2019, a further claim form was issued against both BHP defendants (collectively, "BHP"). On 24 February 2023 a new claim form was issued against BHP, increasing the total number of claimants to approximately 732,000. There are public statements from the claimants' solicitors estimating the value of the claims as £36 billion.
6. The claims, seeking compensation for loss and damage caused by the collapse of the dam, are brought jointly and severally against the BHP defendants. The claimants are all Brazilian and comprise (i) over 700,000 individuals; (ii) over 1,600 businesses; (iii) 78 churches and faith-based institutions; (iv) 46 municipalities; (v) 7 utility companies; and (vi) over 9,500 members of the indigenous and Quilombola communities.
7. The claims are advanced under Brazilian law and include the following pleaded allegations in the current version of the RAMPOC:
  - i) Articles 3(IV) and 14 of the Environmental Law and/or Articles 927 and 942 of the Civil Code impose strict liability on BHP for loss and damage caused by the environmental disaster by reason of their: (a) ownership and/or control of the entity responsible for the damage; (b) failure to supervise the activity giving rise to the damage; (c) funding the activity of others which led to the damage; and/or (d) benefiting from the activity of others which led to the damage.
  - ii) BHP are liable under Articles 186, 927, 932 and 942 of the Civil Code for the loss and damage suffered by the claimants by reason of their voluntary act or omission, negligence or imprudence in: (a) disregarding advice and warnings as to the risks of collapse and/or (b) failing to take satisfactory action to address such risks.

- iii) BHP are liable under Articles 116 and 117 of the Corporate Law, as controlling shareholders, for the loss and damage suffered by the claimants, by permitting activities involving a significant risk of substantial damage to the community.
8. The Amended Defence contains a denial of any liability on the part of BHP and includes the following defences to the claims:
- i) BHP were not polluters within the meaning of Article 3(IV) of the Environmental Law so as to attract strict liability for the loss and damage caused by the dam collapse. They carried out no polluting activity, nor did they cause environmental degradation through any relevant omission.
  - ii) The allegations of fault-based liability are denied. BHP met the expected standard of conduct of parties in their positions and breached no legal duty.
  - iii) There is no liability under the Corporate Law. BHP were not controlling shareholders of Samarco and/or owed no controlling shareholder duties and/or did not breach any such duties by act or omission.
  - iv) It is denied that there was any causal link between any activity or omission on the part of BHP and the dam collapse and/or the claimants' alleged losses.
  - v) BHP plead that all the claims are time-barred under Brazilian law.
  - vi) Certain claimants have accepted compensation, pursuant to settlement agreements with Renova, Samarco, BHP Brasil, Vale and/or through the Novel System compensation scheme, and the terms of the release or waiver clauses in such settlements preclude the claimants from pursuing the claims in these proceedings.
9. On 2 December 2022 BHP served a Part 20 claim against Vale, seeking declaratory relief and a contribution to any sums that BHP might be found liable to pay to the claimants. On 13 April 2023 BHP issued a new Part 20 claim against Vale in respect of any liability arising out of the new claim form issued by the claimants.
10. On 1 December 2023 Vale served its defence to the Part 20 claims, disputing all and any liability, including the following grounds of defence:
- i) Any claims that the claimants might bring against Vale would be time-barred pursuant to Article 206(3)(V) of the Brazilian Civil Code and would have been time-barred when the first and second Part 20 claims were issued.
  - ii) Some claimants have commenced claims against Vale in local Brazilian courts seeking compensation for loss caused by the collapse; a number of such claims have been dismissed by final and conclusive judgments of Brazilian courts. Claims by any of those claimants against Vale in respect of the collapse are barred by cause of action estoppel and/or issue estoppel and/or constitute an abuse of process.
  - iii) Other claimants have accepted settlements, pursuant to settlement agreements concluded with Renova, Samarco, BHP Brasil and/or Vale. Claims by any of those claimants against Vale in respect of the collapse, and which fall within the

scope of the relevant settlement agreements, are barred as a matter of Brazilian law and/or are an abuse of process.

- iv) It is denied that Vale exercised de facto and/or de jure control over Samarco, or was aware at any material time prior to the collapse that the safety of the dam had been or was being compromised.
  - v) Any liability arising for loss and damage resulting from the collapse is to be satisfied, in the first instance, by Samarco and conditions for piercing the corporate veil so as to render Vale liable to the claimants, as Samarco's shareholder, are not satisfied.
  - vi) It is denied that Vale is or would be liable to the claimants as a polluter pursuant to Article 3(IV) and/or 14 of the Environmental Law.
  - vii) It is denied that Vale caused the collapse by any voluntary act and/or omission, negligence and/or imprudence within the meaning of Article 186 of the Civil Code.
  - viii) Vale was not at any material time a controlling shareholder of Samarco and, accordingly, it did not owe any duties or responsibilities under Articles 116 and/or 117 of the Corporate Law; further or alternatively, the requirements in respect of fault-based liability under Article 186 of the Civil Code are not satisfied.
  - ix) The main cause, or trigger, of the collapse was three earthquakes which occurred within four minutes of each other around 90 minutes before the collapse on 5 November 2015, which was unprecedented and would not have been considered a reasonable scenario when the dam was designed and/or at any stage prior to the earthquakes occurring.
  - x) The effect of the TTAC, which has been ratified by a Brazilian federal court, is that any liability in respect of the collapse as between Vale and BHP Brasil (and/or BHP) has been settled and any compensation will be funded by Renova and/or Samarco.
  - xi) Further, it is denied that BHP have any claim for a reimbursement under Article 283 of the Civil Code.
11. Following a CMC in March/April 2023, this court fixed a trial on threshold liability issues to be heard on 7 October 2024 with an estimate of 11 weeks, to include one week of judicial reading. The threshold liability issues include:
- i) whether BHP are strictly liable as "polluters" in respect of damage caused by the collapse pursuant to Articles 3(IV) and 14 of the Environmental Law;
  - ii) whether BHP are liable based on fault in respect of damage caused by the collapse, pursuant to Articles 186, 927, 932 and 942 of the Civil Code and/or Article 225 of the Constitution and/or Article 116 of the Corporate Law;

- iii) whether BHP are liable as controlling shareholders of Samarco in respect of damage caused by the collapse, pursuant to Article 116 and/or 117 of the Corporate Law and/or Article 927 of the Civil Code;
- iv) various limitation issues, including whether environmental damage claims are subject to prescription, whether time runs from the date of knowledge of damage, and circumstances in which protests or service of proceedings gives rise to an interruption of the limitation period;
- v) whether any of the claims (or categories of claim) are precluded by reason of settlement agreements entered into with Renova, Samarco, BHP Brasil, Vale and/or through the Novel System;
- vi) whether the municipalities have standing and/or capacity to bring their claims in these proceedings.

*The application*

- 12. On 27 November 2023 the claimants issued an application, seeking an order for permission to amend their claims as set out in the draft Re-re-amended Master Particulars of Claim (“Re-RAMPOC”) and the draft Re-amended Reply (“RAR”).
- 13. Witness statements have been filed in respect of the application:
  - i) on behalf of the claimants, the first witness statement of Mr Thomas Ainsworth, solicitor and partner in Pogust Goodhead, dated 27 November 2023 and his second witness statement dated 14 December 2023;
  - ii) on behalf of BHP, the twenty-third witness statement of Mr Efstathios Michael, solicitor and partner in Slaughter and May dated 8 December 2023.

*Applicable legal principles*

- 14. Once a statement of case has been served, a party may amend it only with the consent of the other party or with permission of the court: CPR 17.1.
- 15. CPR 17.3 provides that the court has a general discretion to allow an amendment to a statement of case (subject to CPR 17.4 and CPR 19.6, where objections are raised on limitation grounds, not an issue raised on this application).
- 16. A number of authorities have been drawn to the court’s attention but there is no difference between the parties as to the approach to be taken to the application. On an application by a party to amend its pleading, where there are potential issues of lateness or adverse impact on the trial date, the following principles are applicable, as set out in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC) per Coulson J (as he then was) at [19] and *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 per Carr J (as she then was) at [36]-[38]:
  - i) In exercising the court’s discretion whether to allow an amendment, the overriding objective is of the greatest importance. Although the court will have regard to the desirability of determining the real dispute between the parties, it must also deal with the case justly and at proportionate cost, which includes

(amongst other things) saving expense, ensuring that the case is dealt with expeditiously and fairly, and allocating to it no more than a fair share of the court's limited resources.

- ii) Therefore, such applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.
- iii) The starting point is that the proposed amendment must be arguable, coherent and properly particularised. An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success.
- iv) An amendment is late if it could have been advanced earlier, or involves duplication of steps in the litigation, costs and effort. Lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done.
- v) It is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay.
- vi) A very late amendment is one made when the trial date has been fixed and where permitting the amendment would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept.
- vii) Where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission.

17. The amendments proposed in the draft Re-RAMPOC fall into the following categories:

- i) amendments to the claimants' case on matters of Brazilian law;
- ii) amendments to the factual case alleged as to the extent of BHP's knowledge of and involvement in decisions made by Samarco leading to the collapse;
- iii) amendments to the heads of loss claimed;
- iv) amendments to the pleading in reply on issues of limitation, settlement, release and waiver.

*Brazilian law amendments*

18. The claimants seek to amend parts of their case as to BHP's liability for the collapse and its consequences under Brazilian law. The key proposed amendments in the draft Re-RAMPOC comprise:

- i) corrections and additions to the Brazilian law statutes and principles relied on at Section D, including the “polluter pays principle” (“*o principio do poluidor pagador*”) and the “full risk theory” (“*a teoria do risco integral*”);
  - ii) A new pleaded case at Section E1 that BHP are liable under the “polluter pays principle” and/or “full risk theory” by reason of their participation and/or involvement in the activities which caused the damage, including at paragraph 276A specific allegations that BHP approved and thereby authorised the implementation of the “Third Pellet Plant Project” at the Germano Complex, the “P4P Project” and the decision to raise the level of the dam whilst the set-back remained in place and construction of additional drainage was unfinished;
  - iii) A new pleaded case at Section E2 that BHP are liable under Article 186 of the Civil Code based on assumption of responsibility and amended pleaded case under Article 927 based on strict liability, Articles 932 and 933 based on liability for the conduct of their employees or agents, and Article 942 regarding joint and several liability;
  - iv) An amended case at Section E3 that BHP are liable as controlling shareholders under Article 116 of the Corporate Law and/or by abuse of power under Article 117 of the Corporate Law, deleting the allegation that liability arose regardless of fault and substituting an allegation that liability arose through breach of duty to minimise risk of damage to the community under Articles 186 and 927 of the Civil Code.
19. Mr Choo Choy KC, leading counsel for the claimants, submits that the above proposed amendments should be permitted. They have arisen from discussions with the claimants’ Brazilian law experts and constitute clarification or development of the claimants’ case in relation to provisions of Brazilian law already relied on or limited additional points. The function of a pleading of foreign law is to identify the relevant provisions and principles on which a party relies and, so far as necessary, summarise shortly their effect. It is neither necessary nor appropriate to expand upon the meaning of particular words or concepts so as to produce a lengthy pleading, rather than leaving such matters for the experts to discuss and address in their reports. It is not suggested by BHP that the points are not arguable and there would be severe prejudice caused to the claimants if they were unable to rely on these additional arguments. The Brazilian law amendments can all be accommodated within the existing expert timetable, or with minor revisions to the same.
20. Mr Sloboda, counsel for BHP, objects to the claimants’ application to amend on the Brazilian law issues. He explains that the timetable is already tight in this very heavy case and the BHP team is fully committed on all tasks. BHP would have to consider the new legal allegations with their experts before they could respond. That process will take time. BHP’s experts are preparing for the discussion of the existing expert issues and have other commitments. Further, the need to respond not just to a legal case but to a legal case intertwined with a new factual case complicates the process. Despite these pressures, BHP have indicated that so far as the expert evidence process is concerned, their legal experts would be willing to discuss the claimants’ new formulation of existing legal issues and to defer discussion of the new legal issues pending the court’s decision on the application to amend. The experts will need extra



time to deal with the new allegations, which will have an impact on the current timetable.

21. Mr Bolding, counsel for Vale, supports BHP's position. Vale is not directly affected by the claimants' application but it is evident that any amendments are likely to be reflected in amendments to the Part 20 claims and Mr Bolding expresses concern at the extent of the proposed amendments in the context of the current timetable.
22. In my judgment, the proposed amendments in respect of the Brazilian law issues are arguable, cogent and sufficiently detailed to allow BHP to understand the case against them and for the experts to consider them. In the context of the current timetable for the first stage trial, these amendments are not very late. The experts have not yet completed their discussions, concluded their joint statements or prepared their reports. Serious prejudice would be caused to the claimants if they were unable to present the case on legal liability in accordance with the Brazilian law principles advised by their experts. Although it is accepted that all parties face a challenging period of preparation for the trial, the additional burden placed on BHP's legal experts in considering these amendments is not oppressive. It is very likely that some adjustment will be required to the timetable for expert reports but that can be accommodated so that the trial date is not in jeopardy. For those reasons, permission is granted for the Brazilian law amendments.

*Amendments to the factual case*

23. The claimants seek to amend the factual case alleged as to the extent of BHP's knowledge of and involvement in decisions made by Samarco leading to the collapse of the dam.
24. Section C4 of the draft Re-RAMPOC alleges that BHP had knowledge of and involvement in the events leading to the collapse: (a) C4.1: through the Samarco Board; (b) C4.2: through the Samarco Operations Committee; (c) C4.3: in other ways; (d) C4.4: through contents of the Prístino Report; and (e) C4.5: knowledge and conduct in the months preceding the collapse. Paragraphs 176A and 176B clarify the basis of the claimants' case that BHP had such knowledge and involvement through different individuals i.e. constructive knowledge. Sections C4.1 and C4.2 identify the materials, information, discussions and decisions at Samarco Board meetings and Samarco Operations Committee meetings relied on. Section C4.4 pleads the relevant warnings and recommendations relied on in the Prístino Report.
25. The key proposed amendments appear in Section C4.3 at paragraph 196A and Section C4.5 at paragraph 205A of the draft pleading.
26. Mr Choo Choy submits that the amendments provide further particulars of matters already in issue in the case, including the extent of BHP's involvement in Samarco's activities and whether BHP were responsible directly or indirectly for such activities so as to become strictly liable for the consequences of the collapse of the dam. As explained in Mr Ainsworth's first statement, the new factual allegations are based on internal company documents and communications between BHP and Samarco, seized during a police raid on Samarco following the collapse and disclosed to the claimants by the Ponte Nova court in January 2023, together with some additional documents from the initial tranche of disclosure given by BHP produced in April and May 2023.

The claimants waited for some of BHP's rolling disclosure given from September 2023 onwards before making the amendments but have found little of assistance in those documents produced to date. Although the draft pleading contains long lists of meetings, calls and documents, the claimants do not rely on the detailed contents of the documents or the particular matters discussed at meetings, save where those are specifically pleaded elsewhere. Rather the relevant particulars support a general allegation about the extent of BHP's involvement in the activities of Samarco.

27. BHP object to the introduction of these amendments on the basis that they introduce very extensive new factual allegations, they are inadequately particularised and the amendments are made extremely late. Mr Sloboda submits that the new allegations are said to be particulars of BHP's participation and involvement in, and knowledge of, both the operations of Samarco and the events leading up to the collapse. They open up extensive new areas of factual inquiry, including over 235 meetings, visits or inspections, hundreds of reports and references to dozens of individuals not previously identified in the pleadings. BHP and their legal team have already been engaged for months in proofing witnesses and preparing witness statements in respect of the existing pleaded case. If the amendments are allowed, BHP faces the unenviable task of having to go back and consider the new case with existing witnesses and also consider whether new witnesses are required. The additional lines of inquiry required would not be confined to factual investigations but would extend to geotechnical expert evidence to address a new allegation that BHP had knowledge of and involvement in the decision to keep the set-back in place and raise the level of the dam, matters that caused the collapse. Mr Sloboda's position is that the scale and nature of the draft amendments means that they would impact virtually all of the procedural steps and timetable to trial, causing huge amounts of extra work at a time when BHP, their legal team and their experts are fully engaged in preparing the existing case for trial. This cannot be fairly done within the current timetable.
28. Paragraph 196A pleads:

“In addition to BHP's knowledge and involvement as set out above, BHP participated and/or was involved in and/or had knowledge of the operations of Samarco and the events leading up to the Collapse in other ways, as set out below.”
29. In the sub-paragraphs that follow, the claimants list numerous meetings, audits, assessments, visits and inspections to the dam, visits to BHP in Australia, production and receipt of written reports, analyses, ad hoc communications between Samarco and BHP, and risk reviews in respect of the dam. However, the claimants do not identify the knowledge that BHP is said to have acquired from such involvement, any discussions as to specific operational matters or risks, any decisions that are said to have been taken at or as a result of such involvement, or the significance of any of the above to the collapse of the dam. There is no pleaded case as to what facts and matters should be concluded from the numerous documents identified in this section in respect of any relevant involvement or knowledge of the operations of Samarco or its participation in the events leading up to the collapse.
30. I note the claimants' stated position that they do not rely on the detailed contents of the documents or the particular matters discussed at meetings, save where those are specifically pleaded elsewhere; the thrust of the amendments is said to be a general

allegation about the extent of BHP's involvement in the activities of Samarco. If this were the extent of the new allegations, this could be clarified and pleaded in short form by reference to the categories of meetings and other exchanges without listing the numerous meetings and documents in the pleading. However, the claimants' reliance on these meetings and exchanges goes beyond mere demonstration of general involvement in the operations of Samarco and extends to key decisions. That is clear from other parts of the draft amended pleading which refer back to paragraph 196A:

- i) Paragraph 275 pleads that BHP exercised ultimate control with Vale of Samarco's activities, including the ability to require the Samarco Board and the executive officers to implement decisions. Paragraph 276 pleads that:

“276.3 Key decisions such as in relation to the approval of major capital projects, including the P4P Project and other key decisions concerning the Samarco operation (including the Dam and the stability thereof) were made by or at least approved by the GMC, if not also BHP's common Board of Directors.

276.5 BHP further influenced, participated and/or was involved in the operations of Samarco, including as pleaded in paragraphs [196A] and [205A] above.”

- ii) Paragraph 278 pleads that:

“As pleaded in paragraphs [71]-[92] and [177]-[205A] above, BHP participated and/or was involved in the activities and/or management of Samarco, including in relation to the operations and decisions which ultimately led to the Collapse pleaded in paragraphs [93] to [176] above, and had direct knowledge of those matters including the risk that the dam might collapse. In particular ...”

- iii) Paragraph 282 pleads that BHP caused the collapse by their voluntary act or omission, negligence or imprudence within the meaning of Article 186 of the Civil Code. The nature of the case is set out in the sub-paragraphs that follow, together with specific issues relied upon. In addition at paragraph 282.8A it is stated:

“Further, the Claimants rely on the matters pleaded at paragraphs [196A] and [205A] above and paragraphs [124]-[131] of the Reply.”

31. The cross references in the pleading indicate that the claimants rely on the documents identified in paragraph 196A, not just to illustrate the extent of BHP's involvement in the operations of Samarco, but also to establish the extent of BHP's knowledge of and involvement in decisions made in relation to the dam. It is unsatisfactory for the claimants to identify numerous documents which will be relied upon at trial without pleading succinctly the key decisions, knowledge, findings or conclusions alleged. The fact that the documents emanate from BHP or Samarco does not relieve the claimants of their obligation to plead a clear and concise case. It is not for BHP to trawl through the numerous documents looking for relevant material to which they could respond. As

currently pleaded, this part of the draft pleading does not set out the case that BHP have to meet.

32. For that reason, the court refuses permission for the draft amendments at paragraph 196A. If the claimants wish to pursue a case based on the matters set out in that paragraph, they must redraft it to plead a proper case.
33. In contrast to paragraph 196A, paragraph 205A pleads a specific case that BHP knew, or ought to have known, about the defects and drainage problems in the dam arising from the set-back but approved and funded a course of action that kept the set-back in place, continued to raise the dam and continued to raise the set-back ultimately causing the collapse. The relevant technical case, alleging a material risk of collapse caused by the set-back and increased elevation of the dam, is set out in the existing RAMPOC at Section C3 (in particular, C3.6-C3.11). Proposed paragraph 205A identifies specific presentations, materials, reports, notes and minutes and explains in respect of each, the knowledge that BHP had, or should have had as to the risk of collapse of the dam when agreeing, funding or approving the project (Project 940) which raised the elevation of the dam.
34. In my judgment, the proposed amendments in paragraph 205A are arguable, cogent and sufficiently detailed to allow BHP to understand the case against them. The new allegations will necessitate additional factual investigation and consideration of the new materials by the technical experts but the underlying cause or causes of the dam collapse, including the set-back and raised elevation of the dam, are already in issue in the case. This will necessitate some adjustments to the timetable but can be accommodated within the period remaining prior to the trial. Having regard to the size and complexity of this case, the additional allegations could not be described as imposing an unreasonable level of disruption such as to cause unfair prejudice to BHP in having to respond to them. In contrast, if the amendments are not permitted, the claimants will suffer prejudice by losing the opportunity to present its full case against BHP, based on the documents now available.
35. Balancing the above factors, the court permits the amendments introduced at paragraph 205A, the associated breach pleaded at paragraph 276A and the cross-references to paragraph 205A in other parts of the pleading.

*Amendments to the heads of loss*

36. The claimants seek to amend the heads of loss claimed in Section C.5.5 and Section F of the draft Re-RAMPOC. BHP do not object in principle to these amendments but submit that they should not be required to plead a defence to them until after the first stage trial. I consider that this is a sensible and reasonable approach, given the timing of the amendments and the other more pressing procedural steps required to prepare for the first stage trial. The trial in October 2024 does not include any issues of quantum or the individual claims for loss and damage, as matters of principle or fact. Therefore no prejudice will be caused by delaying the pleaded defence on these issues.

*Amendments to the reply*

37. The claimants seek to amend discrete parts of their case as set out in the draft Re-Amended Reply ("RAR"):

- i) amendments to the claimants' case on issues of limitation, to include: (a) suspension of prescription by reason of criminal investigation and proceedings at paragraphs 28.2 and 35A; (b) interruption of prescription by an Instrument of Commitment entered into between Samarco, BHP Brasil, Vale and others on 26 October 2018, which provided that there would be no deterioration of rights and claims of the people affected, on the grounds of prescription, on 5 November 2018, at paragraph 38A; and (c) suspension of all limitation periods between 10 June 2020 and 30 October 2020 during the COVID pandemic at paragraph 39A;
  - ii) new legal arguments as to the interpretation of settlement agreements and the effect of releases and waivers by reference to the Consumer Defence Code and the Civil Code at paragraphs 44A to 44D;
  - iii) new allegations that two geotechnical monitoring reports submitted by Samarco to Supram, the licensing authority, in 2014 and 2015 were misleading at paragraph 104A.
38. Limitation defences and interpretation of the settlement agreements, releases and waivers are already issues in the proceedings and included in the first stage trial. The new legal arguments raise discrete points of law that can be considered by the legal experts in the course of their discussions and preparation of their reports. The new allegations regarding the geotechnical monitoring reports are clear and concise and can be addressed by factual witnesses and the technical experts. None of these points imposes an unreasonable additional burden on BHP in the context of this case. For those reasons the court gives permission for the amendments set out in the draft RAR.

#### *Costs*

39. The claimants should bear the costs of and occasioned by the amendments to their case, the usual rule where a party seeks to amend. They have succeeded on part of the application but lost in part. On that basis, the costs of the application are costs in the case.

#### *Further directions*

40. The parties are invited to agree a sensible and realistic timetable for consequential amendments, adjustments to the dates for factual witness and expert evidence, and other directions. Any outstanding issues will be considered by the court at the next CMC listed on 31 January and 1 February 2024.