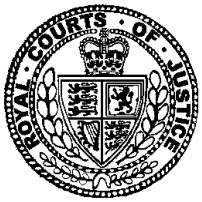

Neutral Citation Number: [2021] EWCA Civ 1156

Case No: A1/2021/0290 A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
MR JUSTICE TURNER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2021

Before :

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
and
LADY JUSTICE CARR

- -

Between :

MUNICIPIO DE MARIANA and others	**Claimants/ Appellants**
- and -	
(1) BHP GROUP PLC (formerly BHP BILLITON PLC)	**Defendants/ Respondents**
(2) BHP GROUP LTD	

- -
- -

Graham Dunning QC, Hugh Mercer QC, Marc Willers QC, Nicholas Harrison, Jonathan McDonagh and Russell Hopkins (instructed by **PGMBM**) for the **Appellants**

Charles Gibson QC, Daniel Toledano QC, Shaheed Fatima QC, Nicholas Sloboda and Max Scholte (instructed by **Slaughter and May**) for the **Respondents**

Hearing date: 22nd June 2021

- -

Approved Judgment

Sir Geoffrey Vos, Master of the Rolls (delivering the judgment of the court):

Introduction

1. Mr Justice Turner (the "judge") struck out this claim as an abuse of the process of the English Court. There were over 200,000 individual, corporate and institutional claimants. Lord Justice Coulson (the "appellate judge") refused the claimants permission to appeal ("PTA") on paper. The claimants then applied to the appellate judge to re-open that refusal to grant PTA under CPR Part 52.30 (the "application"), according to the principles enunciated in *Taylor v. Lawrence* [2002] EWCA Civ 2009, [2003] QB 528 ("*Taylor v. Lawrence*"). As requested by the claimants, the appellate judge then recused himself from dealing with the application. Underhill LJ directed that it be determined at an oral hearing before three LJs. At the start of the hearing, we said that we intended to deal both with the application and, if that were allowed, with whether PTA should be granted. We indicated a preliminary view that, if the application were successful, it would be appropriate to grant PTA. This judgment deals with both those questions.

2. The proceedings arise out of the collapse of the Fundão dam in south-eastern Brazil in November 2015. Over 40 million cubic metres of iron ore mine tailings were released into the Doce River. The consequences were catastrophic. 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. The claimants claim to have suffered loss as a result of the disaster.

3. There are now only two defendants to this claim. They are BHP Group plc, an English company, and BHP Group Ltd, an associated Australian company (together "BHP"). Both defendants were duly served within the jurisdiction. Where it is necessary to distinguish between the defendants, we will refer to them as the "English company" and the "Australian company". A subsidiary of the Australian company, BHP Billiton Brasil Ltda ("BHP Brazil"), was a partner in the Brazilian joint venture, which owned and operated the dam, Samarco Mineração SA ("Samarco"): the other partner was Vale SA ("Vale"). The judge held that the claims (a) were "irredeemably unmanageable" and should be struck out or, in the alternative, stayed as an abuse of process, or (b) in the alternative, would be stayed, in the case of the English company under article 34 ("article 34") of the Brussels I Regulation (Recast) ("Brussels Recast") and in the case of the Australian company because England was not the appropriate forum for their determination ("*forum non conveniens*") (together the "jurisdictional grounds").

4. The claimants contend that the appellate judge failed to grapple with essentially four main points raised on the application for PTA, thereby critically undermining the integrity of the process.

5. The first point with which the appellate judge is said to have failed to grapple was the argument that there was no legal basis to strike out proceedings as an abuse of process on the grounds of "irredeemable unmanageability". *AB v. John Wyeth & Brother (No. 4)* [1994] PIQR P109 ("*Wyeth*") was the only authority relied upon and that was plainly distinguishable (the "unmanageability point").

6. The second point with which the appellate judge is said to have failed to grapple was that the judge had elided the principles applicable to abuse of process with those applicable to the determination of the appropriate jurisdiction in which to bring claims. He had invented the concept of what was described in argument as "jurisdictional abuse", whereby the risk of irreconcilable judgments and the likelihood of "cross-contamination" of parallel proceedings in England and Brazil were recognised as making the English proceedings an abuse of process (the "jurisdictional abuse point").

7. The third point with which the appellate judge is said to have failed to grapple was that there had been no basis for the judge to strike out claims brought as of right against defendants duly served within the jurisdiction. He had ignored article 4 of Brussels Recast ("article 4") which provided for defendants to be sued in their place of domicile. The judge had created impermissible barriers to the claimants' access to justice (the "article 4 point").

8. The fourth point with which the appellate judge is said to have failed to grapple was that the judge had misapplied the principles in *Henderson v. Henderson* (1843) 3 Hare 100 ("*Henderson*") so as to prevent numerous claimants, who had made no claims in Brazil, from vindicating their legal rights in England (the "*Henderson* point").

9. Had the appellate judge grappled with these four essential points, the claimants contend that there was a powerful probability that he would have granted them PTA.

10. In dealing with these submissions, we will set out the essential facts, summarise the judge's reasoning and the appellate judge's reasoning, the applicable principles, before dealing first with the application, and then, if necessary, with the question of PTA.

The essential facts

11. The proceedings were issued on 2 and 5 November 2018 in the Business and Property Courts in Liverpool (the Technology and Construction Court).

12. The claimants' generic case was pleaded in Master Particulars of Claim running to over 100 pages. The claims were pleaded under Brazilian law, on the following bases: strict liability as "indirect" polluters (pursuant to Articles 3 (IV) and 14 of the Environmental Code and/or Articles 927 and 942 of the Civil Code); fault-based liability (under Article 186 of the Civil Code); and liability as controlling shareholders of Samarco (within the meaning of the first part of Article 116 of the Corporate Law). It was common ground before the judge that the claims were properly arguable.

13. With limited exceptions, the claimants pursue their claims with the benefit of conditional fee agreements under which each agrees to pay up to 30% of any damages recovered in these proceedings towards the costs of their lawyers and funding (including for ATE insurance).

14. BHP applied on 7 August 2019 for the claims to be struck out or stayed (the "strike-out application"). At that stage no Defence had been served and questions of case-management, such as the making of a Group Litigation Order under Section III of CPR 19, had not yet arisen.

15. The strike-out application was heard by the judge in Manchester over 8 days in July 2020: further submissions were made in writing in September 2020. The judge delivered his 76-page judgment on 9 November 2020, and made his order on 26 January 2021. In addition to striking out the claims as an abuse of process, the order recorded that if they had not been struck out they would have been stayed on the jurisdictional grounds, alternatively on case-management grounds.

16. The claimants then produced 15 draft grounds of appeal in 39 pages ("draft grounds") to the judge, seeking PTA. The inordinate length of the draft grounds was partly explained by the judge's direction that written submissions on all consequential matters (including costs) should not exceed 10 pages. As a result, material that might otherwise have appeared in submissions was included in the draft grounds. The judge refused PTA in a reasoned judgment (the "PTA judgment") handed down on 29 January 2021. The claimants then filed an Appellant's Notice on 16 February 2021, accompanied by Grounds of Appeal (the "Grounds") and a full skeleton argument (the "PTA skeleton"). There were 15 grounds under the same heads as in the draft grounds, but they had been substantially re-drafted in detail: among other things they were less than half the length. The appellate judge considered the Grounds, the PTA skeleton and brief representations filed by the defendants.

17. CPR 52.5 provides that applications for PTA to the Court of Appeal are to be determined without an oral hearing unless the judge directs such a hearing (which they must do if they believe that the application cannot be fairly determined without one). The appellate judge did not believe that an oral hearing was necessary and he refused permission on the papers.

18. The application (for permission to re-open the appellate judge's decision) was made on 20 April 2021. By rule 52.30(5) there is no right to an oral hearing of such an application "unless, exceptionally, the judge so directs". Underhill LJ made such a direction on 4 May 2021.

The judge's judgment

Introduction to the judge's judgment

19. In order to understand the basis on which the claimants seek to re-open the appellate judge's decision it is necessary to summarise the reasoning in the judge's judgment. We should emphasise that we do so only to the extent necessary for an examination of the application before us, and, if necessary, the determination of the renewed application for PTA.

20. In summarising the judge's decision, we will start with his treatment of the parallel proceedings in Brazil, and then deal with his decisions to strike out the claims as an abuse of process, to stay them on the basis of article 34 in the case of the English company and of *forum non conveniens* in the case of the Australian company, and to grant a case management stay.

21. Having noted the "extremely extensive" evidence, the judge outlined the general position under Brazilian law as follows. Any claimant who is one of a group alleged to have suffered recoverable loss can bring an individual claim in the normal way. The Brazilian Federal Constitution guarantees free legal aid in civil actions to those who do

not have sufficient funds to obtain legal representation. Alternatively, claimants can seek to participate in CPA proceedings. A CPA is a procedural mechanism for facilitating group litigation. CPA proceedings can be resolved by settlement, court ruling or both. Where liability is established, the court makes a "generic sentence" which enables those falling within the relevant class to bring "liquidation proceedings" in respect of their loss and damage. Any given claimant must establish that they qualify for membership of the class of person on whose behalf the proceedings have been brought and then prove causation and quantum. If the proceedings are settled, the parties may enter into a Conduct Adjustment Agreement under which compensation can be claimed.

22. CPA proceedings arising out of the collapse of the Fundão dam were commenced on 30 November 2015: these have been referred to as "the 20bn CPA" (by reference to the anticipated size of the fund to be established). They were brought by several public bodies including the Federal Government on behalf of the communities and individuals who had suffered loss and damage. They were assigned to the 12th Federal Court of the State of Minas Gerais ("the 12th Federal Court") under the management of Judge Mario de Paula Franco Jr ("Judge Mario").

23. The 20bn CPA was compromised by a Transaction and Conduct Adjustment Agreement ("the TTAC") under the terms of which Samarco, BHP Brasil and Vale agreed to create an entity known as the Renova foundation ("Renova"). One of Renova's purposes was and remains to mitigate the environmental consequences of the dam collapse and to provide compensation for individuals (and some small businesses) for their consequential loss and damages. The intention under the TTAC was that there should be full redress to all those eligible under the scheme.

24. On 2 May 2016 the Federal Prosecutor's Office, which had not participated in the 20bn CPA proceedings, commenced a second set of CPA proceedings, referred to as "the 155bn CPA" (again by reference to the anticipated size of the fund to be established). It was contended that the terms of the TTAC were inadequate and that the Federal Government itself (in addition to other public bodies) was also liable for the consequences of the dam collapse. The 155bn CPA proceedings were again assigned to Judge Mario in the 12th Federal Court. They have been stayed since January 2017 in order to allow for negotiations to take place; the judge accepted that it was likely that the stay would remain in place "for another two years or more".

25. The judge noted that the ratification of the TTAC had been heavily criticised and in due course annulled by the Brazilian appellate court. A second agreement, known as the GTAC, was ratified by Judge Mario on 8 August 2018. It provided for a process of renegotiation failing which any outstanding issues within the scope of the 155bn CPA proceedings might be adjudicated on by the 12th Federal Court.

26. Both the 20bn and the 155bn CPA proceedings exclude from their scope the following categories of appellant: municipalities, large business, utility companies and churches. Those categories account for 58 of the claimants. The potential value of such claims is likely to be significantly higher than the average claims of the appellants as a whole. The judge commented that, although excluded from these two CPA proceedings, these bodies were not precluded from bringing conventional individual claims, and municipalities were authorised bodies for the purpose of bringing CPA proceedings themselves. Ten claimants who are municipalities have brought claims against Renova.

Three further claimants, namely the Archdiocese of Mariana and two of the utility companies, have brought individual claims in Brazil.

27. At [40] the judge said:

> "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 … 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."

The judge also records that some 70 other CPA proceedings have been commenced in the aftermath of the dam collapse. The CPA proceedings brought by the Minas Gerais State Public Prosecutor had been concluded by a final settlement agreement.

28. At [42] the judge said:

> "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."

The judge's decision on abuse of process

29. At [47]-[76] the judge considered the law relevant to abuse of process. He cited *Attorney General v. Barker* [2000] 1 FLR 759, *Henderson*, and *Wyeth*. *Wyeth* arose out of group litigation by claimants who had been injured by taking benzodiazepines. The claims against a particular sub-group of defendants (the "prescribers") were struck out as an abuse because the practical benefit to the claimants of succeeding in their claims was in all probability nil, since they had viable primary claims against the manufacturers, and the cost to the prescribers and to the system would be enormous – in short, to pick up a phrase used by the appellate judge and in argument, the claims against the prescribers were "pointless and wasteful".

30. The judge considered the many factors relevant to whether the claims constituted an abuse at [77]-[145]. At [77] he recognised that ultimately it would be necessary to stand back and take a broad view.

31. The judge's first heading was "Practicability of managing the claims in England". It drew attention to the difficulty caused by the progress of parallel proceedings in Brazil and observed that "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".

32. The next heading to [79]-[120] was "Irreconcilable Judgments, Collateral Attack and Cross-Contamination of Issues". Here, the judge carried out his "particular scrutiny" of the problems liable to be caused by the parallel proceedings in Brazil. In summary:

    i) [79]-[96] covered what the judge described at [84], referring to *Henderson*, as "multiplicity of litigation". An important feature in the judge's thinking in [91] and elsewhere is that claimants joining the English litigation were assured that doing so would not prevent them from claiming also in Brazil: many had already done so, and there was no assurance that many more might not. The phrase "cross-contamination" appears to refer to the risk of decisions taken in the Brazilian litigation, both procedural and substantive, undermining or otherwise affecting decisions taken in the English litigation (and no doubt *vice versa*, but the judge's focus was on the English proceedings).

    ii) At [97]-[114] the judge identified a number of "further challenges" which the English court would face if the claims were to proceed, which would, as he put it at [104], make them "irredeemably unmanageable" – or, even if that were not the case, would place a disproportionate burden on the resources of the English courts [105]. His principal reason for that conclusion, stated at [106], is that there would be "an immense pool of claimants with grossly disparate interests", requiring a huge number of lead cases (he also noted at [98] that the population of the pools would be constantly changing) and that continuing developments in Brazil would mean that there was a real prospect of "almost interminable transatlantic iteration" – i.e., as we understand it, "cross-contamination". At [108]-[114] he identified, but explicitly as secondary considerations, various other practical problems that would be caused by the facts that the claims would be governed by Brazilian law and that most of the documentary and witness evidence would be in Portuguese, together with difficulties in taking evidence from Brazilian witnesses.

    iii) At [115]-[119] the judge pointed out that the claimants would not make full recovery in the English proceedings because of the need to pay a success fee: he referred to allegations that this may not have been properly explained to claimants, but he said that he would not take that possibility into account.

    iv) He concluded at [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* [19], 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'."

33. [120] appeared on its face to represent the judge's final decision on the abuse issue, although, as we will see, he in fact went on to consider other aspects. The phrase quoted from *Barker* does not seem a particularly apt summary of the reasoning in the prior paragraphs. Rather, the essential point appears to be his finding at [104] that the proceedings in England would be "irredeemably unmanageable". As we understand it, he was not referring primarily to the inevitable complexities of managing group litigation on this enormous scale but to the particular problems of irreconcilable

judgments and cross-contamination of issues arising from the existence of parallel proceedings in Brazil, particularly proceedings on such a scale and of such complexity.

34. At [121]-[133], under the heading "Full Redress", the judge addressed a case advanced by the claimants that, because of the deficiencies of the Brazilian system, they are unlikely to get full redress for their losses in Brazil. He said at [125] that "it would be inappropriate for me to attempt to adjudicate on the details of the issues arising", and he does not in fact make any definitive overall assessment of the risk that all or any of the claimants will not achieve full redress in Brazil. (He repeated this at [140]: see below.) As we understand it, that is principally because of his conclusion that whatever difficulties there might be in Brazil would "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" [122(i)]. However, he did make observations at [126]-[133] (a) about the problems which parallel proceedings in England would cause for Judge Mario and (b) about what he described as "undue pessimism" on the part of the claimants, or their advisers, about the prospects of achieving full redress in Brazil. Among other things, he noted that by the end of 2019 27,000 claims (i.e. about 10% of the total in these proceedings) had been adjudicated on in the State Courts of Minas Gerais (i.e. Judge Mario's court) and that just under half the claimants had received payments from Renova. A considerable number of individual claims in Brazil had been stayed, but that was because they related to compensation for interruption to water supply and there was a pending appeal on a point of principle. No fewer than 192,000 of the claimants were bringing claims in respect of water interruption.

35. At [134], under the heading "Renova", he summarised and acknowledged the criticisms made of the Renova process, but at [135] he observed, consistently with his findings under the previous heading, that permitting the Claimants to proceed in England "would not provide a panacea" and "would … generate even greater challenges".

36. At [136]-[139], under the heading "Hiving Off the 58", the judge considered and dismissed a fallback submission that the proceedings in England should be permitted to proceed at least for the 58 institutional Claimants who are unable to benefit from Renova or the two CPAs. The relevant passage reads:

> "137. … 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."

37. [140] is headed "Stepping Back" and reads:

> "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* [emphasis supplied]."

38. [141]-[145] are headed "Discretion" and contain the judge's conclusions on the issue of abuse of process. [141]-[142] read:

> "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 [emphasis supplied].
>
> 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* [emphasis supplied]."

[143]-[144] consider and reject the option of merely staying the proceedings pending resolution of the 155bn CPA. [145] reads:

> "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*."[1]

[1] This is a reference to a story in the *Arabian Nights* (the story of the barber's sixth brother (night 33)). A member of the wealthy Barmakid family invites a starving man to eat with him but then presents him with nothing but a series of empty plates.

As appears from the phrases that we have italicised, the judge's focus in [140]-[145] is not on unmanageability but on futility – that is, that the English proceedings will achieve nothing of value.

39. In order to understand the Grounds, and the appellate judge's answers to them, it is necessary to identify three strands in that reasoning:

i) **Unmanageability**: the judge's finding at [79]-[120] is that the English proceedings were "irredeemably unmanageable" ([104]) because of the problems of irreconcilable judgments and cross-contamination arising from the parallel proceedings in Brazil. It is true that the judge does not conclude his analysis with that finding. However, at [67] of his PTA judgment he described it as "the point of central importance to which all other considerations are of secondary significance". As a matter of legal analysis, he treats this as a form of *Henderson* abuse, arising out of the "multiplicity of proceedings" (see [32(1)] above).

ii) **Irrelevance of risk of not obtaining redress in Brazil**: the judge's findings on this aspect are summarised at [34] above.

iii) **Futility**: as noted at [37]-[38] above, the aspect on which the judge focused in his concluding paragraphs on abuse is that the proceedings will achieve nothing of value for the claimants. He evidently has in mind, though he does not expressly invoke it, the decision in *Wyeth*.

40. The judge's conclusion on abuse of process meant that it was unnecessary for him to consider whether the claim should be stayed under article 34 or stayed or struck out on the basis of *forum non conveniens*. However, he proceeded to consider those issues in case he was wrong, and, as we have seen, his conclusions were incorporated in his eventual order.

The judge's decision on article 34

41. The general rule under article 4 was that defendants should only be sued in their place of domicile, which, in the case of the English company, but not the Australian company, is England. But article 34 provided for a limited exception allowing for a stay where a related action is pending in a third state and where various other conditions are satisfied including that there is a risk of irreconcilable judgments and that a judgment in the third state would be capable of recognition and enforcement in the member state in question. The judge considered at [159]-[233] whether those conditions are satisfied. His reasoning can be summarised as follows.

42. At [158]-[200] the judge considered whether the 155bn CPA constituted pending related proceedings in which there would be a risk of irreconcilable judgments and concluded that it did.

43. At [201]-[203] the judge held that "if any claimants were to win in Brazil there [was] no reason why any judgment in their favour would not be capable of recognition and enforcement in England".

44. At [204]-[233] he considered whether he ought to impose a stay on the basis that it was "necessary for the proper administration of justice". He concluded that he should.

The judge's decision on *forum non conveniens*

45. This issue arises as regards the claim against the Australian company. The judge applied the two-stage approach mandated by the decision of the House of Lords in *Spiliada Maritime Corpn v. Cansulex Ltd* [1987] AC 460. At [237]-[242] he concluded that Brazil is the natural forum for the claims (noting at [241] that both defendants had offered to submit to the jurisdiction in Brazil). At [244]-[259] he considered and rejected the claimants' submission that, notwithstanding that Brazil was the natural forum, justice required that they be permitted to proceed in England.

The judge's decision on a case management stay

46. BHP had argued that even if the proceedings were not struck out or stayed on any of the preceding bases, they should nevertheless be stayed indefinitely, as a matter of case management, pending further developments in the Brazilian litigation. At [264], the judge said that he would impose such a stay, but he described that decision as "parasitic" on his other conclusions and said that if he were wrong on those he would not expect it to be sustainable.

The Grounds

47. The 15 grounds are stated in headlines (we will refer to these headlines as "ground 1", "ground 2" etc.). Each is then developed in more detail in one or more particulars. Grounds 1-7 challenge the Judge's conclusion on abuse of process, grounds 8-12 are concerned with article 34, and grounds 13-14 are concerned with *forum non conveniens*. Ground 15 is expressed to arise "in so far as the Judge held that he would grant a stay on case management grounds".

48. The structure of grounds 1-7 is rather complicated and does not leap from the page. Ground 1 is introductory:

> "The Judge's overall approach to the Defendants' abuse of process application at [47]-[145] was novel, unprecedented, wrong in law and wrong as a matter of principle."

49. However, that is purely declamatory, and particulars [1]-[3] go on to provide three particular heads of challenge which are then developed more fully in grounds 2-6. Ground 7 is not trailed in ground 1. Accordingly, the heads of challenge, as regards abuse of process, are:

i) The unmanageability point, whereby the judge held that the fact that the proceedings were irredeemably unmanageable could, in law, make them an abuse of process: grounds 1, 4 and 5, and particulars [2], [12] and [13].

ii) The jurisdictional abuse point, whereby the judge elided the principles applicable to abuse of process with those applicable to jurisdiction: grounds 1, 2 and 3 and particular [1].

iii) The article 4 point, whereby the judge erected impermissible barriers to access to the court: grounds 1, 4 and 5, and particular [2].

iv) The *Henderson* point, whereby the judge failed to make distinctions between the types of claimants, particularly the 58 institutional claimants that had not claimed in Brazil: grounds 1 and 6 and particular [3].

That structure is not really articulated by headings in the Grounds, but the PTA skeleton and Mr Dunning's oral submissions broadly approached the matter on that basis.

50. In all, the Grounds ran to 41 paragraphs over 18 pages. Although on careful study the points being made are relatively clear, in our view their length and discursiveness posed real difficulties for anyone having to analyse them for the purpose of deciding whether, and if so on what grounds, to grant PTA. We accept that, in a complex case, a number of grounds may have to be raised. But the structure adopted here was unsatisfactory because the actual errors of law or fact alleged do not appear as numbered grounds but only in the particulars, and then only in the most general terms. That made the Grounds, viewed as a whole, diffuse and unfocused.

The appellate judge's main reasons for refusing permission

51. The appellate judge's reasons ran to 27 paragraphs. They began with a general section, which read as follows:

> "1. By his order, … the judge … struck out the claims or alternatively stayed them. His reasons for so doing are set out in a careful judgment at [2020] EWHC 2930 (TCC) running to 265 paragraphs.
>
> 2. There were two broad reasons for his conclusions. The first was that these claimants could make claims - and in most/many cases were making such claims - in Brazil, where there was also a special compensation scheme in place. The second was that (as summarised at [104]) he was entirely satisfied that the claims were 'irredeemably unmanageable if allowed to proceed any further in this jurisdiction'.
>
> 3. Notwithstanding the careful attention paid by the judge to the law and the detailed submissions made by the parties, the claimants seek to challenge the judge on each and every point on which he found against them. By their grounds of appeal, they want to relitigate the entire eight day hearing in a new forum. That may be a reflection of what the judge elsewhere described as the 'chronic forensic hyperactivity' endemic in this dispute, but it is impermissible. The hearing before the judge was, in the words of Lewison LJ in *Fage*, 'the first and last night of the show'.
>
> 4. To criticise the judge for every single conclusion, accepting and conceding nothing, reveals a complete lack of focus or discernment on the part of the claimants. It suggests that they have no individual points which are strong or clearly arguable; that all they can do is attack everything in the hope that something will stick. That is borne out by the proposed Grounds of Appeal in respect of the substance of the judge's

> conclusions. There is nothing there that leads me to think, even for a second, that the judge applied the wrong principles or came to any conclusions which he was not entitled to reach. On the contrary, I regard the judgment as impeccable. These claims were a paradigm example of an abuse of process.
>
> 5. Accordingly, the substantive appeal has no prospect of success. I deal very briefly with the individual grounds."

52. It is apparent from those paragraphs that the appellate judge believed that the combination of the two factors identified at [2] – the existence of parallel proceedings in Brazil and the unmanageability of the proceedings in England – unarguably justified the conclusion that the English proceedings were an abuse and that the detailed challenges should not be allowed to obscure that bigger picture. Arguably, those two factors are only one, or at least overlap, since the unmanageability found by the judge derives from the existence of the Brazilian proceedings. Nevertheless, the appellate judge proceeded to consider each of the 15 grounds in turn, albeit avowedly "very briefly", under the headings "Abuse of Process" (grounds 1-7, particulars [6]-[16]), "Article 34" (grounds 8-12, particulars [18]-[22]), "*Forum non Conveniens*" (grounds 13-14, particulars [23]-[25]) and "Case Management" (ground 15, particular [26]). His conclusion was that none of them had a realistic prospect of success, though he made the point at [17] that the effect of his refusal of permission on grounds 1-7 is that even if there were anything in the remaining grounds that would be academic since the claims would fall to be struck out in any event.

The applicable principles

53. The essence of the claimants' application is that the appellate judge failed properly to address the grounds. Before turning to the substance of their case we should identify the principles applicable to the giving of reasons and to an application under CPR 52.30.

The principles applicable to reasons for the refusal of PTA

54. There is no authority which addresses directly the correct approach to the giving of reasons for a refusal of PTA in the Court of Appeal. That is hardly surprising, since such reasons will rarely become an issue. Moreover, applications for PTA are so various in their nature that the scope for general guidance is limited.

55. In *Wasif v. Secretary of State for the Home Department* [2016] EWCA Civ 82, [2016] 1 WLR 2793 ("*Wasif*"), the Court of Appeal (Sir John Dyson MR, Underhill and Floyd LJJ) explained the principles applicable to the giving of reasons in cases where the High Court or the Upper Tribunal refused permission to apply for judicial review without an oral hearing, and more particularly where the application was certified as "totally without merit" so that the claimant was not entitled to renew it orally. Underhill LJ said at [19]-[20]:

> "19. In any case where a judge refuses permission to apply for judicial review on the papers he or she must of course give reasons. It is common, both in the Administrative Court and the Upper Tribunal, for those reasons to be given in extremely summary form. That may be acceptable in cases where the claimant has the right to renew the

> application – though even then the reasons should be sufficient to show with sufficient particularity why permission has been refused. But where the application is certified as TWM, so that the claimant has reached the end of the road (subject to appeal), peculiar care must be taken to ensure that all the arguments raised in the grounds are properly addressed. This is not just for the important reasons of principle discussed in *Flannery v Halifax Estate Agents Ltd* [2000] 1 WLR 377 and in the many other authorities to the same effect. There is the further point that if permission to appeal is then sought from this Court, real difficulties can be caused if the judge refusing permission at first instance has not given adequate reasons, particularly since the option of directing an oral hearing is not open.
>
> 20. It does not follow that the reasons for refusing permission need always be lengthy. On the contrary, conciseness is a virtue, and if a ground can properly be disposed of adequately in a sentence or two so much the better. But what is necessary depends on the case. All the claimant's points must be identified and addressed. If there are professionally pleaded grounds, those grounds should be taken in turn. If, however, as is alas too often the case, the grounds are discursive or repetitious, it is the Judge's responsibility to analyse them into their component parts and say why each fails to give the claimant a realistic prospect of success (unless the case is one where disposing of one ground renders it unnecessary to consider the others)."

56. That passage was expressly approved as being applicable to reasons for giving for refusal of PTA under the new procedure (where oral renewals are not permitted as of right) by the Court of Appeal (Sir Terence Etherton MR, McCombe and Lindblom LJJ) in *R (Goring-on-Thames Parish Council) v. South Oxfordshire District Council* [2018] EWCA Civ 860, [2018] 1 WLR 5161 ("*Goring*") at [35]. We would emphasise the point made in [20] of *Wasif* to the effect that the degree of detail which is appropriate depends on the case. There are very many applications for PTA which can be and are appropriately dealt with in a few sentences. There are also some – mostly, but by no means all, where the applicant is unrepresented – where the grounds contain a mass of secondary and ill-founded submissions with which it is unnecessary and disproportionate that a judge should have to deal in detail. We emphasise also that we are concerned here with reasons for refusal by the Court of Appeal. Where the first-instance court or tribunal refuses permission, very summary reasons may be perfectly acceptable because the would-be appellant can always apply to the Court of Appeal. There are, of course, other cases where fuller reasons may be helpful or even necessary.

The principles applicable to applications to re-open under CPR 52.30

57. Paragraph 1 of CPR 52.30 provides:

> "The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—
>
> (a) it is necessary to do so in order to avoid real injustice;

(b) the circumstances are exceptional and make it appropriate to reopen the appeal; and

(c) there is no alternative effective remedy."

Paragraph 2 provides that paragraph 1 applies equally to the determination of an application for PTA.

58. CPR Part 52.30 (previously CPR 52.17) gives effect to the decision in *Taylor v. Lawrence*, and the jurisdiction is often still referred to under that label. As appears from *Taylor v. Lawrence*, the court would have such a power even if it were not the subject of a specific rule.

59. The most useful review since *Taylor v. Lawrence* was in *Goring* at [10]-[15] as follows:

> "10. The note in the White Book Service 2018 describing the scope of the rule states, at paragraph 52.30.2:
>
> > '… Rule 52.30 is drafted in highly restrictive terms. The circumstances described in r.52.30(1) are truly exceptional. Both practitioners and litigants should note the high hurdle to be surmounted and should refrain from applying to reopen the general run of appellate decisions, about which (inevitably) one or other party is likely to be aggrieved. The jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier proceedings … has been critically undermined. … .'
>
> 11. We would endorse those observations, which are justified by ample authority in this court. The relevant jurisprudence is familiar, but the salient principles bear repeating here.
>
> 12. Giving the judgment of the court in *In re Uddin (A Child)* [2005] 1 WLR 2398 ["*Re Uddin*"], Dame Elizabeth Butler-Sloss, the President of the Family Division, observed that the hurdle to be surmounted in an application to re-open under CPR 52.17 (now CPR 52.30) was much greater than the normal test for admitting fresh evidence on appeal. She observed (in paragraph 18 of her judgment) that the *Taylor v Lawrence* jurisdiction 'can in our judgment only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined'. And she added this (in paragraph 22):
>
> > '22. … In our judgment it must at least be shown, not merely that the fresh evidence demonstrates a real possibility that an erroneous result was arrived at in the earlier proceedings (first instance or appellate), but that there exists a powerful probability that such a result *has in fact* been perpetrated. That, in our view, is a necessary but by no means a sufficient condition for a successful application under CPR r.52.17(1). It is to be remembered that apart from the requirement of no alternative remedy, "The effect of reopening the appeal on others and the extent to which the complaining party is

> the author of his own misfortune will also be important considerations": *Taylor v Lawrence* [2003] QB 528, para 55. Earlier we stated that the *Taylor v Lawrence* jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined. That test will generally be met where the process has been corrupted. It may be met where it is shown that a wrong result was earlier arrived at. It will not be met where it is shown only that a wrong result may have been arrived at.'

13. In *Barclays Bank plc v Guy (No.2)* [2011] 1 WLR 681 ["*Barclays v. Guy*"] Lord Neuberger M.R. said (in paragraph 36 of his judgment):

> '36. … If a party fails to advance a point, or argues a point ineptly, that would not, at least without more, justify reopening a court decision. If it could be shown that the judge had completely failed to understand a clearly articulated point, it is possible that his decision might be susceptible to being reopened (particularly if the facts were as extreme in their nature as a judge failing to read the right papers for the case and never realising it). … .'

14. In *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514 ["*Lawal*"], Sir Terence Etherton, then the Chancellor of the High Court, summarized the principles relevant to an application under CPR 52.30 (in paragraph 65 of his judgment):

> '65. … The following principles relevant to [the] application [of CPR 52.17, as the relevant rule then was] to this appeal appear from *Re Uddin (A Child)* … and *Guy v Barclays Bank plc* … . First, the same approach applies whether the application is to re-open a refusal of permission to appeal or to re-open a final judgment reached after full argument. Second, CPR 52.17(1) sets out the essential pre-requisites for invoking the jurisdiction to re-open an appeal or a refusal of permission to appeal. More generally, it is to be interpreted and applied in accordance with the principles laid down in *Taylor v Lawrence* … . Accordingly, third, the jurisdiction under CPR 52.17 can only be invoked where it is demonstrated that the integrity of the earlier litigation process has been critically undermined. The paradigm case is where the litigation process has been corrupted, such as by fraud or bias or where the judge read the wrong papers. Those are not, however, the only instances for the application of CPR 52.17. The broad principle is that, for an appeal to be re-opened, the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation. Fourth, it also follows that the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large, or that the point in issue is very important to one or more of the parties or is of general

> importance is not of itself sufficient to displace the fundamental public importance of the need for finality.'

Sir Terence Etherton C went on to say (in paragraph 69):

> '69. … [The] appellants' reasons for re-opening the application for permission to appeal Judge May's possession order amount, on one view, to no more than a criticism that Arden LJ's decision to refuse permission to appeal was wrong. That is not enough to invoke the *Taylor v Lawrence* jurisdiction.'

> 15. For completeness, there should be added to that summary of the principles in *Lawal* the requirement that there must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined."

60. The Court of Appeal (Sir Keith Lindblom SPT, Coulson and Andrews LJJ) revisited CPR 52.30 in *R (Wingfield) v. Canterbury City Council* [2020] EWCA Civ, [2021] 1 WLR 2863 ("*Wingfield*"), on the basis that "the clear message of [*Goring*] has still not been understood". At [61], five principles were extracted from the authorities as follows:

> "(1) A final determination of an appeal, including a refusal of permission to appeal, will not be reopened unless the circumstances are exceptional (*Taylor v Lawrence*).
>
> (2) There must be a powerful probability that a significant injustice has already occurred, and that reconsideration is the only effective remedy (*Taylor v Lawrence, … Re Uddin*).
>
> (3) The paradigm case is fraud or bias or where the judge read the wrong papers (*Barclays Bank v Guy*, *Lawal*).
>
> (4) Matters such as the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large or the point in issue is important, are not of themselves sufficient to displace the fundamental public importance of the need for finality (*Lawal*).
>
> (5) There must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined (*Goring…*)."

61. Although that is a helpful summary, we would sound a note of caution about [62] in *Wingfield*, where the court recorded a submission that the combination of factors enumerated above "meant that in practical terms, the requirements of CPR 52.30 are 'almost impossible' to meet" and observed:

> "That may be so; but it seems to us that the difficulty of succeeding in a such an application is merely the inevitable consequence of the principles to which we have referred."

62. Experience shows that practitioners, and even sometimes judges, can fasten on phrases like "almost impossible to meet" and use them as a short-cut to avoid analysis of the circumstances of the particular case. It is better not to put glosses on the language of the rule itself, though of course illustrative guidance based on the case-law such as that given in *Goring* and *Wingfield* is sometimes helpful.

63. At [66] in *Wingfield*, the court said this:

> "In our view, an application for reconsideration of a refusal of permission to appeal involves a two-stage process. First, the court should ask whether the Lord or Lady Justice of Appeal who refused permission to appeal grappled with the issues raised by the application for permission, or whether they wholly failed so to do. Secondly, if the Lord or Lady Justice of Appeal did grapple with the issues when refusing permission to appeal, the court should ask whether, in so doing, a mistake was made that was so exceptional, such as wholly failing to understand a point that was clearly articulated, which corrupted the whole process and where, but for that error, there would probably have been a different result."

64. The claimants submitted that a judge considering an application for PTA must "grapple with" (or "engage with")[2] the issues raised. This means, in our view, that the appellate judge should address the essential points raised by the grounds and identify why in their view the point in question does not satisfy the test for the grant of PTA: cf. *Wasif* at [20]. The concept of "grappling with" the issue does not connote any particular degree of detail: what is required depends on the case.

Preliminary points on the appellate judge's reasons in this case

65. We would make 5 preliminary points before turning to the claimants' specific criticisms of the appellate judge's reasoning.

66. First, although the appellate judge addressed each of the grounds in turn, he did not address each paragraph of the particulars provided. Indeed (with one exception)[3] he does not refer to them at all. It seems that he treated the grounds as sufficiently stating the essential challenges being advanced. That might be a reasonable approach where the grounds actually state the point of challenge, but the claimants' approach in this case meant that taking that course risked failing to address essential points.

67. Secondly, while the appellate judge's approach of considering the 15 grounds one-by-one was entirely conventional and is in most cases the obvious and safest approach (and in line with *Wasif*), in the circumstances of this case, following that course rather than adopting the structure used in the PTA skeleton may have made it more difficult for him to identify the inter-relationship of the various grounds relating to abuse of process.

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2 See *Wingfield* at [67].

3 This is in the part of his reasons dealing with *forum non conveniens*, where he refers to particular [35] of the Grounds.

68. Thirdly, the claimants point out that the appellate judge made no reference to their skeleton in his reasons. This in itself cannot be a basis for re-opening his decision. It is the grounds of appeal, not the skeleton argument, that are the formal basis of a proposed appeal, and it is not only legitimate but necessary that they should be the focus for an appellate judge when giving reasons for a refusal of permission. It is, however, necessary for the appellate judge to read and digest the supporting skeleton. In some cases, it will not be possible to explain why permission is being refused without making express reference to it, but whether that is so depends entirely on the particular case. In this case, as we have already observed, the Grounds are exceptionally full; indeed, they are not much shorter than the PTA skeleton itself. It was possible, though more difficult, properly to address the issues raised by the Grounds without making express reference to the skeleton.

69. Fourthly, the appellate judge referred repeatedly to submissions addressed in the judge's PTA judgment and adopts his reasoning. That was not an entirely safe course because (a) the grounds of appeal were substantially re-drafted following the judge's refusal of permission, and (b) although the 15 grounds are almost identical in both versions, the particulars are substantially re-drafted and much shorter. Although that was made clear in the PTA skeleton, the appellate judge was not supplied with the draft grounds, so it will not necessarily have been apparent to him that there were some arguments that were no longer being pursued. The result is that some passages in the judge's PTA judgment which the appellate judge approved were not relevant to the Grounds. That does not matter as such: what matters is the reasons that he gave in relation to the arguments that survived. But we can accept that it may have left the claimants with an unfortunate impression, particularly in the light of the tone of [3] of the appellate judge's reasons.

70. Fifthly, the claimants contended that it should be inferred that the appellate judge "either did not read or at least did not consider the documents actually relied on". We do not think that there was any basis for that inference. Mr Dunning wisely did not advance that submission orally. The allegation that the appellate judge "did not consider" the documents must, in effect, be an allegation that he did not consider them sufficiently thoroughly. That can only be established by identifying errors or omissions in the reasoning. By itself, it adds nothing to the exercise that we have to undertake.

Did the appellate judge grapple with the claimants' essential challenges to the judge's judgment?

71. The claimants challenged the appellate judge's reasons on both abuse of process and the jurisdictional grounds. The challenges on abuse of process are by far the most important. To be clear, in this section we are not dealing with the correctness of the appellate judge's reasons, which is not a relevant issue, but whether he adequately grappled with the points being made by the claimants.

Abuse of process

72. We have summarised the claimants' four essential challenges above. The claimants contend that the appellate judge failed to grapple with their four main contentions: (1) the unmanageability point: there was no legal basis to strike out on the grounds of "irredeemable unmanageability", (2) the jurisdictional abuse point: the judge had elided the principles applicable to abuse of process with those applicable to the determination

of the appropriate jurisdiction in which to bring claims, wrongly considering on the question of abuse the risk of irreconcilable judgments and the likelihood of "cross-contamination", (3) the article 4 point: there had been no basis for the judge to strike out claims brought as of right against defendants duly served within the jurisdiction, and (4) the *Henderson* point: the judge had mistakenly prevented numerous claimants, who had made no claims in Brazil, from suing in England.

1. Did the appellate judge grapple with the unmanageability point?

73. Particular [2] dealt with both the unmanageability and the article 4 points:

> "The Judge erred in law and principle by treating (what he held to be) the unmanageability and burdensome nature of the claims in England as being by itself a basis for striking out the claims as an abuse of process, irrespective of the ability of the Claimants to obtain full redress in Brazil (see Ground 4). Insofar as he held, in the alternative, that the proceedings should be struck out as an abuse of process because it was clear that, whatever challenges were faced by Claimants in obtaining relief from other parties in Brazil, they would '*on balance*' face greater challenges in their proceedings against the Defendants in England, the Judge erred in law and principle by substituting his own view for the views of the Claimants; it was not the function of the Court to second-guess the Claimants' decision as to which of several potentially liable parties they should sue (see Ground 5). These were also novel bases for striking out proceedings, the effect of which was to erect impermissible barriers on access to the court."

74. The two elements are in grounds 4 and 5. Ground 4 contends:

> "Insofar as he held that the proceedings should be struck out as an abuse of process because they would be unmanageable and/or because of the burden they would impose on the English court system [78]-[107], the judge erred in law and in principle, took into account irrelevant matters and failed to consider relevant matters."

The actual content of that ground appears in particulars [12] and [13]. Particular [13] challenges the premise on which the judge proceeded – i.e. that the proceedings were "unmanageable" – and particular [12] challenges the conclusion that he draws from that premise. We take them in turn.

75. Particular [12] reads:

> The Judge erred in law by approaching the question of whether the Claimants' claims are abusive by first seeking to assess whether it was practicable to manage the claims and treating (what he held to be) the unmanageability and burdensome nature of the claims in England as by itself a basis for striking out the claims, irrespective of the ability of the Claimants to obtain full redress in Brazil. The Judge's approach erected an impermissible barrier on access to the court: see [Ground 1, particular 2 above].

That raises both the unmanageability point, namely that it was impermissible to dismiss the claim on the basis of "unmanageability" because of the burden it places on the English system, and the article 4 point that a properly served claim ought not to have been struck out where full redress might not be available anywhere else (in this case, in Brazil), so raising a barrier to access to the courts.

76. Particular [13] reads:

> "The Judge made further errors of law and fact, in finding that that the proceedings would be *"not merely challenging but irredeemably unmanageable"* [104] by reason of the size of the Claimant cohort and/or the fact of proceedings in Brazil:
>
> (a) the Judge proceeded from a demonstrable misunderstanding of the evidence that these proceedings were 'unique in a number of respects' including that '*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*' [78]. Ground 2 is repeated;
>
> (b) the Judge erred in law by proceeding on the basis that the prospect of there being developments in foreign proceedings is in itself capable of rendering English proceedings '*unmanageable*' [86]-[93], [137];
>
> (c) the Judge erred in law by proceeding on the basis that the size of this Claimant cohort is capable of leading to a conclusion that proceedings will be '*unmanageable*' [97]-[104];
>
> (d) the Judge erred in law by proceeding on the basis (as is the effect of [101]-[103]) that there is a burden on the Claimants, in seeking to resist a strike out for abuse of process prior to the service of a Defence, to prove the existence of a '*workable procedural mechanism for resolving the claims*'; and
>
> (e) the Judge was wrong in principle to find that there are no case management powers available to the Court (including those mentioned at [101], and those referred to at [493]-[497] and Appendix 6 of the Claimants' skeleton argument, to which the Judge made no reference in his judgment) which would enable the claims to be tried;
>
> (f) the Judge was wrong in principle to conclude that proceedings were '*irredeemably*' unmanageable even before jurisdiction has been established, before pleadings have been concluded, and before the parties have been called upon (pursuant to their obligation to the Court) to co-operate in proposing sensible directions for the future management of the action."

77. The appellate judge dealt with ground 4 at [12]-[13] as follows:

> "12. *Ground 4:* This criticises the judge's conclusion that the proceedings would be unmanageable. This ground is misconceived. That was a view to which the judge was quite entitled to come on the material before him: as I have already indicated, I consider it was the correct conclusion. It was plainly, therefore, a matter which was relevant to the application to strike out as an abuse.
>
> 13. One strand of the criticism is that the judge should have considered this 'at a glance' rather than undertaking a detailed analysis. As the judge said with considerable restraint at [34] of his second judgment, this is 'an unpromising ground for challenge'. The judge undertook a detailed analysis which had a clear conclusion. The claimants may not like the conclusion, but they cannot criticise the judge for undertaking the analysis."

78. Of those two paragraphs, only [12] is in fact material. [13] is an instance of the problem identified at [69] above: the "at a glance" submission which the appellate judge rejected appeared in the particulars to ground 4 in the draft grounds and was addressed by the judge in his PTA judgment, but it did not feature in the Grounds which were before the appellate judge (or the PTA skeleton). As we have said, although this is unfortunate, it is not in itself a basis for impugning the rest of his reasoning.

79. The essential question, therefore, is whether [12] of the appellate judge's reasons properly addressed particulars [12] and [13]. In our judgment:

    i) The appellate judge does not address the point of principle that unmanageability is not a proper ground on which to strike out a claim for abuse of process. All he says is that "the judge's conclusion that the proceedings would be unmanageable … was a view to which [he] was quite entitled to come on the material before him". That does not address the question of whether that conclusion could justify a strike-out either at all or in circumstances where, as the claimants submit, it has not been shown that full redress has been secured in Brazil.

    ii) The appellate judge's statement that the judge was entitled to conclude that the proceedings were unmanageable is merely conclusory and does not address the six points made under particular [13].

80. Whilst sub-paragraphs (a)-(f) under particular [13] may have been in some respects repetitious, the centrality of the finding of "unmanageability" to the judge's reasoning meant that the claimants were entitled to expect that their reasons for challenging that finding would be specifically addressed. Moreover, it was not sufficient to say that the challenge to the unmanageability point was misconceived, without giving any reasons. He might, for example, have had *Wyeth* in mind, but he did not say so, and in any event *Wyeth* is certainly not a complete answer to the point, because it was truly a case where the proceedings were "pointless and wasteful". That could not be said about claims that were, in the claimants' submission, not duplicated in Brazil.

81. We should for completeness mention how the appellate judge dealt with ground 5 and particular [2] explaining that the claimants' case is that the judge was wrong to make his own judgment about whether the disadvantages of proceeding in England were

greater than the disadvantages of proceeding in Brazil. The appellate judge's reasons do not specifically address this point, but that is not a real omission because it is only a trailer for grounds 4 and 5, which he addresses at [12]-[14] of his reasons.

82. At [14] he says:

> "This is a criticism that the judge compared the difficulties with proceeding in England with the proceedings in Brazil. So he did, but that was a secondary observation. What mattered was his conclusion that proceedings in England would be 'irredeemably unmanageable'. The judge's conclusion was not linked to whether or not the claimants would obtain full redress in Brazil."

The claimants may not agree with that, but Mr Dunning did not suggest it did not address the point being made in ground 5, and in our view it plainly does.

2. Did the appellate judge grapple with the jurisdictional abuse point?

83. The essence of the case advanced by this group of grounds is that there was no basis to strike out claims duly served within the jurisdiction, and that the judge had elided principles applicable to abuse of process with those applicable to jurisdiction. The difficulties occasioned by the existence of parallel proceedings in Brazil could only properly be addressed under the jurisdiction conferred by article 34 (in the case of the English company) and *forum non conveniens* (in the case of the Australian company). It was wrong in principle to treat them as a basis for a finding of abuse of process. As it is put in particular [1] under ground 1:

> "[The Judge] … created a novel concept of '*jurisdictional abuse*' and failed to respect the mandatory nature of Art. 4 and the conditions for a stay in Art. 34 Brussels Recast and/or to apply the common law principles set out in *Spiliada Maritime v Cansulex* [1987] AC 460."

84. Ground 2 reads:

> "Insofar as he held that the proceedings should be struck out as an abuse of process because of the risk of irreconcilable judgments and the likelihood of 'cross-contamination' of parallel proceedings in England and Brazil, at [79] to [120], the Judge erred in law, took into account irrelevant matters, proceeded on a demonstrable misunderstanding of the relevant evidence, and/or failed to take into account relevant matters."

85. The particulars to ground 2 are lengthy, but they can be sufficiently summarised as follows:

(1) Particular [6] contends that to strike out a case because of the risk of irreconcilable judgments is inconsistent with article 4. This essentially repeats the point of principle made in particular [1].

(2) Particular [7] argues that the judge's finding of a risk of irreconcilable judgments is flawed because:

(i) the parties in the Brazilian and the English proceedings are different (save to the extent that a minority of the claimants have brought individual claims in Brazil, though not against either the English and Australian companies); and

(ii) there were serious doubts over whether the main proceedings in Brazil – i.e. the 155bn CPA – would proceed at all, and, if it did, it was very unlikely to determine the liability even of BHP Brazil as an indirect polluter.

(3) Particular [8] contends that the judge's finding of a risk of cross-contamination between the Brazilian and the English proceedings is flawed because:

(i) it only arose in the case of the minority of claimants who had brought proceedings in Brazil (or received a payment from Renova) and could not justify the striking out of claims by those who had not;

(ii) it was open to the court to require the relevant minority of claimants to abandon their proceedings in Brazil as a condition of pursuing proceedings in England (and indeed this had been offered by leading counsel for the claimants);

(iii) most of the claimants who had recovered compensation in Brazil had only recovered a modest amount for water interruption, and payments from Renova were not the result of litigation.

The point made in particular [6] raises the challenge as a matter of principle to treating the existence of parallel proceedings as justifying a finding of abuse of process. Particulars [7] and [8], by contrast, are directed to the judge's specific findings of a risk of irreconcilable judgments and/or cross-contamination.

86. Ground 3 reads:

> "Insofar as he held that the proceedings should be struck out as an abuse of process because of the disadvantages of proceedings in England as opposed to Brazil ([105] and [108]-[114]), the Judge erred in law and took into account irrelevant matters."

The particulars can be summarised as follows:

(1) Particular [9] argues that the judge's approach undermines the second limb of *Spiliada*, namely whether there is a real risk that substantial justice would not be obtained against the defendant in the alternative forum.

(2) Particular [10] pleads that the Judge was wrong to take into account the secondary factors to which we have referred at [32(ii)] above.

As with ground 2, those grounds comprise both a point of principle about "jurisdictional abuse" as a basis for striking out (particular [9]) and a more particular point about the judge's findings (particular [10]).

87. The appellate judge addressed these grounds at [6]-[11] as follows:

> "6. *Ground 1:* The complaint is that the judge's approach to the abuse of process application was somehow novel and not in accordance with the law. That is wrong. The judge applied the principles from well-known authorities to the facts of this particular case. The judge did not create a category of 'jurisdictional abuse'. He simply concluded that these proceedings were pointless and wasteful, principally because of the myriad individual and group claims already being pursued in Brazil.
>
> 7. The suggestion that the judge should not have dealt with the abuse argument first is misconceived: it was front and centre in the disputes before the court. Moreover, in respect of *Grounds 1-3*, I echo the second judgement (on costs and refusing permission to appeal [2021] EWHC 146 (TCC)) at [33]. The claimants' mechanistic division between what they consider to be the matters relevant to the *forum non conveniens* issues, on the one hand, and the abuse arguments, on the other, has led to a wholly artificial analysis of the central issues raised by these applications. This unreality pervades many of the individual grounds. It is to be deprecated.
>
> 8. For the avoidance of doubt, I agree with and endorse [20]-[28] of the second judgment, and do not repeat it here.
>
> 9. *Ground 2:* The complaint is that the judge wrongly took into account the likelihood of irreconcilable judgments and the risk of contamination of parallel proceedings. I disagree. The judge properly took cross-contamination and the like into account in coming to his conclusions. Moreover, as he rightly said at [31] of his second judgment, there was no justification for drawing a distinction between those claimants who had already brought claims in Brazil and those who had not.
>
> 10. *Ground 3:* The complaint is that the judge took into account the disadvantages of proceeding in England as opposed to Brazil. That is incorrect. The judge expressly said at [104] of his substantive judgment that he would strike the claims out as an abuse of process without considering these additional practical burdens.
>
> 11. The claimants' unrealistic division of the issues into separate and sealed categories arises again."

88. We need not set out [20]-[28] and [33] of the judge's PTA judgment, endorsed by the appellate judge at [7] and [8]. Either he said himself that he only referred to them "for the avoidance of doubt", or they do not make any essential points that the appellate judge does not himself make in [6], [7] and [11]. The judge did, however, say this at [31] of his PTA judgment (which the appellate judge endorsed at [9]):

> "There could be no justification for drawing a distinction between those claimants which had already brought claims in Brazil and those which had not. As noted in the judgment, with but one exception, every claimant reserved the right in future to maintain parallel proceedings in both jurisdictions and, indeed, was encouraged to participate in the English litigation upon formal, written assurances from their solicitors that this

> would remain the case. Leading counsel for the claimants was not prepared to accede to the suggestion that the claimants should make any concessions on this position until, perhaps, they had already succeeded in resisting the defendants' applications (by which time, of course, the incentive to make any such concession would have all but evaporated)."

89. We note first that the argument that the judge "should not have dealt with the abuse argument first" appears in the draft grounds, and is accordingly addressed in his PTA judgment, but it does not appear in the final Grounds. [4] The claimants also point out that some of the particular points made at [20]-[28] of the judge's PTA judgment are directed at arguments in the draft grounds which do not appear in the Grounds, but that takes the matter no further.

90. The essence of the appellate judge's reasoning on the point of principle is that the judge was exercising a well-recognised power to strike out proceedings that were "pointless and wasteful" [6] and that for the purpose of deciding whether that was so in this case it was artificial and mechanistic ([7] and [11]) to exclude consideration of the problems caused by the proceedings in Brazil, even though those might also be relevant to issues of jurisdiction. In our view that reasoning attempts to confront the claimants' challenge and shows why the appellate judge believed it to be unarguable. It might be thought to be in fairly summary terms for so important a conclusion, but it is clear that he had formed a strong view on the point and we do not think he was obliged to say more.

91. Whilst we do not think the CPR part 52.30 challenge could succeed on this ground alone, we are concerned about the brevity of the appellate judge's treatment of the particular points made in particulars [7], [8] and [10]. His incorporation of [31] of the judge's PTA judgment does address the point that most of the claimants had not brought proceedings in Brazil, but that is not the only point made in those paragraphs (see [85]-[86] above).

3. Did the judge grapple with the article 4 point?

92. As we have explained above, the article 4 point was entwined with other points in grounds 1, 4 and 5, and particulars [1], [2] and [12]. That said, we think that the grounds made clear that the claimants were contending that the defendants were sued and served as of right within the jurisdiction under article 4, and that there was no legal basis to strike out such proceedings as an abuse of process, because such an approach erected barriers to access to the courts.

93. This was not a point that the appellate judge squarely addressed. We have some sympathy for him because of the way that point was enmeshed with the unmanageability and jurisdictional abuse points. Mr Gibson QC, leading counsel for BHP, contended that the appellate judge had dealt with the point by referring to [28] of the judge's PTA judgment, where the judge had said that the "mantra" that it was a fundamental principle that a claimant may choose whom to sue was plainly wrong for the reasons set out in [99] of the substantive judgment. In [99], the judge had cited a

[4] Mr Gibson pointed out that a similar point is made, parenthetically, at [11] of the PTA skeleton, but it seems clear that it was the judge's judgment that the appellate judge had in mind.

dictum from Lord Phillips MR in *Jameel v. Dow Jones & Co Inc* [2005] QB 946 ("*Jameel*") at [54]: where he had said:

> "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."

94. Whilst this referential analysis does indeed make the point that court must police its own process, it does not address the point made about a party's right to access the courts. To be blunt, it is not an answer to the argument that a claimant, who is not suing elsewhere, has the right to sue a defendant who can be properly served within the jurisdiction, to say that the proceedings are unmanageable or complex. Neither *Jameel* nor *Wyeth* provide a legal foundation for automatically striking out non-duplicative claims against defendants properly served within the jurisdiction on the grounds of abuse of process. The claimants were entitled to be told why their argument that unmanageability did not trump article 4 was wrong.

4. Did the appellate judge grapple with the *Henderson* point?

95. The summary pleading of ground 6 reads:

> "The Judge failed to distinguish between different categories of Claimant and in particular, insofar as he struck out the proceedings on the grounds that the Claimants had taken a 'tactical decision to progress closely related damages claims in the Brazilian and English jurisdictions simultaneously' [141] or otherwise based on the rule in *Henderson v Henderson*, the Judge erred in law, proceeded on a demonstrable misunderstanding of the evidence, took into account irrelevant matters and/or failed to take into account relevant matters."

96. That is particularised at [16]-[19]. The essential point is that most of the claimants had not made a decision, tactical or otherwise, to progress closely related damages claims in Brazil and England. Most were proceeding only in England because of the difficulty of proceeding in Brazil, and were proceeding in England against different defendants. Such a situation did not involve duplication of the kind addressed in *Henderson* or the authorities based on it. In essence, this argument and the one that raises the plight of the 58 institutional claimants, is, in effect, a subset of the article 4 point.

97. Ground 7 dealt specifically with the 58 institutions as follows:

> "In striking out as an abuse of process, at [136]-[139], the claims of at least 58 large corporate and municipality Claimants who could not claim compensation from Renova or rely on any future judgment in the 155bn CPA concerning the liability of other parties, which were by far the most valuable claims, the Judge erred in law and took into account irrelevant matters."

The relevant parts of [136]-[139] are set out at [36] above.

98. Ground 7 is particularised at particulars [20]-[21]:

> "20. The Judge erred in law in holding that these 58 Claimants' claims fell to be struck out because they '*would still give rise to the acute risk of irreconcilable judgments and, in a broader sense, conflicting developments in the parallel jurisdictions*' [137]. Ground 2 is repeated.
>
> 21. The Judge erred by taking into account and weighing in favour of the Defendants' application the following factors, which were irrelevant, even if they were correct:
>
> (a) that the 58 Claimants *might* benefit in a tangential way from some of Renova's infrastructure programmes and environmental works (a premise upon which the Judge proceeded at [138] without any review of the evidence); and
>
> (b) that the 58 Claimants would be able to bring their claims in the courts of Brazil outside the scope of the 20bn CPA and the 155bn CPA [139] (a premise on which the Judge proceeded without any review of the Claimants' evidence as to why this was not a practical possibility)."

99. The appellate judge addressed these points at [15] and [16] as follows:

> "*Ground 6:* This is a criticism that the judge wrongly took into account the claimants' tactical decision to progress closely-related damages claims simultaneously in Brazil and England. There is nothing in this criticism. At [126]-[127] of the judgment,[5] the judge set out the extent to which the claimants had sought simultaneous redress, the judge having previously noted the individual Claimants had been assured that bringing proceedings in England would not preclude them from pursuing parallel remedies in Brazil. Furthermore, to the extent that the judge is criticised for taking into account the principles in *Henderson v Henderson*, I reject that criticism. That is plainly a relevant consideration when considering striking out duplicatory proceedings."
>
> "*Ground 7:* This is a complaint that at [136]-[139], the judge struck out the claims of 58 large corporate and municipality claimants who could not benefit from certain schemes in Brazil. In my view, this is an attack on the judge's findings of fact which is impermissible. Moreover, the judge was right to say at [43] of his second judgment that he could not ignore the fact that conflicting developments in parallel jurisdictions would render the proceedings completely unmanageable. All of the 58 claimants referred to have made or are entitled to make claims of one sort or another in Brazil. The fact that those claims may fall outside the special compensation scheme is nothing to the point."

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5 We have summarised [126]-[127] of the judge's judgment, to which the appellate judge there refers, at [36] above.

[43] of the judge's PTA judgment, which the appellate judge there endorses, adds nothing to what the appellate judge says in the last three sentences.

100. In our judgment, the appellate judge did not engage with the points raised. The appellate judge noted the judge's findings about the claims already brought in Brazil and the assurances given to the claimants that those who had not yet done so could still bring parallel proceedings there. He regarded that as establishing the existence of duplicatory proceedings, and held on that basis that *Henderson* is relevant. The suggestion that the arguments about the 58 institutions were an attack on the judge's findings of fact rather misses the point.

101. As we have said the *Henderson* point is a subset of the article 4 point. The appellate judge did not really grapple with the argument that most claimants, including some of the 58 institutions, had brought no other claims. As we have said, the unmanageability or complexity of such proceedings is not really an answer. Nor is it an answer to say that claimants can bring different proceedings against different defendants in Brazil. We think that the claimants were entitled to be told why, in the appellate judge's view, the *Henderson* point was bad.

Conclusions on whether the appellate judge failed to grapple with the claimants' essential points of appeal

102. As we have explained above by specific reference to the Grounds and the appellate judge's reasons, we have concluded that the appellate judge failed fundamentally to grapple with (a) the unmanageability point, to the effect that there was no legal basis to strike out on the grounds of irredeemable unmanageability, (b) the article 4 point, to the effect that there had been no basis for the judge to strike out claims brought as of right against defendants duly served within the jurisdiction, and (c) the *Henderson* point, to the effect that the judge had mistakenly prevented numerous claimants, who had made no claims in Brazil, from suing in England.

The jurisdictional grounds

103. In the light of our conclusions on abuse of process, we can deal with the jurisdictional aspects shortly. The grounds of appeal relating to article 34 and *forum non conveniens* follow the same format, and are on the same scale, as those which we have already considered above. In each case, an uninformative summary ground is followed by particulars, some of them lengthy, articulating substantive challenges. The appellate judge addressed each ground (save ground 13) in a single paragraph, mostly of a sentence or two. Mr Dunning took us through most of the grounds seeking to demonstrate that those reasons did not grapple with the full points made in the particularising paragraphs. Despite Mr Toledano's efficient response, we were satisfied that in at least some instances Mr Dunning's point was made out. No separate issue arises about ground 15 since it stands or falls with the other grounds: see [47] above.

104. That conclusion is not, however, a matter of criticism. The appellate judge had made clear at [17] that in view of his conclusion on the abuse of process grounds the challenge to the jurisdictional grounds was "entirely academic". He need not in those circumstances have dealt with them at all. It is nevertheless not uncommon for judges in that situation to say something about the grounds in question, but they usually do so much more briefly than in the case of the dispositive grounds.

Conclusions on the application to re-open under CPR part 52.30

105. We have concluded for the reasons already given that there were important aspects of the Grounds which the appellate judge did not address. We have no doubt that he paid proper attention to the application. But evidently, like the judge, he regarded the case for a strike out as so clear-cut that subtleties of analysis should not be permitted to obscure the big picture. The appellate judge was also not assisted by the presentation of the Grounds. The essential criticisms of the judgment did not feature as specific grounds but only in composite particulars.

106. It does not follow from what we have said thus far that the stringent test imposed by CPR 52.30 is satisfied. We have, however, concluded that in this case it is, for the following reasons:

i) The essential points that the judge failed to address go to the heart of the claimants' challenge to the judge's decision on abuse of process. It was wrong for the appellate judge to have failed to grapple with the contentions that neither unmanageability nor the ability to bring proceedings elsewhere are grounds, in law, for striking out proceedings, properly brought and served.

ii) These failures, in our judgment, can properly be regarded as critically undermining the integrity of the process for granting PTA, in the sense in which that phrase is used in the authorities.

iii) In our view, if the appellate judge had grappled with the grounds in question there was a "powerful probability" that the outcome would have been different, and that he would have granted PTA. We have reached the conclusion, as appears below, that PTA should have been granted.

iv) Finality is of fundamental importance in this context, but in the most unusual circumstances of this case, we have no doubt that the integrity of the PTA process has been undermined, and re-opening is justified on a proper application of the authorities we have cited.

v) We have taken into account, but not regarded as determinative, that the claim itself is of exceptional importance, both because of the number of claimants and the importance to them of obtaining such compensation as they may prove to be entitled to. It is also fair to say that the issues raised by BHP's strike-out application are of wide general importance.

vi) Although the appellate judge's failure to appreciate that some of the points which he took from the judge's PTA judgment were no longer being pursued by the claimants is entirely venial given that he was not supplied with the draft grounds, we can understand the claimants' concern that it may have influenced his approach to the grounds that were before him.

Disposal and concluding observations

107. For the reasons given, we grant permission for the appellate judge's decision on PTA to be re-opened.

108. When directions were given for this hearing, the parties were notified that if the court allowed the claimants' application it would wish if possible to decide the application for PTA. There was a considerable overlap between the issues raised by the application and the question whether PTA should be granted. We are satisfied, despite some forceful submissions from Mr Gibson, that this is a case in which permission should be granted.

109. Whilst we fully understand the considerations that led the judge to his conclusion that the claim should be struck out, we nevertheless believe that the appeal has a real prospect of success. We would add that on any view the situation facing the court was a difficult and novel one which we believe would benefit from full and thorough consideration by this court. Case management directions will be given by Underhill LJ separately.

110. We wish to make three observations in conclusion.

111. First, disappointed applicants for PTA must understand that this judgment does not mean that this court will be any more ready than it has been before to re-open a decision to refuse PTA. The combination of circumstances in this case is truly exceptional.

112. Secondly, although the rules no longer provide for a right to an oral hearing on an application for PTA, the court has a discretion to direct such a hearing, and with hindsight this is probably a case where that would have been the better course in view of its exceptional complexity and importance.

113. Thirdly, we wish to take this opportunity to emphasise again how important the drafting of the grounds of appeal is to the proper determination of applications for PTA. This court is far too often presented with grounds which are over-lengthy and ill-focused, and where the distinct roles of the grounds and the skeleton argument are not respected. The correct approach has been spelt out in a number of recent cases. We confine ourselves to three examples:

i) In *Rasheed v. Secretary of State for the Home Department* [2014] EWCA Civ 1493 Moore-Bick LJ said, at [12]:

> "Grounds of appeal are intended to be short, succinct documents which identify as briefly as possible the respects in which it is said that the court below … erred. If drafted as the rules intend and require, they provide the court and the parties with a clear and concise statement of the issues that will arise on the appeal and to which argument will be directed. They are *not* intended to be a vehicle for describing in general terms the circumstances giving rise to the appeal; nor are they intended to serve as a vehicle for setting out the appellant's arguments or submissions. That is the function of the skeleton argument. To include material of that kind in the grounds of appeal renders them unhelpful both to the parties and to the court."

(2) In *Goring*, the Court of Appeal said at [36]:

> "… [A]dvocates settling grounds of appeal ought to take care to draft each ground crisply and clearly as a properly formulated ground of appeal. Discursive, repetitive or prolix grounds are unhelpful and add unnecessarily to the burdens of a judge dealing with an application for permission to appeal. Each main issue in the proposed appeal should be succinctly identified in a separate ground. Where this has not been done, it is likely to be more difficult for an applicant to complain that a particular point has not been addressed by the judge."

(3) In *Harverye v. Secretary of State for the Home Department* [2018] EWCA Civ 2848, Hickinbottom LJ said at [56]-[57]:

> "56. … [I]t is incumbent upon the Appellant to set out in his grounds of appeal, clearly and 'as concisely as practicable', the relevant part of the decision and the way(s) in which it is said to be wrong or unjust (paragraph 5(1) of CPR PD 52C). No more is required of grounds of appeal. Indeed, no more may be incorporated in them.
>
> 57. The grounds of appeal are the well from which the argument must flow. The reasons *why* it is said the decision is wrong or unjust must not be included in the grounds, and must be confined to the skeleton argument (paragraph 5(2) of CPR PD 52C). …"

114. In addition, we would add the following:

i) The grounds of appeal are an essential analytical tool for the court, to enable it to identify the issues which it is being asked to decide: they are not a vehicle for advocacy, which is the role of the skeleton argument.

ii) The starting point in every case must be for the appellant to think through carefully what <u>specific</u> errors the court below is alleged to have made. Once these errors have been identified, they need to be clearly and concisely articulated. In the unlikely event that the grounds are numerous, they must be presented in a structure which makes clear how they inter-relate.

iii) Each ground of appeal must be separately numbered, and the particular passages in which the judge appealed is said to have gone wrong must be specifically identified.

iv) The purpose of the grounds of appeal is to identify the points on which permission to appeal is sought, not to argue those points. Supporting submissions belong in the skeleton argument.

v) It follows that grounds of appeal should be short; in many cases, a few sentences will suffice. In a complex case, grounds of appeal may be longer, but clarity and concision should never be compromised.

115. This application is allowed. The claimants will be granted permission to appeal as already stated.

ORDER

UPON the Claimants' CPR 52.30 application dated 20 April 2021 to reopen the decision of Lord Justice Coulson dated 23 March 2021 that refused the Claimants' application for permission to appeal to the Court of Appeal against the Order of Mr Justice Turner dated 26 January 2021 (sealed on 28 January 2021);

AND UPON the Order of Mr Justice Turner dated 26 January 2021 that struck out, or alternatively stayed, the Claimants' claims;

AND UPON the judgment of Mr Justice Turner dated 9 November 2020 [2020] EWHC 2930 (TCC);

AND UPON the further judgment of Mr Justice Turner dated 29 January 2020 [2021] EWHC 146 (TCC);

AND UPON the Claimants' grounds of appeal dated 15 February 2021 (the 'Grounds of Appeal'), which are numbered Ground 1 to 15;

AND UPON considering the parties' submissions in writing, including the e-mail from the Defendants' counsel sent on 26 July 2021;

AND UPON hearing from Leading Counsel for the Claimants and Defendants on 22 June 2021;

IT IS ORDERED THAT:

1. The Claimants' application is allowed pursuant to CPR 52.30. The decision of Coulson LJ dated 23 March 2021 is reopened.

2. The Claimants shall have permission to appeal on all grounds, on the following condition:

> Unless payment of the full amount of the costs ordered by paragraph 2 of the order of Turner J dated 29 January 2021, plus interest, is made to the Defendants by no later than 4 p.m. on 3 September 2021 the appeal will stand dismissed.

Save that if by that time (4pm on 3 September 2021) the Claimants file with the Court, and serve on the Defendants, written representations, together with any evidence relied on, showing cause why the said condition should not apply the matter will be determined by this Court at a hearing on 10.30 a.m. on 4 October 2021 (estimate 30 minutes); in the event of such representations being filed, the Defendants shall file and serve any written representations and evidence in response by no later than 4 p.m. on 24 September 2021.

3. The costs of and occasioned by the Claimants' CPR 52.30 application dated 20 April 2021 and the costs of and occasioned by the hearing on 22 June 2021 shall be costs in the appeal.

4. The Defendants' time for filing a Respondent's Notice is extended to 4 p.m. on 30 September 2021; liberty to either party to apply to vary or revoke this paragraph of this order.

REASONS FOR PARAS. 2-4

(1) As regards para. 2, no application has been made for a stay of the costs order made by Turner J. The difficulties to which the Claimants refer, in the most general terms, in their submissions, cannot constitute justification for their failure to comply with an order of the Court; nor indeed do they so suggest. In those circumstances, and having regard to the other matters referred to in the Defendants' submissions, the Court takes the clear provisional view that it is appropriate that it should be a condition of the appeal proceeding that the full amount outstanding be paid by the deadline specified. However, it is right that the Claimants should have the opportunity to try to persuade the Court otherwise.

(2) As regards para. 3, the Court's criticisms of the Defendants' grounds of appeal are not such as to justify depriving them of the costs of the appeal should they succeed in upholding Turner J's order.

(3) As regards para. 4, the Defendants' application for an extension appears reasonable, but it has been made subject to a liberty to apply, partly because that is formally appropriate in circumstances where the Claimants have not had an opportunity to respond and partly because it is possible that the Defendants may wish to reconsider the timetable if the Claimants seek a show cause hearing in accordance with para. 2.