

Neutral Citation Number: [2024] EWHC 207 (TCC)

Case No: HT-2022-000304

Case No: HT-2023-000058

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 February 2024

Before :

Mrs Justice O'Farrell

Between :

Município de Mariana & Others	<u>Claimant</u>
- and -	
BHP Group (UK) Ltd and BHP Group plc	<u>Defendant</u>
- and -	
VALE S.A.	<u>Third Party</u>

Alain Choo Choy KC, Nicholas Harrison, Jonathan McDonagh, Pippa Manby, Russell Hopkins, Grace Ferrier, Anisa Kassamali and Antonia Eklund
(instructed by **PGMBM LAW LTD t/a Pogust Goodhead**) for the **Claimant**
Daniel Toledano KC, Shaheed Fatima KC, Victoria Windle KC, Nicholas Sloboda and Maximillian Schlote (instructed by **Slaughter and May**) for **BHP**
Richard Eschwege KC, Michael Bolding, Crawford Jamieson and Charles Wall (instructed by **White & Case**) for the **Third Party**

Hearing date: **1st February 2024**

JUDGMENT

Mrs Justice O'Farrell
(11:42 am)

Thursday, 1 February 2024

Judgment by **MRS JUSTICE O'FARRELL**

1. The court has before it a number of discrete issues arising out of the draft DRD document produced by BHP and Vale in relation to the Part 20 claims.
2. The first relates to disclosure issue 5 in the DRD. It is an agreed issue for disclosure and concerns:
 - a. whether Vale was a direct competitor of Samarco in the Brazilian and/or European markets for iron ore, iron ore pellets and/or seaborne iron ore;
 - b. what policies or guidance Vale and/or Samarco had in place to restrict Vale's ability to control, participate in or influence decisions concerning Samarco's operations; and
 - c. what policies or guidance Vale and/or Samarco had in place to restrict Vales's ability to access Samarco's commercial information and the extent to which such policies or guidance were implemented.
3. Although it is an agreed issue for disclosure, the parties are in disagreement as to which extended disclosure model should apply. The contenders are model B and model D.
4. I consider that in this case model B is appropriate for both parties for the following short reasons.
5. Firstly, insofar as the issue concerns Vale's activities within the market, that is a matter that is clearly within the knowledge of Vale and in respect of which Vale will have all relevant documents. Therefore, in that respect it is not appropriate to require BHP to give model D disclosure.
6. Secondly, in relation to Samarco's policies and guidance, that is necessarily an issue that is within the knowledge of both BHP and Vale and to the extent that there are any relevant documents, they will be common to BHP and Vale. Therefore, for that reason it would not be

appropriate, reasonable or proportionate to require BHP or Vale to give more than model B disclosure.

7. Model B requires each party to produce the key documents that it relies on in support of its case or defence, together with those key documents that are necessary to explain its case and any adverse documents. It is not required to carry out a search for documents, although it is not precluded from doing so, and no doubt a search will have been or will be carried out in order to support the pleaded issues in this respect.
8. For those reasons I will order both parties to give model B disclosure.
9. The next disclosure issue is issue 13, which relates to a new pleaded issue which has arisen in the Part 20 proceedings that was not already an issue in the main proceedings between the claimants and BHP. The issue is the extent to which, if at all, the collapse was caused by the three earthquakes that occurred near the dam on 5 November 2015.
10. Again, it is agreed that this is an issue for disclosure but the dispute between the parties is whether disclosure should be by reference to model B or model D.
11. In this case I am satisfied that model D is the appropriate, reasonable and proportionate model to apply. It is suggested by Mr Sloboda, counsel for BHP, that there may not be any documents that are relevant. Well, if that is the case then the disclosure exercise is going to be a short one. However, it does seem to me that this is an issue where there may have been contemporaneous internal reports, discussions or findings in relation to the cause of the collapse and those documents may not have been shared as between BHP and Vale.
12. It is a new pleaded issue by Vale. It expressly relies upon the earthquakes as causing or contributing to the dam collapse. The date range proposed is between 2015 and 2016, covering the time of and shortly after the collapse of the dam. This does not seem to me to be an unreasonable burden to impose on both parties so I will order model D.

13. In relation to disclosure issue 14, this is not agreed as a disclosure issue. Vale puts it forward as an issue in the following terms:

"To what extent (if at all) did BHP participate in the negotiation and/or performance of the TTAC?"

14. The issue is raised in Vale's defence to the additional claim at paragraph 89, where it asserts that:

"Any alleged liability that may exist as between Vale and BHP relating to the collapse has been compromised pursuant to the terms of the TTAC."

15. At paragraph 89.3 it is stated that:

"BHP is bound by the terms of the TTAC under Brazilian law. A non-signatory is bound by the terms of a contract, as a matter of Brazilian law, if it participated in the negotiations and/or performance of the contract. BHP participated in the negotiation and/or performance of the TTAC and is therefore bound by that agreement."

16. That is denied by BHP; therefore it is in issue. It seems to me that it raises, in very general terms, two issues:

- a. an issue of Brazilian law, namely, the impact in law of any participation and/or negotiation on the part of BHP in the TTAC; and
- b. a factual issue, namely, whether BHP participated in the negotiation and/or performance of the TTAC.

17. The factual issue is not necessarily straightforward because it is common ground that BHP Brasil did participate in the TTAC, as did Vale and Samarco. But what Vale is seeking is relevant disclosure, if there is any, in relation to the capacity in which individuals engaged by BHP and/or BHP Brasil were acting in respect of the TTAC; whether they were acting on behalf, or at the direction of, BHP.

18. Mr Sloboda makes a legitimate complaint that this is simply a bare assertion on the part of Vale and that no further details have been provided as to Vale's case on this. That difficulty has arisen in part because BHP hasn't issued an RFI, seeking further details of the allegation, from Vale.
19. It seems to me that in those circumstances it is an issue for disclosure, but the appropriate model to be adopted would be model C. I direct that Vale should compose a model C request, identifying the relevant individuals and the date ranges for the search and setting out the basis the questions that it wishes to have answered by the documents. That will narrow the search to a manageable level, rather than simply requiring BHP to go away and trawl through all of their various documents to find anything that might possibly impinge on this TTAC issue.
20. So I will order model C. If the model C request can be drafted say within 14 days then that will give BHP plenty of time to either come back to the court if it is dissatisfied with it, or to get on and provide the relevant disclosure in accordance with the current timetable.
21. I turn then to section 2. There are a number of issues that are under discussion by the parties which they do not need to trouble the court with, at least just yet. However, there is one issue that has arisen in relation to Vale's expert reports, expert depositions and witness depositions in the US security class action concerning the collapse of the dam. It has been proposed by BHP that those documents should be disclosable.
22. Vale accepts that those documents are disclosable but they are subject to a confidentiality order and they are held by Cleary, who was previously acting for Vale in the US proceedings. Therefore, it is not a straightforward exercise of simply disclosing the relevant documents without permission and/or redactions.
23. BHP has proposed that the order should be that Vale should disclose copies of the relevant documents by 16 February 2024. If redactions are made because of the confidentiality issues then the unredacted versions should be disclosed as soon as possible thereafter.

24. Vale is proposing that it should give disclosure of those documents in accordance with the current timetable which provides for it to provide its first tranche of disclosure by 19 April 2024. That is also the date by which the claimants seek disclosure of these documents. But Vale has identified a potential issue with the timing of any application made to Clearys and its resolution.
25. The appropriate order is that, first of all, I will order the solicitors acting for Vale, White & Case, to produce a witness statement, explaining to the court the terms of the confidentiality order currently in place, the process that is required to be undertaken in order to obtain consent for disclosure of any of the documents containing confidential material, the steps that have been taken to date and any further steps to be taken, with a time estimate for that process. Such witness statement should be filed by 9 April so that it will be with the court at the CMC to be fixed for the week commencing 15 April.
26. The documents otherwise will be ordered to be disclosed as part of the first tranche by 19 April 2024. That is still in good time for everyone to prepare for the forthcoming trial.