

Neutral Citation Number: [2024] EWHC 192 (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: 31 January 2024

Before :

Mrs Justice O'Farrell

Between :

Município de Mariana & Others

Claimant

- and -

BHP Group (UK) Ltd and BHP Group plc

Defendant

- and -

VALE S.A.

Third Party

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: **31st January 2024**

JUDGMENTS

Mrs Justice O'Farrell
(12:54 pm)

Wednesday, 31 January 2024

Judgment 1 by **MRS JUSTICE O'FARRELL**

1. The matter before the court is the claimants' application to amend the current re-amended RAMPOC in order to plead a new paragraph 196A and subsequent references to that paragraph in other parts of the pleading. The application is made in the light of an earlier judgment of this court following the claimants' application to make a number of amendments to its case, heard by this court on 21 December of last year, and dealt with in the judgment handed down on 11 January of this year.
2. In that judgment, the court allowed all of the other amendments but refused permission for the draft version of paragraph 196A then in existence on the basis that it did not plead with sufficient particularity the nature of the case so as to enable the defendants to know the case that they have to meet.
3. The application before the court today is the revised version of paragraph 196A which, in essence, sets out a general allegation that BHP was extensively involved in Samarco's operations. There then is set out a list of the categories of meetings, telephone calls, site visits, reports sent or received and other communications including emails in which it is said that the claimants can demonstrate extensive involvement in the operations of Samarco.
4. Mr Choo Choy KC, leading counsel for the claimants, has explained to the court that the claimants rely upon these identified categories of contact for more than mere attendance; they also rely upon them as evidence as to the extent of the general interaction between BHP and Samarco. However, he clarified that the claimants do not rely on the specific content of any of the meetings, reports, calls or inspections.
5. The cross-references to those allegations are set out elsewhere in the pleading, including paragraph 276.5, in which it is said that BHP controlled Samarco's activities and that was manifested through the matters identified in paragraph 196A.

6. Some of the references to 196A have been deleted from other paragraphs, either by a specific deletion or a specific reference to the fact that it is excluded from a more general allegation.
7. In paragraph 278.5 and paragraph 278.6, it is pleaded that BHP was extensively involved in Samarco's operations. Again, it has been clarified by Mr Choo Choy that it is not relied upon as particulars of any assertion that such involvement led to the collapse; it is simply a reference to extensive involvement in the activities of Samarco.
8. Finally, paragraph 282.3 has been amended to identify categories of meetings and other exchanges in which BHP were involved, as set out in paragraph 196A, on which the claimants rely in support of their allegation that BHP assumed responsibility for risks arising from Samarco's activities by involving itself in the assessment, management and oversight of such risks.
9. The application is opposed by BHP and by the Part 20 defendant, Vale.
10. The primary ground on which the application is opposed is that the proposed amendments are not sufficiently clear so as to enable BHP to understand the case that it has to meet.
11. Paragraph 196A is said by Mr Toledano KC, leading counsel for the defendants, to simply refer to the allegation that BHP was extensively involved in Samarco's operations without properly particularising either the involvement or the operation. He notes that the claimants' case is not limited to an allegation that the mere attendance at meetings and other contact demonstrates extensive involvement but he submits that no explanation has been given as to what information, discussions and / or decisions in the meetings or reports, visits or communications is relied upon to demonstrate extensive involvement or to what specific end.
12. In relation to the subsequent paragraphs that refer back to paragraph 196A, it is said that paragraph 276.5 alleges that BHP's involvement in Samarco's operations, as pleaded in paragraph 196A, is a manifestation of BHP's control over Samarco, but it does not set out what acts of involvement are alleged to amount to such control.

13. In relation to paragraph 278.6, there is an allegation that BHP participated in and had knowledge of matters that are said to have led to the collapse, but the relevant meetings, calls, reports and other communications identified in paragraph 196A are not explained as demonstrating participation in or knowledge of the relevant matters.
14. Then, finally, in relation to paragraph 282.3, the assumption of responsibility allegation, it is pleaded that: "BHP assessed, managed and/or had oversight of the relevant risks" but no particulars are given as to how or when or by what acts BHP assessed, managed and/or had oversight of these risks.
15. Further objected to the application is made by BHP on the ground that it will involve an unreasonable level of work for the defendants at a time when the challenge of preparing this case for an October trial is already very difficult. It is said that BHP will need to investigate the extent and nature of BHP's involvement in the matters identified in paragraph 196A and the other paragraphs in which cross-reference is made to 196A. That would involve a very significant task given the volume of documentation and other contact identified. There would need to be a document review in respect of all of those identified categories. Those matters would need to be discussed with existing and potentially additional factual witnesses. BHP would need to plead to the amendments and then BHP would wish to pass them on to the Part 20 defendant, Vale. For those reasons, it is said that there is insufficient time in which to deal with what amounts to an intolerable burden of additional work.
16. Vale echoes those concerns. Mr Eschwege KC, leading counsel for Vale, is concerned that although the defendants have indicated that they will mirror the allegations made by the claimants in the proposed amendments, in fact it will not be a straightforward passing-on of the new allegations. Regardless, the work that would be involved would be very extensive and an intolerable burden on Vale which would imperil the trial date, already under significant pressure.

17. The court starts by considering the purpose for which this amendment is sought. The general basis of the allegation is to demonstrate that there is strict liability on the part of BHP, which BHP in due course would seek to pass on to Vale, under Article 3(IV) of the Environmental Law, based on ownership and control of Samarco. That is already pleaded in section C.2 of the existing RAMPOC in which is identified both the basis of ownership of Samarco and the nature of the control of Samarco, that is said to give rise to strict liability under the Environmental Law.
18. The proposed pleading is said to be a belt and braces approach in order to rely upon BHP's alleged involvement in the activities of Samarco as giving rise to strict liability under the Environmental Law.
19. The section into which the allegation has been inserted is section C.4 which is headed "BHP's knowledge of and involvement in the events leading to the Collapse". That immediately indicates the reason that BHP is concerned about it, because it appears to be relied upon as involvement not just to demonstrate ownership and control, but to demonstrate BHP's involvement and knowledge in events that led to the collapse, that is, part of the case on fault liability, in addition to bringing it within the Environmental Law. The current version of paragraph 196A that has been put forward to the court is not sufficiently clear to enable the defendants to understand the case that they have to meet.
20. I understand that this is a complex case and that there are many different aspects to the case on liability but it currently reads, under the general heading, "Other forms of BHP's involvement with Samarco's operations", at paragraph 196A: "Prior to the collapse, BHP was extensively involved in Samarco's operations in the following additional ways ..." It then identifies BHP's involvement in the meetings, reports and other contacts. It is clear that the claimants do not simply rely on attendance at the meetings or receipt of reports or communications with specific individuals. What the claimants are saying is that those elements of attendance and contact demonstrate extensive involvement in Samarco's operations. However, it is unclear from the list

of various documents as to what it is said about the involvement, beyond mere attendance, that gives rise to the alleged strict liability.

21. The list is not simply limited to meetings; it also includes what are said to be regular calls between Samarco and BHP personnel in Australia, health and safety reports, and strategy and development reports, including risk assessment and audits. The reason that that is relevant is because the assumption of responsibility allegation in paragraph 282.3 expressly pleads that BHP assumed responsibility for risks arising from Samarco's activities by involving itself in the assessment, management and oversight of such risks. However, there are no particulars of the alleged assessment, management or oversight of the relevant risks.
22. Essentially, therefore, the pleading does not deal with the vice that was identified by this court in its judgment of 11 January; it remains a pleading that purports to make wholesale incorporation of a number of meetings, reports and other contacts between BHP and Samarco, without identifying with any particularity the conclusions or findings that the court would be invited to draw from those matters.
23. It therefore follows that the case that BHP has to meet is still not set out with sufficient particularity so as to enable it to know the case that it has to meet.
24. For that reason, leaving aside the consequential difficulties that this would impose on the timetable, the court refuses the application.

Mrs Justice O'Farrell
(16:12 pm)

Wednesday, 31 January 2024

Judgment 2 by **MRS JUSTICE O'FARRELL**

1. Disclosure as between BHP and the claimants has already been resolved as being 29 February for the main tranche and 28 March for the final tranche.
2. I then turn to deal with the disclosure as between Vale and BHP.
3. I have taken into account the evidence of Mr Caisley about the difficulties for Vale in dealing with what, on any view, is a vast disclosure exercise. However, the court also expects Vale, having been rather slow in getting going in this set of proceedings, to make sure that it does take every step that it can take in order to make both the disclosure and the subsequent evidence stages as efficient as possible so as to ensure that it can be ready for the autumn trial.
4. With those initial comments in mind, the starting point is the first tranche of disclosure which I will fix at 19 April 2024, the date that Vale has proposed.
5. In terms of BHP's additional disclosure relating to the Part 20 claims, that I will fix as 26 April, which both BHP and Vale agree.
6. As to Vale's second tranche of disclosure, I will also fix that at the date that Vale asks for, which is 31 May.
7. However, the third and final tranche I will fix at 14 June. That is only a few weeks before the date that Vale has asked for but it has a significant impact on subsequent dates for factual witness statements. Despite the detail that Mr Caisley has gone into in his witness statement regarding the time and steps that will be required for disclosure, they are of course simply estimates based on what has been done before. There is the possibility of recruiting some additional first-level reviewers and, also, of an improved learning experience as one goes through. In particular I note the suggestion from Mr Choo Choy that both BHP and Vale could consider making available any translations of documents that they already have and focusing their efforts on what are likely to be the most relevant documents, such as the period from

2013 to just after the collapse in 2016. That seems to me to be eminently sensible which should mean that the most relevant disclosure is given in the first two tranches, leaving the final tranche comfortably achievable by 14 June.

8. In terms of witness statements, as between the claimants and BHP, given that there has been a delay by BHP in finalising its disclosure until 28 March, I will fix the date for those factual witness statements at 12 April. That will give until after Easter to allow for the slightly later disclosure, but it will still be prior to the CMC that is going to be fixed for the week commencing 15 April.
9. There is then a need for both the claimants and BHP to serve responsive witness statements. That is likely to be very limited; the claimants have very few witness statements to serve in the first round, therefore BHP will not have that much to respond to and, on the claimants' side, because they have very few witnesses giving evidence, it is likely that their responses will not be substantial. So I will fix that for 10 May 2024.
10. As between BHP and Vale, Vale should file and serve their factual witnesses' witness statements by 28 June. That is only two weeks after the final tranche of disclosure but, of course, they will have given earlier tranches of disclosure some time before that. In any event, there is nothing to stop the factual witnesses starting to produce their witness statements based on their own knowledge from documents that they already have in their own possession; the process does not have to wait until disclosure is finally completed as between all parties.
11. As to the claimants and BHP filing and serving responsive witness statements to Vale's witness statements, I will fix that as at 19 July.
12. That will then still allow for a pre-trial review to be carried out by the court towards the end of July.
13. I will come back to a final date for the DRD as between BHP and Vale when they have had a further opportunity to consider that.

Mrs Justice O'Farrell
(16:32 pm)

Wednesday, 31 January 2024

Judgment 3 by **MRS JUSTICE O'FARRELL**

1. As to expert meetings, joint statements and reports, I am going to adopt the dates that have been put forward by both BHP and Vale. They are a little bit later than those put forward by the claimants but they are generally in line with the revised timetable for factual witness statements and disclosure. Although it does not mean that everything else should slip, nor am I complacent about the achievability of everything in good time before the trial, but nonetheless we must press on and fix a sensible timetable.
2. It does seem to me that there is some value in having slightly later dates so that, insofar as documents are required by the experts, they will be to hand, and also so that the experts will at least have a general view of the scope of the factual witness statements before they produce their reports and supplemental reports. So, for those reasons, I will fix the later dates.
3. I accept Vale's explanation for its difficulty in obtaining an appropriate licensing law expert and for that reason I am prepared to give them and BHP a little bit more time to deal with that evidence in line with their proposed dates.