

Neutral Citation Number: [2024] EWHC 952 (TCC)

Case No: HT-2022-000304

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: **18 April 2024**

Before :

Mrs Justice O'Farrell

Between :

Município de Mariana & Others	<u>Claimants</u>
- and -	
BHP Group (UK) Ltd and BHP Group Limited	<u>Defendants</u>
- and -	
VALE S.A.	<u>Third Party</u>

Alain Choo Choy KC, Andrew Fulton KC, Jonathan McDonagh, Pippa Manby, Russell Hopkins, Grace Ferrier, Anisa Kassamali and Antonia Eklund (instructed by PGMBM LAW LTD t/a Pogust Goodhead) for the Claimants
Daniel Toledano KC, Shaheed Fatima KC, Victoria Windle KC, Nicholas Sloboda KC, Maximillian Schlote and Joe Johnson (instructed by Slaughter and May) for the Defendants
Vernon Flynn KC, Crawford Jamieson and Charles Wall (instructed by White & Case) for the Third Party

Hearing dates: **18th April 2024**

RULING ON DISCLOSURE

Mrs Justice O'Farrell
(11:11am)

Thursday, 18 April 2024

Ruling by MRS JUSTICE O'FARRELL

1. Before the court is the claimants' application, dated 8 April 2024, seeking to extend the disclosure issues and, therefore, the DRD, with a view to obtaining additional disclosure from the defendants.
2. The relevant test can be shortly stated. Paragraph 18 of the Practice Direction 57AD provides that the court may at any stage make an order that there is an order for extended disclosure. The party applying for such an order must satisfy the court that varying the original order for extended disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate.
3. That has to be construed in accordance with paragraph 6.4 of the Practice Direction, which provides that the court must have regard to the overriding objective, including the nature and complexity of the issues in the proceedings, the importance of the case, the likelihood of documents existing that will have a probative value in supporting or undermining a party's claim or defence, the number of documents involved, and the ease and expense of searching for and retrieval of any particular document.
4. With that background, I turn to the particular requests with which the court is concerned, namely, the Model C requests. These requests arise out of the claimants' pleading at paragraph 176A of the Re-RAMPOC that:

"As pleaded in Section C.4.1 to C.4.4, it is the Claimants' case that BHP had knowledge of and involvement in the events leading to the Collapse in a variety of different ways, through numerous different individuals. Where individuals are referred to below as 'BHP representatives' or 'BHP executives', or where the individuals are referred to below as attending meetings, receiving documents or otherwise acting 'on behalf of' BHP, those individuals were either (a) employed by BHP and/or (b) were acting at the direction of and/or in the interests of BHP, such that they were agents of BHP and that, in any event, (c), they were all treated by BHP as acting on behalf of BHP and held out as such."

Various particulars are then given of that allegation.

5. The relevant part of the proposed amended DRD document provides as follows at 1(D):

"What were the employment, agency and/or contractor relationships between the Defendants (or the affiliates of the Defendants) and the BHP affiliated persons referred to", in section C.4.4 of the claimants' Re-RAMPOC and re-amended reply.

6. There is then a definition of affiliate.

7. And at 1(E):

"Whether and if so how, the performance of the BHP affiliated persons referred to (in section C.4 of the Claimants' Re-RAMPOC and re-amended reply) was assessed, monitored and/or incentivised by BHP."

8. The relevant requests effectively seek documentation which can be summarised as the employment, agency or contractor agreements and also the key performance indicators and performance evaluation documents, in relation to specific individuals. It is regarding the individuals that the disagreement between the parties has arisen.

9. The defendants have agreed as a matter of principle to respond to requests 1 and 2 but they object to extending that disclosure to additional nine individuals, who are not referred to in section C.4.1 to 4.4 of the Re-RAMPOC, but who are identified in section 105A of the re-amended reply.

10. The basis on which Mr Sloboda KC, leading counsel for the defendants, objects is that the request was first made to amend the DRD, in respect of these allegations, prior to the service of the re-amended reply. The defendants agreed in relation to the individuals specifically referred to in sections C.4.1 to C.4.4 of the Re-RAMPOC and there is no specific pleaded issue in relation to the additional individuals currently set out in paragraph 176A of the principal pleading. The belated attempt by the claimants, it is said, to add in additional individuals is to seek disclosure that goes beyond the scope of the pleaded issue.

11. In response, Mr Choo Choy KC, leading counsel for the claimants, submits that this is a technical pleading point and that it would have been possible, and indeed remains possible, for the claimants to repeat the allegations set out in 105A of their re-amended reply in the Re-RAMPOC, or to deal with it by reference to a response to a recent request for further information served by the defendants. That would make it technically part of the pleaded case in the Re-RAMPOC. Mr Choo Choy emphasises that the relevant individuals identified in paragraph 105A of the re-amended reply are identified specifically by reference to involvement and knowledge of events in the months preceding the collapse and, therefore, it would be reasonable, necessary and proportionate for the court to order the additional disclosure in respect of those individuals.
12. I am satisfied that in this case it would be appropriate, reasonably necessary for the court to order that the extended DRD issues 1(D) and 1(E) should include the additional individuals identified in paragraph 105A of the re-amended reply. The inclusion of those additional individuals will not impose an onerous burden on the defendants. Reading the re-amended reply, it is clear that although those additional nine individuals are not explicitly referred to in section C.4.1 to C.4.4 of the Re-RAMPOC, nonetheless, there are clear pleaded issues as to the knowledge and conduct of those individuals. Therefore, on the current state of the pleadings, it is clear that the court will have to grapple with those issues. It is convenient that whilst the defendants are giving disclosure in relation to those specified areas, namely employment and performance evaluation, it should cover all of the relevant individuals that are identified on the pleadings.
13. So for those reasons, I will order the extended disclosure in relation to Model C requests 1 and 2.