

Neutral Citation Number: [2024] EWHC 954 (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 **Claimants**
- and -
BHP Group (UK) Ltd and BHP **Defendants**
Group Limited

and –

VALE S.A. **Third Party**

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 MODEL C DISCLOSURE

Mrs Justice O'Farrell
(15:02pm)

Thursday, 18 April 2024

Ruling by **MRS JUSTICE O'FARRELL**

1. This matter concerns Vale's application for Model C disclosure in relation to disclosure issue 14 as between Vale and BHP.
2. Issue 14 is identified in the agreed DRD as: "To what extent, if at all, did BHP participate in the negotiation and/or performance of the TTAC".
3. Vale has explained that its case is that any liability that may exist as between Vale and BHP has been compromised, pursuant to the terms of the agreement dated 2 March 2016, which is known as the TTAC.
4. Vale's position is that if it wins on that point, namely that the liability as between Vale and BHP has been compromised, then that would be fatal to BHP's Part 20 claims. Vale's case is that BHP is so bound because it participated in the negotiation and/or performance of the TTAC.
5. The request that has been made has been through a degree of negotiation already and there is a large measure of agreement. The current version of the request seeks the following documents:
 - a. organisations, structures and/or charts which record reporting lines that were established between the relevant individuals and BHP UK, BHP Australia;
 - b. employment agreements or board subcommittee minutes which assign roles and/or responsibilities to the relevant individuals;
 - c. all formal instructions and/or recommendations provided to the relevant individuals, in connection with the relevant meetings, concerning the negotiation of the TTAC and/or steps taken to comply with provision of that agreement and
 - d. records of the relevant meetings which were not attended by Vale affiliated individuals.
6. Items (a) and (b) have been agreed. The parties have also reached agreement on the relevant individuals, the date range for any searches and the questions that Vale wishes to be answered by reference to the relevant documents.

7. The remaining issues in dispute are relatively narrow and relate to (c) and (d).
8. In relation to part (c), BHP's position is that the request is unnecessary and too wide. It is not in compliance with the requirement that a Model C request must be capable of precise description, whether by individually or by class, to ensure and allow that the disclosing party is in a position to understand what must be disclosed, such that when the relevant category of document is searched for, it can be recognised. The relevant documents, it is said, will be in both sides' possession. As to the capacity in which the individuals were acting at the relevant meetings, it is said that question will be answered by reference to parts (a) and (b) of the request and, therefore, (c) is unnecessary. Finally, it is said that the defendants have difficulty any in ascertaining the nature and scope of the request for all formal instructions and/or recommendations provided to the relevant individuals that go beyond (a) and (b).
9. The court considers that part (c) is a reasonable and proportionate request for Vale to make. It seems to me that it has been narrowed as much as can reasonably be done. It is limited to instructions and recommendations. It is limited to the 14 relevant individuals that have been identified. The relevant meetings are also identified, being those that concern negotiation of the TTAC. The nature of the instructions or recommendations are also identified, as anything to do with negotiation of the TTAC and/or steps to be taken to comply with provision of that agreement. Therefore I consider that in nature and scope it is sufficiently clear and sufficiently narrow so as to be a reasonably and proportionate request.
10. I am further persuaded that it is a proper request to make because of the importance that Vale has placed on it. Vale has explained its case that it considers that this could be a dispositive point. Whether they are right about that, I have formed no view; it may well be that it turns out ultimately to be an irrelevant point that the court dismisses. However, the pleaded case does raise the significance of the capacity in which BHP attended and participated in the TTAC and therefore it is a proper matter in respect of which the disclosure sought should be given.

11. In relation to (d), again, I consider that this is a reasonable and proportionate request. It should not be limited to the data already collected by the defendants for the purposes of disclosure in the main proceedings, primarily because it is limited to six identified meetings, namely, the relevant meetings that weren't attended by Vale or its affiliates. It should, therefore, be relatively easy to search against the 14 named individuals, and it will not place a significant burden on the defendants. It is also the case that it is limited in date range, which may not coincide with the date range for disclosure in relation to these documents in the main proceedings. Regardless, it is a precise, targeted request for further searches to be carried out and I consider that it would be appropriate to order them.