

Neutral Citation Number: [2024] EWHC 953 (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**

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Between :

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

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**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: **18<sup>th</sup> April 2024**

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**RULING ON INTERVIEW NOTES**

**Mrs Justice O'Farrell**  
**(14:00pm)**

**Thursday, 18 April 2024**

**Ruling by MRS JUSTICE O'FARRELL**

1. This is the claimants' application dated 8 April 2024 seeking notes of interviews of 11 persons identified in the Panel Report lists as prepared by Cleary Gottlieb Steen and Hamilton, such notes to be reviewed by Slaughter and May with any maintained claim to privilege to be identified to the claimants by 3 May 2024 with any remaining dispute as to the production of those documents to be determined by the court thereafter.
2. The application is resisted by the defendants on the grounds that the relevant notes of and from the interviews are covered by litigation privilege. The test for litigation privilege is not in dispute and has been helpfully set out in the defendants' skeleton argument based on the summary in the case of *Al-Sadeq v Dechert LLP* [2024] EWCA Civ 28, per Popplewell LJ (with whom Underhill LJ and Males LJ agreed).
3. The relevant summary in that case was taken from the judgment of Hamblen J in *Starbev GP Ltd v Interbrew Central European Holding BV* [2013] EWHC 4038 Commercial Court at [11]-[13]:  
  
“[11] The legal requirements of a claim to litigation privilege may be summarised as follows:  
  - (1) The burden of proof is on the party claiming privilege to establish it ...
  - (2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative and are evidence of a fact which may require to be independently proved. The court will scrutinise carefully how the claim to privilege is made out and the witness statement should be as specific as possible ...
  - (3) The party claiming privilege must establish that litigation was reasonably contemplated or anticipated ...

(4) It is not enough for a party to show the proceedings were reasonably anticipated or in contemplation. The party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. If there is another purpose, this test will not be satisfied...

[12] In relation to the Court's approach to the assessment of evidence in support of a claim for privilege, it has been stated that it is necessary to subject the evidence to anxious scrutiny in particular because of the difficulties in going behind that evidence. The court will look at purpose from an objective standpoint, looking at all relevant evidence including evidence of subjective purpose ...

[13] As was stated by Beatson J in the *West London Pipeline* case at [86]:

"It is, however, difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from:

(a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed ...

(b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect ...

(c) the other evidence before the court that affidavit is incorrect or incomplete on the material points..."

4. In this case the claimants' position is that following the dam collapse, at the BHP investors call meeting, BHP indicated that an enquiry would be conducted, lessons would be learned and that BHP would publish openly the findings as to the cause of the collapse. Similar claims were made on the website for the investigation. On that basis, the claimants state that it is suggested that litigation is not the dominant purpose for which the investigation leading to the panel report was produced.
5. The Panel Report was published in 2016. However an earlier draft of the report, the conclusions of which are now challenged by Vale in these proceedings, was disclosed by Vale, which indicates a number of the individual witnesses who were interviewed as part of the enquiry into the cause of the collapse. Hence the claimants have sought an order for the documents arising out of the interviews of witnesses to be reviewed by Slaughter and May, so that any claim for privilege may be ascertained. Once a firm claim to privilege has been made, the claimants will consider it and if there is any dispute, bring back before the court.
6. The defendants' position is that the witness interview notes are covered by litigation privilege. Reliance is placed on, in particular, the witness statement of Ms Cox dated 15 April 2024 and the witness statement of Ms Park, dated 15 April 2024.
7. Ms Cox is chief legal counsel of BHP. She explains in her witness statement that following the collapse of the dam, it was immediately clear that it was very likely that there would be litigation, whether by way of direct claims, securities litigation, criminal prosecutions, or other matters. In the light of that, BHP was concerned that it should ascertain at the earliest stage the cause of the collapse so that advice could be obtained in respect of the litigation risks, BHP could prepare any defences or responses and a litigation strategy could be prepared.

8. As from 2 December 2015, BHP appointed Cleary Gottlieb to carry out the investigation. The panel were engaged by Cleary some weeks later in order to provide expert input into the investigation and preparation of the report.
9. Ms Cox states in her witness statement, clearly, that the dominant purpose for which Cleary was engaged and the investigation was carried out, was to obtain information, advice and to prepare defences and strategy in relation to the anticipated legal proceedings.
10. Ms Park is a partner in the firm of Cleary Gottlieb Steen and Hamilton and explains that her firm was retained to investigate the cause of collapse of the dam. At the outset she states that she understood that her clients were subject to an ongoing litigation relating to the collapse and potentially a criminal investigation. In addition, there were, in Brazil, as at December 2015, preliminary injunctions against Samarco freezing its assets and requiring it to take specific actions in relation to the consequence of the collapse, collective actions commenced against the clients by public authorities and various individual claims. At the same time, law firms in the United States, where BHP and Vale had securities, announced that they were investigating potential securities law claims against BHP and Vale relating to the collapse.
11. Ms Park states that her role involved:
  - a. gathering, reviewing and analysing business records and relevant documents;
  - b. advising on where business records should be stored;
  - c. conducting witness interviews, including identifying which fact witnesses to interview, advising on witness related matters, assessing the facts and documents collected, analysing the evidence and assessing the credibility of witnesses and evidence gathered;
  - d. deciding which documents should be provided to the panel;

- e. advising on the appropriate processes to adopt to maintain the integrity of the evidence collected and the integrity of the process undertaken by Cleary to understand the evidence; and
- f. advising on the steps that the client should or should not take as part of any fact gathering exercise to ensure the fact investigation did not interfere with the potential criminal proceedings in Brazil and any other ongoing investigation or proceedings relating to the collapse.

12. Ms Park also explains her role in overseeing the interviews of the relevant witnesses, the preparation of notes, which were non-verbatim summaries intended to reflect impressions, conclusions and/or opinions of each interview, the reporting that was carried out during this exercise and advice that was provided to BHP.

13. The upshot of that evidence is a clear picture that the dominant purpose, for which the investigation including the taking of witness evidence and preparation of the notes of the witness interviews, was to enable an assessment of the merits to be carried out, enabling legal advice to be given, obtaining evidence or information to be used in respect of anticipated or ongoing proceedings and overall to enable a litigation strategy to be carried out.

14. I appreciate that the publication of the findings of the investigation by way of the Panel Report is a matter that indicates that not all of the outcome of the exercise was subject to confidentiality and/or privilege. However, I consider that a distinction can properly be drawn between the outcome of the investigation and the investigation process itself, in particular the evidence gathering part of the investigation, which was overseen by Cleary Gottlieb.

15. For the above reasons, I am satisfied that this is a case in which litigation privilege has properly been claimed and set out by BHP. Therefore it would not be appropriate for the court to order the disclosure of the witness summaries or notes, or indeed a further review by Slaughter and May.