HAND IT OVER?

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INTRODUCTION

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Construction disputes often commence with a request for disclosure of a raft of project documents by the prospective claimant, sometimes even before details of the claim have been provided. More often than not, the claimants invoke the contractual provisions with threats to resort to provisions of the Civil Procedure Rules relating to pre-action disclosure if the contract is not complied with.

The nature of construction projects and claims is no doubt one of the key reasons why construction parties in particular seem to be lacking the documents which would support their position. Such projects last for years and defects often do not manifest themselves until some years after the works have finished. There can be millions of documents created that are not centrally stored or organised in a way that allows prompt retrieval. Even the most fundamental documents can be lost and despite parties having obligations to prepare and provide documents, sometimes they are reluctant to provide the same, particularly when a dispute is on the horizon.

When a dispute arises, and parties seek legal advice the first questions are always requests for contemporaneous documents which may be in the possession of other parties or consultants. Consolidation of construction firms and novation or assignment of contracts can also lead to less than ideal documentation retention and storage. This leaves huge gaps in the available project documentation.

If asking the other parties and invoking the contract is unsuccessful, the claimant may then approach the court requesting pre-action disclosure. Such applications have a number of significant hurdles to overcome and many fail. The reasons include:

- the request being too wide and more akin to a ‘fishing expedition’;
- the request was made too early – before the pre-action protocol procedure had been followed;
- the request may impede or frustrate a contractually agreed expert determination mechanism;
- the court had no jurisdiction because the claim was governed by an arbitration agreement; and
- the request was unlikely to assist resolution of the dispute or save costs.

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All of the above reflect the court's desire to avoid disproportionate disclosure requests and to uphold the parties' contractual bargains. It also reflects the problems that particularly befall construction disputes, namely a significant lack of the basic documentation that the claimant needs to formulate a complex claim in the first place.

RECENT DEVELOPMENTS

The recent decision in *Balfour Beatty Regional Construction Limited (formerly Mansell Construction Services Limited) v Broadway Malyan Limited* [2022] EWHC 2022 (TCC) has highlighted all these issues, as well as further complications presented by the new disclosure regime which has been introduced for the Business and Property Courts (which includes the Technology and Construction Court).

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The dispute arose out of the construction of a complex known as the Hive. It was owned by Hive Bethnal Green Limited ("HGBL"), the developer was JG Colts LLP, who entered into a JCT Design and Build Contract (2005 edition) with Mansell Construction Services Ltd. Broadway Malayan ("BM") was appointed architect. BM's appointment was novated to Mansell, which was then acquired by Balfour Beatty ("BB"). HGBL issued but did not serve a claim form against BB. Those proceedings are currently stayed pending the pre-action protocol steps being taken.

BB wrote to BM passing on some of the allegations from HBGL and asking for a significant amount of documentation in respect of BB including all work products such as drawings, designs, specifications, the original appointment, site inspection records, fire strategy report and final inspection letter to the developer/employer. BM did not provide the documentation and so BB applied to the court.

BB's application was based on almost everything that could be relied on:

- CPR Part 31;
- CPR PD 51U paragraph 31.12;
- contractual obligations or proprietary rights to the documents;
- relationship of principal and agent;
- RIBA Professional Code of Conduct, Principle 2, paragraph 5.3; and
- statutory remedy of delivery up in section 3 of the Torts (Interference with Goods) Act 1977.

THE DECISION

"Further complications presented by the new disclosure regime which has been introduced for the Business and Property Courts (which includes the Technology and Construction Court)."

The court declined to consider the contractual disclosure obligations on the basis that it would involve making a final determination as to the interpretation of the contract. That would be inappropriate where there was not even a pleaded case and at a time when summary judgment was not available.

It also rejected CPR Part 31 as a basis because the claim fell under the new disclosure regime in PD 51U. The application failed under the provisions in PD 51U because it disapplied the provision in CPR 31.12 for specific disclosure and the sole basis of the court's power to grant early specific disclosure was the general case management powers in CPR 3.1(2)(m).

The court refused to exercise its discretion to order early specific disclosure. Almost every party could make a case for early disclosure that something significant and important would be achieved to promote settlement. That would run contrary to the intentions of the disclosure regime and so there must be something outside the usual run for early disclosure to be ordered. Further, the Pre-Action Protocol is designed to help the parties understand the issues between them before proceedings are commenced, so it would rarely make sense for pre-action disclosure to be ordered before that pre-action process had been embarked upon.

The requests were said to be focussed but, in reality, they potentially encompassed a wide range of documents. BB had overstated the difficulties of identifying the issues without disclosure and those difficulties were not unusual in cases where claims are brought years after completion of the works. BB was seeking to shift the burden of finding relevant documentation onto BM, the prospective defendant, with only the most general idea of what to search for. That also ran contrary to the PD 51U disclosure scheme.

DISCUSSION

"The Balfour Beatty case is another in a long line of construction disputes with a party seeking to get hold of documents to help with preparing the claim."

The *Balfour Beatty* case is another in a long line of construction disputes with a party seeking to get hold of documents to help with preparing the claim. The reported cases have illustrated on many occasions that the pre-action disclosure and early specific disclosure provisions are not appropriate for this scenario.

The reasons why such documentation is not available may relate to the length of the project and the time that has passed since completion, but there may also be questions to be asked about how the contractual obligations to prepare and provide documents are working in practice? Is the problem caused by parties not complying with these obligations or the other party not enforcing its obligations to receive documents because they are busy dealing with other issues on the project?

The issue may also be more fundamental. Are the contractual provisions fit for purpose? Do they need to be redrafted to ensure that parties get what they need? Not only will it benefit a developer or owner trying to put together a claim for defective workmanship, but likewise a contractor on the receiving end of such a claim. If the documents exist and are available that establish what happened, that is likely to result in a significant saving in litigation costs, not to mention time.

KEY CONTACTS

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