

Twenty Brilliant Construction and Engineering Questions and Answers

With Industry Experts

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Balfour Beatty Regional Construction Ltd v Broadway Malyan Ltd [2022] EWHC 2022 (TCC) (29 July 2022)

Application for early specific disclosure

This was an application before Mrs Justice Jefford, for early specific disclosure from the Defendant; Broadway Malyan Limited ("BM").

Background

The dispute concerned a 6 storey complex, including student accommodation and commercial units, in London. BM was appointed as architect by the original developer (JG Colts LLP) on or around 29 February 2008. The Property was owned by Hive Bethnal Green Limited ("HBGL")

The original developer of Hive was JG Colts, who entered into a JCT Design and Build Contract (2005 ed) with Mansell Construction Services Ltd and appointed BM as architects. BM's appointment included obligations to design, co-ordinate design of, and inspect the works. There were a number of sub-contractors, sub-designer and sub-consultants.

BM's appointment was novated to Mansell (the Claimant) and Mansell was acquired by Balfour Beatty ("BB"). HBGL issued a claim form against BB in June 2021.

HBGL alleged defects in the design and construction of the Hive and specifically in the cladding, ventilation, windows and roofing, and the claim is for approximately £12 million.

By a letter dated 23 November 2021, BB passed on some or all of those allegations by HBGL to BM. BB's solicitors asked for the file BM held in respect of BB including *"all work products such as drawings, designs, specifications, the original appointment of your client (signed version), site inspections records (relating to the façade and related works), the fire strategy report/ equivalent, and the letter issued to JG Colts/ the employer on final inspection of the works."* BM made the point that it was for BB to investigate the claims against them, that BM had very little detail of the alleged defects, and that they had no duty to disclose documents at this very early stage.

BB stated their entitlement to the documents was:

(i) On the basis of a relationship of principal and agent,
(ii) On the basis that the client file was BB's property,
(iii) Under "Paragraphs 5.2 and 5.3 of the RIBA Code of Conduct on the subject of record keeping",
(iv) On the basis of an entitlement to internal documents produced for BB's benefit (relying on *Gibbon v Pease* [1905] 1 KB 810); and
(v) Because they were entitled to pre-action disclosure

BM responded that the relevant information would be disclosed if found. At this point there was a standstill agreement between the parties.

Judgement

The judge dismissed BB's application based on contractual and/or proprietary right to the documents on the grounds that this was a claim for a final remedy which was premature.

It was agreed that common ground for disclosure was under the provision of PD 51U. BB submitted that the application for early disclosure fell within PD 51U.6A.2, however the judge was not convinced by this argument.

The judge noted that the only express provision for "specific disclosure" is in PD 51U.18.1, which can only come after an order for Specific disclosure. The judge considered principles identified by Coulson J in *Bullring Limited Partnership v Laing O' Rourke Midlands Limited* [2016] EWHC 3092 (TCC) and in taking account of these principles concluded that the issue to consider was whether there was a good reason to order early specific disclosure which was a question of proportionality and justice on the facts

of the particular case. Alongside this the purpose and principles of PD51U was also taken into account alongside specific reference to the identified issues.

The case of Bullring was distinguished as an unusual case where there was a need to level the playing field, which was not necessarily the case in this matter as both parties were faced with a position where they did not have ready access to documents dating back years.

The application of BB sought to place on BM the burden of searching for, finding and identifying the relevant documents, against the background of the difficulties that both parties face. The application, if granted, would also require the defendant to do so when there is only the most general articulation of what BM is searching for.

It was on this final consideration that the order for disclosure was refused as the order would run contrary to the purpose PD 51U.

This was an important case as whilst the judge recognised the need for a claim in professional negligence to be properly particularised, if BB's argument was right, early specific disclosure would be available in almost every case involving allegations of negligent design and inspection, which would be contrary to practice and authority.

Tinkler v Esken Ltd (formerly Stobart Group Ltd) [2022] EWHC 1375 (Ch), 7 June 2022, unrep. (Leech J)

The was a case to attempt to set aside a judgement on the basis of fraud. Leech J considered the three-limb test set out in *Takhar v Gracefield Developments Ltd (2020)* and *Royal Bank of Scotland Plc cv Highland Financial Partners LP (2013).*

The Limbs are as follows:

1. The successful part committed conscious and deliberate dishonesty;
2. The dishonest conduct was material to original decision; and
3. There was new evidence before the court which was either not given or not disclosed in the earlier proceedings.

In his consideration, Leech J preferred the approach taken in *Royal Bank of Scotland Plc v Highland Financial Partners LP (2013),* in which it was *"suggested that the dishonest conduct had to be material in the sense that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision" (limb 2).*

In assessing limb 3, the general rule can be located in *Coghlan v Bailey* whereby the question for the court was how the judge's conclusions may have been affected by evidence said to have been concealed through the giving of the alleged false evidence. Leech J expanded as to the scope of this principle in stating that "*there will be cases in which the new evidence is so fundamental to the credibility of the witness that it will be material even though it is not directly relevant to the substantive issues. For example, if a solicitor gives evidence that she is a solicitor and holds a valid practicing certificate but conceals from the court that she has been struck off for mortgage fraud, I would consider evidence of the striking off to material."*

In terms of limb 3, Leech J found that on admission of new evidence it is not the role of the judge to rehear and redetermine issues that the trial judge in the original proceedings determined, but to ask the question of whether the previous judgement could stand in the light of the decision made.

Valley View Health Centre v NHS Property Services Ltd [2022] EWHC 1393(Ch) 8 June 2022, unrep. (Edwin Johnson J)

This was a trial following an application for judgement on admission.

A party may apply for a judgement following an admission by another party (CPR r.14.3).

The proceedings were brought by five claimants against a common defendant, all sought declaratory relief regarding the question of whether policies concerning service charges had been incorporated into their tenancy agreements.

The High Court considered the following:

- Was it an abuse of process to continue with a claim which has been rejected; or
- Was the claim subject to cause of action estoppel.

Judgement

It was held that the answer to the above two questions were "no". This was on the basis that an application for a judgment on an admission is an interim application that resulted in the dismissal of an application and not the dismissal of a claim. The application is based on limited evidence and neither party could, or should treat such an application as equivalent to a trial in terms of evidence and argument.

Curtiss v Zurich Insurance Plc [2022] EWHC 1514 (TCC), 17 June 2022, unrep. (HH Judge Keyser QC sitting as judge of the High Court)

In this case proceedings were brought by approximately 150 claimants against the defendant seeking damages for deceit.

The claim arose from the sale of flats and during the proceedings forty-nine witness statements were brought against the defendant. The defendant subsequently applied to strike out four witness statements and strike out parts of another 29 witness statements on the basis of multiple breaches of the requirements of CPR PD57AC and its statement of best practice.

The Defendant in support produced a 109 page document identifying the alleged breaches in the witness statements, served on the claimants.

Judgement

The judge granted the application in part.

Keyser HHJ considered the question on how to determine the cost of the application and came to the conclusion that the application was "fundamentally inappropriate" and should never have been brought.

On the basis that the application was unusual in its nature, costs would be awarded against the defendant on an indemnity basis.

Keyser HHJ stated, "*If parties make such oppressive and disproportionate applications, resulting in the incurring of very substantial and quite unnecessary costs, they can hardly be surprised if their conduct is marked by an award of costs on the indemnity basis."*

Keyser HHJ made the point that although the Defendant succeeded on some aspects of their application, the extent of their application in the creation of a 109 page document was excessive and that *"if one makes hundreds of points, there are almost bound to be some good ones"* and that the size of the application does not correlate to the justification of the application.

In reaching his conclusion Keyser HHJ emphasised that *"applications for the imposition of sanctions for breach of the Practice Direction should not be used as a weapon for the purpose of battering the opposition"*. Instead, when assessing how to respond to a failure a party must use common sense and have a regard to proportionality. Applications to strike out witness statements for no-compliance with

the requirements of PD 57AC should only be made where it was reasonably necessary for such a course of action to be taken.

In many other cases, much as *Greencastle MM LLP v Payne* it was noted that rather than striking out the witness statement, the better and more proportionate action would be for the court to place either no or less weight on the witness statement that has breached the Practice Direction.

Orchard Plaza Management Company v Balfour Beatty Regional Construction Limited [2022] EWHC 1490 (TCC)

Background

This was an application by Orchard Plaza Management Company Limited ("the Claimant") to strike out and/or for summary judgment in respect of one part of the defence of Balfour Beatty Regional Construction Limited ("the Defendant"). In their Defence, the Defendant contended that the Claimant's pleaded loss and damage was too remote to be recoverable.

Proceedings began on 30 November 2020 whereby the Claimant sought to recover costs of remedial works to a development at Orchard Plaza, Poole, ("the Property") under the terms, and as assignee, of a collateral warranty given by the Defendant.

The development involved the conversion of an existing 1970s office block into 115 residential apartments and two commercial units. The development was designed and constructed by the Defendant during 2007/2008 under an amended JCT D & B contract with Coltham Limited ("Coltham"). Coltham was the then freeholder of the Property. The funder of the project was AIB Group (UK) plc ("AIB"), who lent sums to Coltham.

On 22 October 2007 the Defendant granted an assignable collateral warranty to AIB ("the Collateral Warranty").

Coltham granted long leases to the purchasers of the apartments, which are said to be in materially identical form ("the Leases"). The Claimant is the management company established to acquire and hold a long lease of the Property. Each lessee was required to be a member of the management company. On 1 January 2008 Coltham granted a separate lease of the Property to the Claimant ("the Coltham Orchard Lease").

The Leases were sold with Premier Guarantees, a specialist form of insurance for new build properties. Those guarantees were paid for by the Defendant. Premier admitted liability for many issues, however a due to a funding agreement the underwriters of Premier refused to pay insurance proceeds until the proceedings were resolved.

In 2015 the Claimant became aware of the possibility of defects in the rainscreen cladding to the development.

On 28 June 2017 AIB assigned its rights under the Collateral Warranty to Coltham. On 10 July 2017 Coltham assigned its rights under the Collateral Warranty to the Claimant.

On 6 January 2020 Bournemouth, Christchurch and Poole Council issued an improvement notice to the Claimant ("the Improvement Notice") requiring the Claimant to carry out works, including the replacement of the rainscreen cladding. The Claimant sought to recover from the Defendant the costs of remedial works sufficient to correct the defects said to arise from the Defendant's works.

Remoteness

The key issue for the judge to consider was one of remoteness.

The Judge held that the loss claimed were a foreseeable consequence of breaching the collateral warranty and that it was within the contractor’s reasonable contemplation when issuing the collateral warranty that an assignee of its benefit would incur repair costs if the work was defective. Even if the assignee’s losses had not been contemplated, it is a serious possibility that the party funding the project would incur repair costs, as losses were not necessarily restricted to diminution in value. The Judge found in favour of the claimants and passed summary judgement.

The judge also held that the express wording of “no loss” in the collateral warranty did not leave open the possibility that a claim could be denied by reason of remoteness. The collateral warranty provided that the contractor could not avoid claims “by reason of the fact that such person is an assignee only or otherwise is not the original beneficiary or because the loss or damage suffered has been suffered by such person only and not by the original beneficiary, or because such loss is different to that which would have been suffered by the original beneficiary". The judge commented that if the arguments for remoteness were allowed then this would “wholly undermine” the wording of the warrantee.

The use of “no loss” wording is common in construction industry collateral warranties and this judgement asserts that drafting of this manner is effective. Additionally, residential purchasers, who would not ordinarily have the benefit of a collateral warranty may have the possibility of bringing a claim for breach of contract if they can convince a funder to assign the benefit of a collateral warranty for which it no longer has any use.