Case No: HT-2018-000204, HT-2018-000205

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

[2019] EWHC 3679 (Comm)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 October 2019

Before :

Mr Justice Waksman

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Between :

Bombardier Transportation UK Limited v London Underground Limited and Hitachi Rail Europe Limited	**Claimant**
- and -	
London Underground Limited	**Defendant**

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Philip Moser QC, Anneliese Blackwood and Valentina Sloane QC (instructed by Womble Bond Dickson and DLA Piper) for the Claimants
Jason Coppel QC, Joseph Barrett and Richard Handyside QC (instructed by Ashurst) for the Defendants

Hearing dates: **25th October 2019**

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APPROVED RULING 1

Mr Justice Waksman **Friday, 25 October 2019**
(3:33 pm)
Ruling by MR JUSTICE WAKSMAN

1. On this application for specific disclosure, whose origin I will describe in a moment, the context here is that the principal issue in this procurement challenge is how the defendant dealt with and evaluated the material submitted to it by the claimant, not the materials it did not see.
2. However, and perhaps understandably, since the dispute relates to the proven reliability or otherwise of spheroidal graphite iron (SGI), as the principal component of the bogie frames to be used on the rolling stock which the claimant was offering the defendant, as opposed to traditional steel, some questions have arisen about the track record (no pun intended) of SGI in the claimant's development.
3. Using Mr Gale's first witness statement as a helpful summary, in its pleaded case and on the question of manifest error, the claimant alleged that the view expressed by the defendant's consultant was that the variability of SGI over large production runs, and in the castings made, together with the need to avoid defects, would be very difficult to manage. That position, and judgment, as adopted by the defendant was challenged as being a manifest error. In fact, according to the claimant, the risk of defects in SGI castings was considerably lower than that in steel, and over the past ten years quality problems with SGI were less than compared with cast steel or welded fabrications. Just to give some more flesh to that bone, in annex 1 it went on to say:

   > "There are reduced numbers of manufacturing and quality issues with SGI frames as compared with steel frames because the casting process allows for elimination of welds. The lower casting pouring temperatures reduce the risks of sand inclusions, porosity [and so on and so forth] and that over the past ten years they claimants have experienced negligible quality problems with SGI as compared with cast steel or welded fabrications."

4. Then proceeding on from that, in the context of the experts the claimants were asked:

   > "Is it correct that the variability over large production runs, even in individual castings, together with the need to avoid defects, would be very difficult to manage?"

5. That refers to the opinion that had been ventured by the defendant's consultee. Equally, it was posed whether there were any material differences between SGI and cast or fabricated steel in relation to weld joints.

6. I appreciate, as Mr Moser quite rightly points out, that this is not a trial of SGI generally: it is a trial of the evaluation undertaken by the defendants. Nonetheless, those particular matters have arisen. The specific reason why this all came about was because of an email which was disclosed from Mr Winning.

7. Mr Winning is an important person because he is the claimant's director of structural integrity. In this email, he said that the attachments thereto, which consisted of a report, showed serious defects on SGI bolster from Boccacci. It was the first example he had seen of casting defects and he observed:

   > "We need to understand the root cause of these problems and make sure we don't experience the same problem with the frame."

8. There is a distinction between bolster and frame, but it does not matter here because there is quite clearly an overlap in terms of considerations, which is why Mr Winning says, "We want to make sure there are not problems with the frame..." (which is the SGI structure involved in this case) "... otherwise that would kill off the SGI frame for FLEXX Eco", which, as I understand it, is the model proposed by the claimants for the rolling stock bogies here. And that, therefore, led to him referring to, "... the need to apply more extensive inspection regime so we can have a high confidence in the stability of the casting process."

9. Disclosure was given on 28 June, and on 7 August the defendant sought confirmation that all relevant searches in relation to that casting defects issue, among other things, had been done,

and the claimants came back on 30 August and said they were not entitled to any further disclosure in this matter. And then what happened on 6 September was that the claimants, at least to some extent, ran with this particular point and sought to defuse it by saying, in the witness statement of Mr Bradley that, having discussed the email with Mr Winning:

> "This was a one-off defect in relation to the product of bolsters rather than deterioration. It was not picked up initially due to the type of inspection that was undertaken. When these defects became apparent, the inspection requirements of the general casting specification were tightened. Furthermore, quality checks included a further consideration for fatigue testing and, in any event, had they succeeded in the tender by the time we had come to produce the SGI casting, the inspection procedure would have been updated."

10. Of course, it's always possible for a search to throw up in disclosure a document which is in fact irrelevant, and the court would much prefer that to happen than the search misses out relevant documents. That in itself does not render relevant that which was previously irrelevant.

11. But the fact is here that the point was taken up in Mr Bradley's witness statement. He is a witness and one has the background to the pleadings and the expert evidence which I have referred to above and, in the light of that, the defendants would at least be permitted to cross-examine Mr Bradley on that part of his witness evidence; to that end the specific disclosure which has been sought, dealing with this particular issue is, in my judgment, limited and proportionate. I can't see that it has been raised too late, given the chronology here, and in the light of the parameters which I will shortly put forward, it does not seem to me to be a disproportionate interference with trial preparation, of course bearing in mind on the other hand this is a claim for substantial sums in relation to a very substantial contract.

12. The fact that Mr Justice Stuart-Smith in a different case ruled that evidence of documents relating to Bombardier's other bids to other bodies was not relevant is perfectly understandable; but I do not read Mr Justice Stuart-Smith as attempting to lay down any rule that any single document which was not shown to the evaluators cannot possibly be relevant. It is, of course, all a question of the facts and the issues raised in any particular case.
13. In my judgment, a proportionate disclosure process is fully justified here, and in my judgment that should be on the following basis: the start date will be August 2017. The report was from December 2017 and since it was obviously triggered by something or a decision was made in relation to it beforehand, is not disproportionate to go back three or four months before the report.
14. On the other hand I will say that the finishing date is 31 March 2019. One reason for that is that, although it is a long time after January 2018, and it's said that the new regime would go into place very quickly, Mr Collins' witness statement suggests that in fact it was only concluded in March 2019; on the other hand, there is an advantage in staying with March, as the defendants now accept, because that gets round some of the more difficult technical issues which would arise if one got into April and beyond.
15. The search will be a reasonable search. In my judgment the obvious custodian here is Mr Winning. It is very unlikely, in my view, that anything related to this would have not been seen by him but by somebody else since his title is "Director of structural integrity", but even before Mr Handyside's suggestion to this effect, I had considered that the right way to deal with this was to say that the reasonable searches should consist of searches of appropriate keywords of Mr Winning's email account or the email account of any other senior person whom Mr Winning says was involved in the three issues that are set out in the disclosure order. In my judgment that will therefore entail that the search is limited, so that there is no real likelihood of this matter resurfacing before me or someone else.