



Neutral Citation Number: [2020] EWHC 1309 (TCC)

Case No: HT-2019-000208

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (QBD)**

The Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: Wednesday 27<sup>th</sup> May 2020

**Before :**

**MR ROGER TER HAAR QC**

**Sitting as a Deputy High Court Judge**

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**Between:**

**BOUYGUES (U.K.) LIMITED**

**Claimant**

**- and -**

**SHARPFIBRE LIMITED**

**Defendant**

**-and-**

**MOUNTFORD PIGOTT LLP**

**Third Party**

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**Christopher Reid** (instructed by **Mayer Brown International LLP**) for the **Claimant**  
**Paul Cowan** (instructed by **Kennedys Law LLP**) for the **Defendant**  
**Ben Patten Q. C.** (instructed by **Clyde & Co LLP**) for the **Third Party**

Hearing date: 1 May 2020

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**APPROVED JUDGMENT**

**Covid-19 Protocol: This judgment will handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on Wednesday 27<sup>th</sup> May 2020.**

**Mr Roger ter Haar QC :**

1. In this action the Claimant (“BYUK”) claims damages from the Defendant (“Sharpfibre”) for allegedly defective cladding installed as part of the construction of a new Premier Inn Hotel which formed part of the Bedford Riverside development.
2. BYUK’s claim concerns the cladding system installed in respect of the Hotel and arises out of the Grenfell Tower fire which occurred on 14 June 2017.
3. In April 2015 Bedford Riverside Regeneration Ltd (“the Developer”) engaged a contractor, J B Leadbitter & Co. Limited (“JBL”) to construct the hotel under a design and build contract.
4. JBL in turn engaged Sharpfibre under a design and build sub-contract to carry out “structural framing external walling, external cladding”.
5. In April 2016 JBL also appointed the Third Party (“MP”) as architect in respect of the development. Before this appointment MP had provided in October 2015 an Insulation Specification.
6. In June 2016 BYUK entered into a novation agreement which BYUK contends novated the sub-contract from JBL to BYUK.
7. In August 2016 JBL, BYUK and MP entered into a novation agreement which novated MP’s appointment to BYUK.
8. In March 2017, JBL, BYUK and the Developer entered into a novation agreement under which the main contract was novated to BYUK.
9. The Hotel was certified as practically complete in April 2017.

10. BYUK's case is that in the aftermath of the Grenfell Tower fire, inspections were carried out at the Hotel and the view was formed that the cladding and insulation products that had been installed were not acceptable. It is BYUK's case that it agreed to undertake works to remove and replace the cladding and insulation at BYUK's own cost.
11. Having reached that agreement, BYUK then claimed against Sharpfibre that the cladding and insulation products were non-compliant with the requirements of the Building Regulations and were non-compliant with the sub-contract. It is BYUK's case that Sharpfibre was fully contractually responsible for the design of all the sub-contract works.
12. The amount of the claim brought by BYUK against Sharpfibre is in excess of £1,950,000.
13. BYUK's claim is disputed by Sharpfibre.
14. BYUK has made no claim itself against MP, but Sharpfibre has brought a contribution claim against MP under the Civil Liability (Contribution) Act 1978. I return to the nature of the claim below.
15. On 1 May 2020 I held a CMC by telephone. Most matters in respect of directions leading to trial and as to cost budgeting were then resolved, but there are some matters which were left for further submissions in writing if agreement could not be reached. This judgment deals with those outstanding issues.

## Cost budgeting

16. At the hearing on 1 May, both Sharpfibre and MP attacked the cost budget put forward by BYUK, which proposed a figure of £1,537,644.55 for incurred and estimated future costs.
17. I determined that the amount of that total figure compared to the amount claimed did justify a more detailed look applying the guidance in *CIP Properties Limited v Galliford Try Infrastructure Limited* [2015] EWHC 481 (TCC) and *GSK Project Management Limited (In Liquidation) v QPR Holdings Limited* [2015] EWHC 2274 (TCC). I reduced the cost budget, mainly, but not entirely, in respect of counsel's fees.
18. The parties were left to go away and attempt to agree a revised cost budget for BYUK's costs based upon the decisions I had made.
19. In the event there is one issue left to resolve between BYUK and Sharpfibre.
20. In the original cost budgets prepared by all parties, no allowance had been made for the possibility that the judge conducting the trial might direct that the parties should file written closing submissions. I directed that this should be dealt with by way of a Contingent Cost.
21. The cost put forward by BYUK for this is £66,000 being for 6 days of work by counsel and substantial fee earner time.
22. Sharpfibre contends that the cost should be limited to £16,600, being leading and junior counsel's refreshers for one day of oral submissions and a total of

£6,950 in respect of fee earner's time (10 hours each for a partner and senior associate).

23. To put this in context, Sharpfibre's revised cost budget has assumed a total of £41,515 for four days of written submissions and a one day hearing.
24. As Mr Reid has submitted in his written submissions in this respect, the difference between the parties largely relates to (a) Sharpfibre's assumption that I had ordered that the costs allowed for the trial phase should be treated as including the costs of written submissions; and (b) the involvement of leading counsel.
25. In my view the cost proposed by BYUK should be allowed in full as a contingent cost. I did not understand the budget before me to include any figure for written submissions, and I did not allow the costs for the trial phase on that basis. On the contrary, I anticipated that the whole of the projected costs of written submissions would be additional, and would be included on a contingent basis.
26. This concludes the only outstanding item as between BYUK and Sharpfibre.

## **Disclosure**

27. As between Sharpfibre and MP there are two outstanding issues, both relating to Sharpfibre's request for disclosure from MP.
28. The first relates to issue 20 on the List of Issue for Disclosure. As originally formulated by Sharpfibre, the issue is:

“What steps did BYUK and/or Mountford Piggott take to assess and/or ensure quality control of the works?”

29. Sharpfibre seeks in the alternative disclosure in respect of the issue as reformulated thus:

“What steps did BYUK and/or Mountford Piggott take to assess and/or ensure ~~quality control~~ compliance of the works with applicable contractual, statutory or other requirements?”

30. MP is willing to give disclosure against an issue formulated as follows:

“What information was apparent to BYUK and/or Mountford Piggott when carrying out their assessment functions to suggest that Sharpfibre’s works were not contractually compliant and/or did not comply with Revision E?”

31. The part of the pleaded case to which these different formulations of the issue are relevant is contained in paragraphs 62.12 and 62.13 of Sharpfibre’s Particulars of Additional Claim:

“62.12 Failure to verify or take reasonable steps to procure BYUK to verify the compliance of the design and specification of the cladding panels, insulation and/or adhesive that Sharpfibre proposed to use and/or did use in respect of Block 5 as against the Cladding Specification (Rev. E) and/or the Insulation Specification and/or as against Requirement B4(1) of the Building Regulations and the guidance in respect thereof contained in Approved Document B, whether in accordance with the Required Standard or at all.

“62.13 Failure to identify or take reasonable steps to enable BYUK to identify any potential non-compliance the design and specification of the cladding panels, insulation and/or adhesive that Sharpfibre proposed to use and/or did use in respect of Block 5 as against the Cladding Specification (Rev. E) and/or Insulation Specification and/or as against Requirement B(4)(1) of the Building Regulations and the guidance in respect thereof contained in Approved Document B, whether in accordance with the Required Standard or at all.”

32. MP concedes in its written submissions that disclosure in respect of the issue as formulated by it would require it to carry out a reasonable search for (1) its

considerations of Sharpfibre’s construction design drawings and other information and (2) its inspections of Sharpfibre’s works so as to identify any fact or matter which might suggest that the works were non-compliant.

33. In my judgment, the issue as formulated by MP, taken with its concession as set out in paragraph 32 above is a reasonable and proportionate approach to disclosure. Indeed, in practice I doubt if there will be a significant difference between disclosure in response to the issue as reformulated by Sharpfibre and that in response to the issue as formulated by MP as explained above.

34. The other issue as between Sharpfibre and MP relates to disclosure of “narrative documents”.

35. Pursuant to PD 51U, para. 8, in relation to Extended Disclosure on the basis of Model D it is required that:

“The order should specify whether a party giving Model D disclosure is to search for and disclose Narrative Documents. If the order does not so specify, Narrative Documents should not be disclosed.”

36. However, where Narrative Documents are not to be included, para. 9.6(2) provides that this must also be addressed:

“...if Narrative Documents are to be excluded, how that is to be achieved in a reasonable and proportionate way”.

37. The definition of “*Narrative Documents*” is provided in Appendix 1 to PD 51U (para. 1.11):

““Narrative Document” means a document which is relevant only to the background or context of material facts or events, and not directly to the Issues for Disclosure; for the avoidance of doubt an adverse document (as defined at paragraph 2.6) is not to be treated as a Narrative Document”.



38. Sharpfibre has offered to qualify this by the following limitation:

“In relation to disclosure between Sharpfibre and MP,  
“Narrative Document shall have the following meaning (in  
substitution for the definition in PD 51U Appendix 1):

““Narrative Document” means a document which is relevant  
only to the background or context of material facts or events,  
and not directly to the Issues for Disclosure, and which is  
identified from a keyword search carried out in connection with  
any of the Issues for Disclosure.

[the underlined text being supplemental to the definition in PD  
51U]

“Further, where relevant documents are identified and appear in  
an email chain, the entire email chain shall be disclosed. If  
further documents may reasonably be required to understand  
the context or background to relevant documents disclosed to it,  
a party may make a supplementary request for the same.”

39. In its submissions MP raises a number of difficulties with the proposal even as  
so modified.

40. MP’s submission is that in order to justify disclosure there must be

(1) a real (as opposed to a fanciful) prospect that in connection with a  
particular issue a document exists which is relevant only to the background  
or context of material facts or events, and not directly to the Issue, but  
which would none the less be sufficiently important to the parties’ cases  
that it merit searches, analysis and the other costs of disclosure

and

(2) no real likelihood that such a document will emerge as a result of the  
disclosure exercise in respect of any other Issue.

41. The submissions then continue (at paragraphs 20 to 22):

“What kinds of documents does Sharpfibre seek? That is something of a mystery. Despite efforts to complicate it, this is a building dispute. It is not a fraud claim. It is not likely to involve secret meetings, obscure processes or hidden participants. The documents which MP has which are going to be relevant to the issues (including known adverse documents) will be the documents in respect of which disclosure is already sought. Precisely what “context” does Sharpfibre need otherwise irrelevant documents to understand?

“Moreover, how is MP supposed to search for and identify “narrative documents” ? What are the material facts or events where there is likely (1) to be some cache of documents which cast a new light on the fact or event and where (2) those documents would not already be disclosed under Issues 1 to 20 ? How does MP go about finding them?

“What are the prospects that after a lengthy and expensive process MP will find relevant documents which it would not otherwise have disclosed ? The Court is asked to consider Items 1 to 8 and 10 to 20 (the latter in either form). These Issues were compiled by Sharpfibre in order to ensure that *nothing* of any possible relevance failed to be disclosed. They are very broad categories cast in relation to an already very expansively pleaded case.”

42. In my judgment there is strength in these submissions. The Court’s investigations will be an objective analysis of whether MP in carrying out its functions did so to the standards of a competent professional. I do not believe that the width of disclosure sought will assist in the determination of the issues which those investigations will examine.
43. Accordingly the disclosure of narrative documents is refused on the basis that such disclosure is not necessary for the fair disposal of the issues in this action.
44. This ruling does not preclude an application in due course for disclosure of specific documents of classes of documents where these can be shown to be relevant.