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Case No: HT-2022-000139

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

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

Date: 29/07/2022

Before :

MRS JUSTICE JEFFORD DBE

Between :

**BALFOUR BEATTY REGIONAL
CONSTRUCTION LIMITED (FORMERLY
MANSELL CONSTRUCTION SERVICES
LIMITED)**

Claimant

- and -

BROADWAY MALYAN LIMITED

Defendant

MR TOM OWEN (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the
Claimant

MR HUGH SAUNDERS (instructed by Reynolds Porter Chamberlain LLP) for the
Defendant

Hearing date: 1st July 2022

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 29th July 2022

Mrs Justice Jefford :

1. This is an application by the Claimant (“BB”) for early specific disclosure from the Defendant (“BM”). The Claim Form was issued on 20 April 2022. It has not yet been served and the parties are agreed that time for service should be extended. The Claim Form was issued before any steps had been taken to comply with the Pre-Action Protocol for Construction and Engineering Disputes.

Background

2. The dispute between the parties concerns a 6 storey complex including student accommodation and commercial units known as The Hive and located in Bethnal Green, London. The property is owned by Hive Bethnal Green Limited (“HBGL”). Practical Completion was certified on 21 August 2009.
3. The original developer of the Hive was JG Colts LLP. They entered into a JCT Design and Build Contract (2005 ed) with Mansell Construction Services Ltd. on or about 30 March 2008 and appointed BM as architect on or about 29 February 2008. BM’s appointment included obligations to design, co-ordinate design of, and inspect the works. There were a number of sub-designers, sub-consultants and sub-contractors, including AWS Turner Fain Ltd. (external window and curtain walling sub-contractor), Baris Facades & Linings Ltd. (cladding and roofing sub-contractor), and HCD Building Control Ltd.
4. BM’s appointment was then novated to Mansell. Mansell was acquired by BB in 2014 and its name was subsequently changed to Balfour Beatty Regional Construction Ltd.
5. On 25 June 2021 HBGL issued a claim form against BB (claim no. HT-2021-000242). These proceedings have been referred to as the Upstream Proceedings and are currently stayed until 30 September 2022 while the parties undertake the steps provided by the Pre-Action Protocol. Following the issue of the Claim Form, Addleshaw Goddard LLP acting on behalf of HBGL, sent to BB their PAP Letter of Claim dated 25 October 2021. In that letter, HBGL alleges 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.

Correspondence

6. By a letter dated 23 November 2021, which did not purport to be in accordance with the Pre-Action Protocol, Pinsent Masons, then acting on behalf of BB, passed on some or all of those allegations to BM. The letter was in brief terms but reflected what had been said by HBGL in the letter dated 15 October 2021, which was subsequently provided to BM.
7. Following a change of solicitors, BB's current solicitors ("CMS") wrote to BM's solicitors ("RPC") on 10 January 2022. Saying that they were keen to understand the background, they 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." That was on any view a far reaching request for documents.
8. RPC responded on 7 February 2022. They said that, as the design and build contractor, BB should have the documentation CMS was asking for. They 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.
9. CMS replied on 10 February 2022. They said that BB had not undertaken the work itself and that BM would have much more extensive documentation than the design and build contractor. They asserted BB's right to the client file and made reference to "the RIBA's view". Further, CMS said that BB would be entitled to the vast majority, if not all, of the documents sought by way of pre-action disclosure. RPC responded to each of these matters by letter dated 17 February 2022 and said that where no allegations had been set out against BM and no expert evidence provided to support a claim, they remained of the view that BM was not required to accede to this "extensive document request".
10. The correspondence continued. In letters dated 17 February 2022 and 22 March 2022, CMS asserted BB's entitlement to the documentation (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. In the same letter dated 22 March, CMS set out again the documents that it sought. I cannot see that it was any different, other than in layout, from the original request but RPC considered it a more limited request and by letter dated 23 March 2022, RPC said that they were liaising with BM about the revised request and that if BM located relevant documentation it would be disclosed. The caveat to that was that what would be disclosed was what was relevant to the issues in dispute “as our client presently understands them based on the extremely limited information provided so far”.

11. I do not propose to set out the entirety of the correspondence that followed. It is sufficient to say that there was otherwise, during this period, a standstill agreement between the parties. CMS made it clear that it would make an application for disclosure – I assume the intention being to do so when the standstill agreement came to an end. CMS sought an extension to the standstill period. CMS, by letter dated 13 April 2022, proposed an extension during which period BM would give disclosure and Pre-Action Protocol correspondence would take place. In their reply dated 14 April, RPC complained that they had agreed to the previous extension on the basis that BB would provide its expert’s findings, and any requests for documentation would be made by reference to that, but that nothing had been received. In particular, BM had not received BB’s expert’s findings, site inspection reports, details of remedial works and “clarity regarding your client’s claim”. They asked for these by 19 April. CMS responded that BB would not provide this evidence and disclosure by return. There was more correspondence but no resolution and no extension to the standstill agreement.

The application

12. The present application was issued on 20 April 2022, that is at the same time as the Claim Form. The application sought directions for compliance with the Pre-Action Protocol; extensions of time for the service of the Claim Form and the Particulars of Claim; and early specific disclosure. The last of these was described in the application notice as “An order against the Respondent for early specific disclosure; alternatively delivery up and/or specific performance and/or an injunction to provide disclosure of documents”. I note that the application notice itself did not identify the procedural basis for the application for early specific disclosure, although the draft Order attached referred to Part 31. If anything, the emphasis in the application was on a contractual entitlement to the

documents sought. Under the heading “Basis of Order”, the application said nothing about an application under the Civil Procedure Rules but said:

“The parties are in contract, and the Respondent is obliged contractually to give the disclosure sought. The Applicant has a contractual and/or proprietary right to the documents. The disclosure is necessary for completion of the Protocol. The Respondent controls and is in possession of the documents sought.”

13. The documents sought, as set out in the draft Order, fell into three categories:
 - (i) Category 1 (appointment documents): a signed/ executed copy of the Appointment, including its schedules and incorporated documents.
 - (ii) Category 2 (design documents): the design documents of the Respondent and sub-contractors and/or sub-consultants, including but not limited to AWS Turner Fain and Baris Facades & Linings Limited and HCD Building Control Limited, approved for construction of the Hive; and the co-ordination documents of the design and correspondence with the above and with Building Control concerning the cladding, windows, roofing and ventilation at the Hive.
 - (iii) Category 3 (inspection documents): the Respondent’s inspection and commissioning records, including minutes, reports, photographs and correspondence concerning the cladding, ventilation, windows and roofing at the Hive; and the letter under paragraph 50 of Part 2 of Schedule 2 of the Appointment.

14. Taking the terms of the application and the draft Order together, this was a wide application for documents both in BM’s possession and control. BB confirmed at the hearing of the application that it only sought documents actually in BM’s possession. By the time of the hearing of the application, a copy of the Appointment had been provided and only categories 2 and 3 remained in issue. Although BB’s skeleton argument arguably framed the categories more narrowly – for example omitting any reference to correspondence in category 2 - these remained wide requests for disclosure of documents relating to design and inspection.

Delivery up of documents

15. I deal firstly with the claim for what I will call for brevity the delivery up of the documents. This is the claim predicated on there being a contractual and/or proprietary right to the documents sought.
16. So far as the Appointment is concerned, and in respect of the category 2 documents, Mr Owen pointed to two provisions of the Appointment in the Schedule of Services (Part 2) headed Construction Phase):
- (i) Paragraph 41 provided that BM should in conjunction with the Employer's Consultants prepare and provide as required information including drawings, specification of materials and workmanship and schedules. The provision continued: *"the Consultant will provide to the Employer throughout the course of the Works not less than 6 complete sets of drawings, specifications and other relevant documents as may be amended and revised from time to time."*
- (ii) Paragraph 51 provided:
- "The Consultant shall on or prior to practical completion of the works in conjunction with the Employer's Consultants and any specialist sub-contractors and suppliers arrange for the procurement of such copies of the as built drawings, maintenance and operation manuals, the health and safety file and other documents as the Employer may require."*
17. In relation to the category 3 documents, Mr Owen referred to paragraphs 43, 45 and 49. Paragraph 43 provided for BM to carry out site inspections to satisfy themselves that the Works were being carried out in accordance with the specification and to report to the Employer in writing following any site inspection. Paragraph 45 provided for attendance at site meetings and for BM to minute the meetings and circulate the minutes. Paragraph 49 provided for BM, prior to practical completion, to inspect the works and attend any meetings to deal with snagging items and assist in the preparation of a snagging list. Paragraph 50 then provided:
- "Prior to practical completion of the Works the Consultant shall issue a letter to the Employer ... stating that the Works have been carried out and concluded to such a standard that in the opinion of the Consultant a written statement or certificate of practical completion can be issued in respect of the Works and if required by the Employer issue a certificate of practical completion in respect of the Works."*

18. The submission on behalf of BB was that it was clear from these provisions that the documents within categories 2 and 3 fell squarely within the services to be provided and had to be provided at the time.

19. BB also relied on clause 11.1 of the Appointment which provides as follows:

“The Consultant grants to the Employer and, where it does not own the copyright in any of the Documents, it shall use reasonable endeavours to procure the grant to the Employer of, an irrevocable, royalty-free and non-exclusive licence to copy and use the Documents for any purpose related to the Works or to the Site which shall include any Documents not yet in existence at the time of this agreement where such licence shall take effect from the date of their creation. Such licence shall remain in full force and effect after the completion of the Consultant’s obligations and termination of its engagement under this agreement and in the circumstances where there is any dispute under this agreement.”

“Documents” were defined in clause 1 as “all calculations, designs, details, drawings, plans, reports, specification, bills of quantities, sketches, traces, surveys and other documents or data (including electronically stored information) prepared by or on behalf of the Consultant in connection with the Services.”

20. BB relied on this clause as the basis for its legal entitlement to delivery up of the documents sought in this application.

21. There is a fundamental problem with the application for documents to which BB asserts a contractual or proprietary right and it is one that is both procedural and substantive. Firstly, it is not an application for a procedural direction or interim relief. It is rather a claim for a final remedy. Even if it is within the scope of the Claim Form issued, this is a final remedy sought without any process of pleading out the claim, any opportunity for the defendant to set out its defence, and any identification of the issues on this claim that might themselves require disclosure or evidence. As Mr Saunders put it on behalf of BM, the court would be making a decision without any context.

22. The paragraphs from the Schedule of Services set out above appear under the heading Construction Phase. Paragraph 41 is concerned with the provision of “drawings, specifications and other relevant documents” “throughout the course of the Works”. Paragraphs 50 and 51 are concerned with the provision of documents on or prior to Practical Completion. The terms relating to inspections make provision for reports and minutes of meetings to be provided to the Employer and, in the case of paragraph 50, a letter prior to Practical Completion. There is no evidence as to whether these provisions were followed during the course of the Works. There could clearly be issues both of law and fact as to whether BB is now entitled to delivery up of these documents if they were not provided during the course of the Works or whether a remedy such as specific performance or a mandatory injunction would be granted.
23. On its face, clause 11.1 grants a licence to use the Documents as defined and not any other proprietary interest in the documents. Mr Owen submitted that it was implicit in this clause that BB was entitled to documents or copies of documents in respect of which it was granted a licence. That simply identifies another area of argument. Further, there may be issues both as to whether the documents sought all fall within the definition of Documents. Although there is a wide definition of the Documents, it is not obvious that a clause that is concerned with copyright is applicable to all the documents that may have been produced.
24. None of this is straightforward, yet the effect of my granting the application on this basis would be to give summary judgment for the claimant without so much as a pleaded case and at a time when an application for summary judgment is not available.
25. As the argument before me developed, therefore, Mr Owen placed reliance on these matters as militating in favour of my exercising my discretion to order early specific disclosure rather than as a discrete basis for the making of this application.
26. I note that in correspondence, it was also suggested that BB was entitled to the documents sought because BB and BM were in a relationship of principal and agent or because the provisions of the RIBA Professional Code of Conduct (Principle 2, paragraph 5) applied. Paragraph 5.3 provides that “*Members shall, upon request, return to a client any original papers, plans or property to which the client is legally entitled.*” Neither of these was pursued as a basis for the application and they would only have served to throw up further

arguments as to the nature and terms of the contractual relationship. In argument, reference was also made to the statutory remedy of delivery up in section 3 of the Torts (Interference with Goods) Act 1977 but again that would have given rise to yet further issues as to interference with goods and the appropriate remedy for interference.

Early specific disclosure

27. As I noted above, the only procedural basis for the application identified in the application itself was Part 31. It is now common ground between the parties that that cannot be the basis for the application as PD51U applies to these proceedings. Paragraph 1.9 of the Practice Direction disapplies Part 31 save as set out in Section II. That Section retains the provision in Part 31.16 for pre-action disclosure but not Part 31.12 (specific disclosure). BB, therefore, initially relied on paragraph 6A of the Practice Direction as a basis on which to make this application under the Practice Direction and submitted that the same principles that applied on an application for early specific disclosure under Part 31.12 should apply to an application under the Practice Direction.

28. The purpose of the Practice Direction is to bring about much more focussed and, at least potentially, more limited disclosure than had commonly been the case. An order for Extended Disclosure is not automatically given nor is it to be regarded as the default position; different models of Extended Disclosure are available; and all disclosure is driven by the issues that the parties have identified or the court has ordered (see *UTB LLC v Sheffield United Limited and others* [2019] EWHC 914 (Ch) at [75]). The parties can seek guidance on disclosure from the court under paragraph 11, and paragraph 11.4 makes it clear that whilst the court will primarily give guidance, it may make an order. Paragraph 17 contains provisions relating to failure adequately to comply with an order for Extended Disclosure. Paragraph 18.1 provides:

“The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.”

29. All these provisions give the court tools to make the equivalent of an order for specific disclosure where a party has failed to disclose documents that ought to have been disclosed within the scope of the ordered Extended Disclosure or to make an order for

additional disclosure of specific documents or categories of documents. All of this flows from and is related to the identified Issues for Disclosure. The only express provision for specific disclosure is, therefore, one that can only come after an order for Extended Disclosure has been made. That is consistent with the emphasis in the PD on focussed disclosure by reference to issues.

30. Instead, as I have said, for early specific disclosure, BB sought to rely on Part 6A which is headed Court Control Over Disclosure and provides as follows:

“6A.1 The court will determine whether to order Extended Disclosure at the first case management conference or, if directed by the court, at another hearing convened for that purpose or without a hearing.

6A.2 The court may determine any point at issue between the parties about disclosure including the application or effect of any provision in PD51U or an order made by the court and about the scope of searches, the manner in which searches are to be carried out and the use of technology. The parties may, at any time, apply to the court to seek the determination of an issue concerning disclosure by issuing an application notice.

6A.3 The court may also provide disclosure guidance in accordance with paragraph 11.

.....”

31. BB submitted that an application for early specific disclosure fell within the last sentence of paragraph 6A.2. I am not persuaded by that submission which takes that sentence out of context. Although the wording of the first sentence is inclusive rather than exclusive – “any point at issue between the parties about disclosure including ...” – the issues expressly referred to are ones about disclosure within the scope of the Practice Direction and which may arise when disclosure is undertaken in accordance with the Practice Direction. The sentence does not introduce into the careful structure of this Practice Direction, a free-standing power to order, or basis on which the court may order, early specific disclosure.
32. BB similarly placed reliance on paragraph 6A.3 and the court’s jurisdiction to give disclosure guidance. For the avoidance of doubt, I do not decide that disclosure guidance can only be sought after an order for Extended Disclosure has been made but it would be highly unusual for the parties to seek guidance before that stage had been reached let alone the court make an order as a result of that hearing and I do not consider that the Practice Direction contemplates this being used as a method of obtaining early specific disclosure.

33. Despite the argument advanced before me in writing and orally in relation to the Practice Direction, it was nonetheless common ground between the parties that the court had power to order early specific disclosure under the general case management powers in Part 3.1(2)(m), that is the power to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.

Discretion

34. Accordingly, the key issue on this application was the exercise of discretion.
35. BB relied on the decision of Coulson J in *Bullring Limited Partnership v Laing O' Rourke Midlands Limited* [2016] EWHC 3092 (TCC) at [20]. I set out paragraphs [20] and [21] in full. In paragraph 20, the judge endorsed counsel for the defendant's formulation. In paragraph 21, he also largely accepted counsel for the claimant's lengthier formulation coming back to the overarching test of proportionality and the justice of the case:

"21. It does not seem to me that, in reality, the parties are very far apart in terms of their formulation of the test that I should apply. Mr Hargreaves formulated it in this way:

"Taking in account the overriding objective and the respective consequences of making or not making the order, whether, on all the circumstances of the case, the applicant has demonstrated that there is a proper basis for early disclosure as opposed to disclosure after close of pleadings."

I think that is apposite, although I would say that, for a proper basis to be identified, there does need to be something important or significant which can be achieved by ordering early disclosure.

22. *Mr Hanham's test is lengthier, with a number of stages, but in general terms I accept the majority of it. He says it has to fall within the probable ambit of CPR Part 31.5, and I agree with that. He says that the making of the order requires something 'out of the ordinary'. As I have already said, I agree that there has to be a good reason to order early disclosure: 'out of the ordinary' may possibly overstate the nature and extent of the good reason for the order. This is not a pre-action disclosure case. Mr Hanham also says that the request must be for specific class of documents; I agree with that. He says that the reasons for the*

value of the early provision need to be analysed and measured; I agree with that too. Relevant considerations must be the overall importance of the issue and the impact upon the utility of the statement of case: I agree with both of those elements. ... Obviously, cost is a matter that is relevant to any consideration of an application for specific disclosure. There is also the question of the effect of any order (or not making an order) on the timetable, on court time, and on other court users. Ultimately, it does seem to me it comes back to a question of proportionality and the justice of the individual circumstances of the case taking into account all of those relevant factors. That, then, is the law.” (Emphasis added)

36. In particular, BB relied on the particularisation that the court will require in a professional negligence claim such as this as set out by Coulson J, as he then was, in *Pantelli Associates v Corporate City Developments No. 2 Ltd.* [2010] EWHC 3189 (TCC), affirmed by Coulson LJ in *Building Design Partnership v Standard Life* [2021] EWCA Civ 1793. BB argues that it is proportionate and in accordance with the overriding objective to order disclosure now, even before the letter of claim, because without this BB cannot begin to particularise its claims against BM. Not only does that limit any value in the pre-action process but it inevitably means that the claim will require amendment – whether in correspondence or more formally in pleadings. It is both more efficient and more cost effective to get it right the first time and that, on BB’s case, requires disclosure of the documents sought. Further, in this context and as factors in favour of ordering disclosure, BB relied on its proprietary or contractual rights to documents and made reference to BB’s status as BM’s client and BM’s role as agent for BB.
37. For BM, Mr Saunders’ submission was that, in exercising my discretion, I should have regard to the context provided by PD51U. This was a widely framed application made before the pre-action protocol process had been commenced and before any issues for disclosure had been identified. To allow this application would cut across the purpose and intention of the Practice Direction. In any case, BB’s inability to articulate its case was exaggerated. Whilst recognising 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. That would be contrary to practice and authority.

Discussion

38. I start with the authorities and, in particular, the decision *Bullring*. The facts of this case were unusual. The case concerned the Selfridges building in Birmingham which was completed in 2003. From 2011, problems with water ingress and cracking were identified. In April 2015 a detailed report on defects was obtained by the claimants and sent to the defendants. In August 2015, the defendant sought 17 categories of document from the claimant and at the same time the parties entered into a Standstill Agreement while they tried to resolve the dispute. The claimant said it did not object to providing the documents but did not provide them despite repeated requests. Eventually in February 2016, the claimant changed tack and placed the burden on the defendant to show how the documents would help the investigations into the defects. As the judge pointed out, at the time, those were the claimant's own investigations. The defendant brought the standstill agreement to an end; the claimant was forced to issue a claim form; but the claimant then sought to stay the proceedings. The judge commented adversely on the conduct of the claimant, including the fact that, following that application, the claimant had to be ordered to comply with the Pre-Action Protocol, and that the claimant refused to provide copies of letters of claim in proceedings against other defendants.
39. Coulson J identified six areas of concern in respect of unfairness to the defendant. It is not necessary to set them out but it is clear that the unfairness to the defendant was an important driver in the court's decision and, in particular, that over time the level of information available to the claimant had increased and improved but that information had not been shared with the defendant so that there was no level playing field.
40. Coulson J set out the principles cited above and then dealt with each of the categories of document sought. On the facts, there was little or no difficulty in providing most of the documents sought, they were clearly relevant, and the judge considered that they ought to have been obtained and collated years earlier. Providing them would go some way to levelling the playing field and giving the defendant some of the benefits of the lengthy periods of evidence gathering which the claimants had enjoyed (see [31] and [32]).

41. Taking account of the factors identified by Coulson J in *Bullring*, the issue that I have to consider, put shortly, is whether there is a good reason to order early specific disclosure which is a question of proportionality and justice on the facts of the particular case. Alongside this, however, I also have to take into account the purpose and principles of PD51U and, most importantly, in my judgment the focus on disclosure by reference to identified issues. To my mind, there can be no doubt that there will be Extended Disclosure by some model ordered in this case but the question is whether the court should decide now what that will be and exercise a general power and discretion to order early specific disclosure when that is not expressly provided for in the Practice Direction. What that consideration does is reinforce the approach that an order for early specific disclosure should only be made in circumstances which are unusual or out of the ordinary.
42. Mr Owen relied principally on the documents which BB seeks as being “something important or significant which can be achieved by early disclosure”. That something is, in his submission, the necessity for disclosure in order even to formulate the claim with a degree of particularity which will make the Pre-Action Protocol process worthwhile and the benefit in, as I have put it, getting it right the first time.
43. There is an obvious attraction in that submission but the first difficulty with it is that in very many cases of this nature a party seeking early specific disclosure would be able to make the same submission that something significant and important would be achieved in terms of greater particularity, promoting settlement and avoiding change of position and amendment. In fact, such applications are not commonplace and are unusual.
44. In the commercial context, pre-action disclosure is recognised to be unusual (see *Assetco plc v Grant Thornton UK LLP* [2013] EWHC 1215 at [17] and *Carillion plc v KPMG* [2020] EWHC 1416 (Comm) at [15]). In *Hutchinson 3G (UK) Ltd v O2 UK Ltd and others* [2008] EWHC 55 (Comm), also in the context of pre-action disclosure, Steel J observed that in almost every dispute a case could be made out that pre-action disclosure would be useful in achieving settlement or otherwise saving costs and that that there must therefore be circumstances outside “the usual run” for disclosure to be ordered. Although this is not an application for pre-action disclosure, given that nothing has been done other than the issuing of the Claim Form, there is a close analogy.

45. Further, the Pre-Action Protocol process is intended to enable the parties to understand the issues between them before proceedings are commenced. It would rarely make sense for pre-action disclosure to be ordered before that pre-action process had been embarked upon but that, in effect, is what is sought in the present case. For reasons of limitation, proceedings were commenced before the Pre-Action Protocol was complied with and BB's position is that the process should not be embarked on now without extensive disclosure. Although Mr Owen submits that the requests for documents are focussed ones, it seems to me clear that there is a wide range of documents potentially encompassed by the application (see paragraph 13 above). BM's submission is that the application is premature when it is not yet possible to identify the issues in respect of which disclosure might, in due course, be given. BB says that that puts it in an impossible position because it cannot identify the issues without disclosure and that PD51U should not be relied upon in such a way that it puts a party in this impossible position.
46. In my view the difficulties which BB face are overstated.
47. The first letter from Pinsent Masons dated 23 November 2021 was in the most general terms. To take two examples, it alleged that there were "improperly fixed rain screen cladding panels" and that the specified cavity barrier was "unsuitable for the proposed application". No explanation has been offered for why the expert instructed by BB is unable to provide further particulars of the respects in which the rain screen cladding panels were improperly fixed or what cavity barriers were referred to, what their proposed application was and how they were unsuitable. These are all matters that could be expanded upon by observation and the application of expertise without the need for any design documents or inspection reports. Although I was told that some remedial works have been carried out, it appears from the correspondence that BB was given opportunities to inspect before that and it can be anticipated that the owner will have kept records of defects before remedial works were carried out.
48. Mr Owen submitted that the difficulty was that, even if the expert could expand upon the nature of an alleged defect, he was unable to say whether it was a defect of design or workmanship without the design documents sought or, perhaps, the inspection reports. The position is not as simple as that. Firstly, whether a defect is one of design or workmanship can itself engage an element of expertise. It may be possible to identify a

common design failing or a common workmanship failing. If the defect is systemic, that might imply a design defect; if it is spasmodic, that might imply a workmanship defect. In any case, the more common the defect, the more it might be inferred that BM failed in its inspection obligations. None of these matters requires further documentation. If, for example, the nature of the improper fixing is more fully identified and if that appears to BB to be a design defect, BM will know what design documents they are looking for. At present, they are simply being asked to produce every design and inspection document relating to cladding. BB are not in a position where, absent the documents sought, they are unable to engage meaningfully in the Pre-Action Protocol process and certainly not to the extent where unusually disclosure should be ordered before they do so.

49. Further, the difficulties that BB face with lack of documentation are far from unusual in cases where claims are brought many years after the completion of the works, as they frequently are in the Technology and Construction Court. The *Bullring* case was the only one cited to me from either before or after the introduction of the pilot scheme in PD51U in which such an application was granted. An important consideration in that case seems to me to have been that the claimant had the relevant documentation, and indeed had been adding to its pool of knowledge for years, while refusing to share that information with the defendant. The playing field needed to be levelled. There is nothing of that nature in this case.
50. On the contrary, both parties are faced with a position in which they do not have ready access to documents dating back years and may not even have those documents in their possession at all. The two witness statements of Caroline Hall, solicitor for BB, set out the searches that have been made including those of electronic documents, e-mails and hard copy documents. Documents appear to have been moved and lost; e-mails are in an unreadable form. The second statement set out in further detail the steps taken to retrieve information and the limited information so far obtained. The witness statement for Laura Cassullo of BM states that the project was undertaken by the Reading office which has now closed. Older documents including e-mails would have been recorded on tape and external IT support will be needed to read them. Some electronic project files have been located but used software which BM no longer have so cannot easily be accessed. 15 boxes of hard copy documents have been retrieved from off-site storage and are being reviewed. Both parties face similar difficulties in searching such hard copy documents

as they have and in locating and reading electronic documents and communications for which further IT support is likely to be required.

51. The claimant's application seeks to place on the defendant 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. In itself, that runs contrary to the purpose of the Practice Direction.
52. For these reasons, I do not make the Order for disclosure sought. At the conclusion of the hearing I indicated to the parties what my decision would be so that other aspects of the application could be addressed during the oral hearing but, for the avoidance of doubt, no order was to be made until the handdown of this written judgment.