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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date of judgment: 13 May 2020

Before :

THE HONOURABLE MR JUSTICE FRASER

Between :

Taylor Wimpey UK Limited

Applicant

- and -

Harron Homes Limited

Respondent

Judgment

Tom Owen (instructed by **Dentons UK and Middle East LLP**) for the Applicant
Lucie Briggs (instructed by **Clarion Solicitors Ltd**) for the Respondent

Hearing date: 7 May 2020

Mr Justice Fraser:

Introduction

1. These proceedings concern an application, dated 13 March 2020, in which the applicant Taylor Wimpey UK Ltd (“TW”) seeks pre-action disclosure under CPR Part 31.16 against the respondent, Harron Homes Ltd (“HH”). That application notice was issued on 13 March 2020, which was 10 days before the national lockdown was imposed on 23 March 2020, with all that has entailed. The hearing was therefore conducted remotely by the court using Skype for Business.
2. The application notice is somewhat unusual in that it sought to have the application, which was almost certainly (or at least very likely) to be contested, determined without any hearing at all. Specifying that such applications should be dealt with “without a hearing” by ticking that box in Section 5 of the Application Notice N244 is never likely to be constructive, when the subject matter of applications is highly contentious, which this one was likely to be. It is not helpful to the administration of court business.
3. There is another feature of this application which is that the factual circumstances of the dispute between the parties, as they were presented to the court in early May after evidence from HH had been served, are rather different to how these were dealt with in the evidence lodged by TW in support of the application. Whilst in *inter partes* hearings of this type, there is not the same duty of full and frank disclosure that there is upon a party who, for example, comes to the court *ex parte* (which is a high burden, as the other side will not be present or represented) it is not helpful for an applicant to fail to include or address a central factor that will be significant and relevant to the application, particularly where (as here) the court’s discretion is involved. The factor to which I refer in this case is the service by HH of a notice to refer the dispute to expert determination. This occurred prior to the issuing of the application; on one view, the application was issued in response to that, although whether that is correct or not does not matter. HH had also given written confirmation to TW that court proceedings would not be commenced; TW had also refused to engage in the expert determination process, notwithstanding its inclusion in the Collaboration Agreement. This is a subject to which I will return.
4. Regardless of that, the substantive application was heard by me on 7 May 2020. At the conclusion of that hearing, I indicated to the parties the outcome of the application, and explained that I would give detailed reasons for my decision in writing. These are those reasons.
5. This judgment on the application is in the following sections.
 - A. The application
 - B. The agreement between the parties
 - C. The law
 - D. The jurisdictional threshold
 - E. Discretion
 - F. Conclusion

A. *The application*

6. The application is for an order under section 33(2) of the Senior Courts Act and CPR 31.16 for disclosure and inspection of documents in a number of different categories. This is therefore an application for pre-action disclosure. There are no substantive legal proceedings underway between HH and TW, although as I have said, HH is seeking to have the dispute resolved by means of the contractual mechanism to resolve disputes. I deal with the categories of documents themselves at [7] below. The terms of the application seek not only disclosure and inspection of the documents contained in these categories, but also that HH be ordered to specify any of the documents in each of the three categories that are no longer in their control. An order is also sought that HH also identify what has happened to documents that are no longer in their control, together with identifying those documents to which HH claims a right or duty to withhold inspection.
7. The categories of documents which are sought are as follows:
 - (1) **Certain design documents:** the iD Civils design drawings and the design calculations and correspondence concerning the designed allowances and flows from the Retained Land. The Retained Land is explained at [16] below.
 - (2) **The as-built drawings** of the drainage installed by or on behalf of HH.
 - (3) **The adoption correspondence** between HH and Yorkshire Water. Yorkshire Water is the statutory undertaker for the area where the Retained Land is situated, and this is explained further at [18] to [20] below.
8. Some of the documents are relatively limited in scope, for example in category 3. Category 1 is far wider. The entity called iD Civils was engaged by HH as a design specialist. It is accepted by TW that it already has 35 specific drawings prepared by that practice, but it wishes to have far more.
9. The application is supported by three witness statements by Mr Akinbode, a partner in the firm of solicitors representing the applicant TW. The first two of these statements are dated 13 March 2020, and 28 April 2020. That second statement is also said to have narrowed or clarified the categories of documents sought, and whereas there were originally said to be four categories (set out in paragraph 3.2 of Mr Akinbode's first statement) there are now the three I have identified at [7] above, these being identified in paragraph 1.6 of his second statement. The application is opposed by HH, and a witness statement in response was served dated 4 May 2020, that statement being made by Mr Morrison, a partner in the firm of solicitors representing the respondent HH.
10. The dates of the different witness statements do not, however, tell the full story in at least one respect. In the skeleton argument served for HH, counsel for HH, Ms Briggs, stated that Mr Akinbode's second statement, which clarified the documents sought, "was served on Monday 4 May (the day upon which Harron was due to serve its evidence in response). It is not clear why this clarification was not given in his first statement."

11. Given the hearing itself had been set down for 7 May 2020, a decision by TW to serve a statement (which was, on its face, dated almost one week earlier than it was served in any case) on the Monday of the week of the hearing, and on the day when HH was due to serve its own evidence in response, could hardly be said to be helpful. Whether this delay in serving the statement was inefficiency – which itself would have been unhelpful – or litigation game playing, is not entirely clear.
12. Mr Morrison’s statement did however add a considerable, and in my judgment essential, layer of detail to the underlying dispute between the parties that was relevant to the application itself. Although Mr Akindobe’s second statement referred to the issuing by HH of a notice of dispute under the Collaboration Agreement dated 10 March 2020 to seek expert determination of the dispute (which it can be seen predated his first statement) all that is said in the second statement, in terms of progress of that reference, is that “HH never appointed an expert” either in that reference, or an earlier one where the notice was dated 30 October 2019. Mr Morrison’s statement, on the other hand, together with the correspondence exhibited to it, makes it clear that TW was, as of the date of that statement and the date of the application, refusing to agree to the appointment of an expert under the notice of 10 March 2020. Nor would TW agree to the appointment of an expert under the earlier notice either. These are, in my judgment, highly material facts. The expert determination procedure is also of central relevance to the application. This subject is barely addressed in the evidence in the first two witness statements submitted by TW to support its application. Indeed, TW’s refusal to engage in that expert determination, and to challenge it on the basis of alleged lack of jurisdiction on the part of the expert, is simply not addressed at all.
13. After Mr Morrison’s statement was served, a further witness statement was served from Mr Akindobe. This was his third statement, and is dated 5 May 2020, very close to the hearing. That statement included some assertions as to the law, and quoted extracts of the Collaboration Agreement between the parties (which I deal with in detail below). It also went into considerable detail concerning the chronology of the dispute from October 2019 up to the date of the statement, and (for the first time, at least so far as evidence from TW is concerned) made it clear that TW was refusing to engage in the expert determination procedure expressly included in the Collaboration Agreement, taking what is said to be a jurisdictional objection. This, as I have explained, was missing from each of his first two statements.
14. I gave counsel for TW, Mr Owen, an opportunity to explain this at the hearing itself. He stated that it was understandable that TW’s solicitors had not dealt with this subject in any detail, due to the detail of the chronology of the dispute between the parties. He also explained that neither of the references by HH of the dispute to expert determination “had been pursued”. I do not consider that this is the correct way to describe a dispute resolution process which HH initiated, twice (once in October 2019, and once in March 2020) and in respect of which TW refused to agree to the nomination of an expert, and in respect of which TW challenged the jurisdiction of the expert, in respect of both references.
15. All of the authorities make it clear that, provided the jurisdictional threshold required under CPR Part 31.16 is surpassed, whether an order under CPR Part 31.16 is made is a matter of the court’s discretion, and this requires a fact based analysis that will be different from case to case. I consider that HH’s attempts to refer this dispute to

expert determination (in accordance with the express provision to that effect within the Collaboration Agreement between the parties); TW's stance in those proceedings; and the statements made on HH's behalf to TW that proceedings in the High Court would not be issued; are all factors relevant to the exercise of that discretion. None of these matters are sufficiently dealt with in the evidence in support of the application. I am however satisfied that as of the date of the hearing, the evidence by both sides gave me sufficient information on these matters for me correctly to consider all the matters relevant to determine the application fairly and in accordance with both the Rules and the authorities.

B. The Agreement between the parties

16. The background to the dispute is as follows. The dispute concerns drainage on land at Lindley Moor, Huddersfield, West Yorkshire ("the Site"). Stirling Scotfield (Huddersfield) LLP ("Scotfield") was the owner of the site and for development purposes decided to split it into three parts. The other two parts are each owned therefore by TW and HH, with Scotfield retaining a parcel which is referred to in the documents as the Retained Land. Scotfield, TW and HH are all parties to an agreement called the Collaboration Agreement, which is dated 23 June 2015. It provided for the development of the Site, which is split effectively into three: (1) the Retained Land (i.e. Scotfield's land), (2) the TW Land, and (3) the HH Land. The HH Land is called the Harron Land in the Collaboration Agreement.
17. The Site was developed. The Retained land has three industrial units built upon it (which I am told are automotive dealerships, but that does not impact upon the issues). Both the TW and HH Land have been used for residential development; the TW Land has 133 houses built upon it, and the HH Land 119 houses. All three parties applied for planning permission together, and by a contract of sale dated 17 March 2015, Scotfield sold the TW Land to TW, and the HH Land to HH. HH commenced its works on the HH Land about one year earlier than TW became involved in works on the Site.
18. The Collaboration Agreement obliged TW and Harron each to construct drainage on their respective land to adoptable standards and in accordance with designs of a consultant, called iD Civils Design Limited ("iD Civils"). TW did not directly engage iD Civils. HH managed the engagements for the HH Land and, subsequently, the TW Land, although TW does have the iD Civils drawings for the TW Land. This arrangement obviously made sense given the involvement of HH on the HH Land so much earlier than TW (a period which I was told was about one year earlier). Under the Collaboration Agreement, the parties agreed to carry out construction works on their respective areas of the Site so that the drainage systems would be constructed correctly, and to adoptable standards and in accordance with the Permission for Development – Application Number 2014/62/93136/W dated 8 May 2015, to allow connection to the main sewer system and approval by Yorkshire Water.
19. Drainage is, generally, required to be what is sometimes called "adopted" by the relevant statutory undertaker, which in this case for this Site is Yorkshire Water. There are drainage issues with both the TW Land and the HH Land. Although the evidence states that Yorkshire Water has refused to approve the drainage from the HH Land, there appear to be wider issues between the parties than the refusal (if refusal it

be) to adopt by Yorkshire Water. It is the drainage of the HH Land, and the drainage of the TW Land, which has led to a dispute between TW and HH.

20. HH is the Developer who engaged iD Civils, and is also named as the Developer for the purposes of Yorkshire Water and its adoption of the drainage for the site. Yorkshire Water is dealing with HH, and the witness statements for TW state that Yorkshire Water will not deal with TW. However, there is no reason why Yorkshire Water should deal with TW. The adoption of the drainage is something that has been agreed by the parties to the Collaboration Agreement would be dealt with by HH. Further, this is not an application for pre-action disclosure against Yorkshire Water, it is one against HH.
21. Given HH and TW are, effectively, in control of adjacent parcels of land, there are potential causes of action *inter se* both (or either) under the Collaboration Agreement or, potentially, those that would arise under the tort of nuisance. However, I refer to this point for completeness only, because nuisance is not central to the existing dispute between HH and TW. That is said to arise from the terms of the Collaboration Agreement itself, and indeed in Recital F of that agreement it is stated that TW and HH, who are together with Scotfield defined as Developers “wish to enter into this Agreement to provide for their respective rights and responsibilities with regard to the Development”. The Development is defined in clause 1.1, “Definitions”, as “the development of the Site in accordance with the Planning Permission”. The agreement is therefore the relevant source of the parties’ rights and obligations in respect of the dispute.
22. The other provisions of the Collaboration Agreement, which is dated 23 June 2015, which are relevant to this application are to be found in Clause 24. This is headed “Disputes” and contains the following:

“24.1 Save as otherwise provided herein any dispute or difference which shall arise between the Developers as to the construction of this Agreement or as to the respective rights duties and obligations of the Developers or as to any other matter arising out of or connected with the subject matter of this Agreement shall at any time by serve of a Dispute Notice be referred to an Expert for Expert Determination.”
23. The clause provides for the appointment of an expert by one of the nominated appointing bodies in the event that the Developers cannot agree on their identity, those bodies being the usual ones to be expected in an agreement and in a clause such as this one, such as the Leeds Law Society, the RIBA, the RICS, the ICE and the Royal Town Planning Institute.
24. Clause 24.6 states “the Expert when conducting the Expert Determination shall have the powers set out in Schedule 10” and that Schedule to the Collaboration Agreement sets out certain aspects of his or her powers relevant to this application. These include at paragraph 2, where the expert can “require the delivery of written and/or oral representations including without limitation witness evidence and documentation by either Developer at such time and in such form as the Expert shall state”. Another provision is that contained in paragraph 7 which states that the Expert shall “conduct the Expert Determination inquisitorially and take the initiative in ascertaining the fact and the law”. “Fact” is probably correctly read as “facts”, but the lack of the plural form does not make any difference in my judgment. The only other relevant provision

is that at clause 34 which is a governing law and exclusive jurisdiction clause in favour of the courts of England and Wales.

25. On 4 October 2018 HH commenced the pre-action protocol against TW by sending a pre-action protocol letter of claim for TCC claims. HH stated that TW's drainage (which is another way of saying the drainage which serves the TW Land) was not constructed to adoptable standards. On 30 November 2018 TW responded to this, and did not accept that there was anything deficient in the drainage for which TW was responsible. HH and TW held a protocol meeting on 20 February 2019 which did not lead to the dispute being settled or resolved. The quantum of the claim which HH intimated against TW was originally stated to be £233,611.28 plus VAT, but that figure is now somewhat higher, and it is now stated to be £558,155.63 plus VAT. Although that figure is not an insignificant sum, it is not large by comparison with the sums usually at stake in litigation in the TCC. Indeed, the total costs expended by both parties simply on this application alone, which by definition is before any proceedings have been issued, are respectively £18,116 for HH and £51,028 for TW. That sum is itself in aggregate over 12% of the total sum in dispute on the figures provided to the court.
26. HH also issued a notice of dispute to expert determination dated 30 October 2019. TW took various points in respect of that determination, not least what appears to be a jurisdictional objection, and 10 March 2020 HH tried again and served another or second notice of dispute to expert determination. TW relies upon, or putting it at its lowest, draws the court's attention to, clause 38.2 of the Collaboration Agreement which contains the exclusive jurisdiction clause in favour of the courts of England and Wales. However, that is something that I will revisit at [50] below.
27. There are some other points of note. TW did request some documents from HH during the pre-action protocol process, and these were provided. TW did not request the documents the subject of this application before February 2020. HH disclosed with its first dispute notice for expert determination an expert report of Mr Taylor. That report refers to 4 drawings that TW says it does not possess.
28. Some of the evidence before me goes into considerable detail about the subject matter of the dispute in relation to which the categories of documents are sought. However, this application does not require an analysis of the merits of the underlying dispute. That is not the function of the court when considering an application for pre-action disclosure. Although, if one reaches that step in the process, the discretion of the court is exercised when deciding whether or not to make such an order (if the necessary jurisdictional threshold is crossed), it will, in my judgment, only be in the very rarest of cases that the merits of the underlying dispute will be considered on a pre-action application such as this one. The hesitancy of the court in this respect is made clear in *Rose v Lynx Express Ltd* [2004] EWCA Civ 447.
29. The dispute as it is framed in the notice of expert determination concerns the flow of water from TW Land and/or from TW drainage systems into the HH area of the site and the HH drainage systems. TW states in its correspondence and evidence that the issues HH has encountered are as result of HH not carrying out its works on the drainage system on its part of the Site to the standard required in the Collaboration Agreement. In particular, that certain aspects of the drainage are not fit for purpose and are not to an approved "adoptable standard".

C. The law

30. Turning to the relevant principles, the power to order pre-action disclosure (which is contained in section 33(2) of the Senior Courts Act) is codified in CPR Part 31.16. That lays down the requirements that have to be satisfied for an order for pre-action disclosure.

31. There are the following elements of the test under CPR Part 31.16 that must be satisfied before an order will be made. The rule states at Part 31.16(3):

“(3) The court may make an order under this rule only where --

(a) the respondent is likely to be a party to subsequent proceedings;

(b) the applicant is also likely to be a party to those proceedings;

(c) if proceedings had started, the respondent’s duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to:

i. dispose fairly of the anticipated proceedings;

ii. assist the dispute to be resolved without proceedings; or

iii. save costs.”

32. The leading authority on this ability by the court to order the disclosure of documents prior to proceedings actually starting is *Black v Sumitomo* [2001] EWCA Civ 1819. In that case Rix LJ laid down certain principles and explained the approach that should be taken by the court when considering such an application. He explained that there was both a jurisdictional threshold and a discretionary test, and said at [73] the following:

“The jurisdictional threshold is not, I think, intended to be a high one. The real question is likely to be one of discretion, and answering the jurisdictional question in the affirmative is unlikely in itself to give the judge much of a steer as to the correct exercise of his power.”

33. He also stated at [77] that:

“It also seems to me to follow that if there would be considerable doubt as to whether the disclosure stage would ever be reached, that is a matter which the court can and should take into account as a matter of its discretion.”

34. Finally, Rix LJ accepted that in some cases it would or may be difficult to keep the two stages of the process separate from one another:

“[82] Of course, since the questions of principle and of detail can merge into one another, it is not easy to keep the two stages of the process separate. Nor is it perhaps vital to do so, *provided* however that the court is aware of the need for both stages to be carried out. The danger, however, is that a court may be misled by the ease with

which the jurisdictional threshold can be passed into thinking that it has thereby decided the question of discretion, when in truth it has not. This is a real danger because first, in very many if not most cases it will be possible to make a case for achieving one or other of the three purposes, and secondly, each of the three possibilities is in itself inherently desirable.”

35. The first three requirements of the rule are clearly threshold tests. Here, both TW and HH would be parties in subsequent proceedings, and the documents sought would be disclosable under standard disclosure. Although, given the attempt by HH to engage the contractual dispute resolution mechanism, there must be considerable doubt as to whether that disclosure stage would ever be reached (because there is doubt that HH will ever initiate those proceedings in court, given its attempt to use the expert determination process) that is something that *Black* makes clear ought to be taken account of in the discretionary consideration that is required once jurisdiction for such an order has been established.
36. The requirement in (3)(d) of the rule is treated as involving both a jurisdictional element as well as a discretionary element. The jurisdictional element is that an applicant must show that there is a real prospect in principle of one of the stated objectives in 3(d) being met. The discretionary element is whether, as a matter of discretion, disclosure is considered to be desirable.
37. As Steel J stated in *Hutchison 3G (UK) Ltd v O2 UK Ltd and others* [2008] EWHC 55 (Comm) at [55]:
“It must be that, in almost every dispute, a case could be made out that pre-action disclosure would be useful in achieving a settlement or otherwise saving costs. It follows, in my judgment, that, in order to obtain pre-action disclosure, the circumstances must be outside “the usual run” to allow the hurdle to be surmounted: *Trouw UK Ltd v Mitsui & Co (UK) Plc [2006] EWHC 863 (Comm)* at [43]. The point is a somewhat barren one. The absence of any convincing grounds for distinguishing the case from the normal run would be telling grounds for not exercising the court’s discretion. But for the moment I will consider the topic in the context of jurisdiction.”
38. Miss Briggs for HH submitted that it should be particularly out of the normal where an applicant was the putative defendant, as TW is here, rather than a party seeking documents pre-action in order to know whether they have a claim or not, and/or if so against whom, and what the details of their causes of action are. I reject that submission. I do not consider that the fact that a party seeking pre-action disclosure may be a potential defendant in those proceeding rather than a claimant makes any difference to the jurisdictional hurdle to be surmounted, particularly where as here that party states it has a counterclaim. It might be said that if an applicant were likely to be a defendant, rather than a claimant, the discretion might be exercised differently in the sense that “saving costs” must mean (or at least include) costs of the litigation, and there is extra uncertainty in that if the applicant itself is not the entity contemplating commencing those proceedings. However, in my judgment this type of case specific factor can, and should, be considered at the discretion stage.
39. In *Jet Airways (India) Ltd v Barloworld Handling Ltd* [2014] EWCA Civ 1311 the Court of Appeal considered an appeal from an order for pre-action disclosure made by

Burton J in the Commercial Court. The underlying facts concerned an extensive fire at Heathrow Airport and its cause. It appeared to have started in a forklift truck. The applicant successfully persuaded Burton J that maintenance records and such like of the respondent's forklift fleet for a period of two years prior to the fire ought to be disclosed, and he found that the experts would be "stymied" without such documents as the actual forklift in question had (not surprisingly) been completely destroyed in the fire. The appeal against that decision failed. Moore-Bick LJ, in giving the judgment, stated that *Black* was the leading authority on the interpretation of the rule. I would add that disclosure of the type sought in that case, on those facts, appears to me to be typical of the unusual type of case in which such an order would be justified. The potential claimant, literally, would have had nothing for its experts to consider concerning its potential claim absent the documents it sought. Here, it can be seen from the categories of documents sought by TW that this simply is not the case.

40. The parties also cited a number of authorities that are first instance applications of the principles set down in *Black*. Given the exercise of the discretion is so highly fact specific, the fact that in other cases such orders have, or have not, been made does not necessarily take one very far. However, one first instance case which is of direct relevance is that of *Birse Construction Ltd v HLC Engenharia SA* [2006] EWHC 1258 (TCC) because it contains dicta in relation to TCC cases generally. Jackson J (as he then was) stated at [25] the following:
"In many TCC cases, disclosure is a labour-intensive exercise and a major head of costs. Therefore, disclosure before the proper time is not something which should be lightly ordered. On the other hand, the court encourages the early and candid exchange of information in the hope that this will promote settlement before excessive costs are incurred. Alternatively, it is hoped that the parties may at least narrow the issues between them. This is part of the philosophy which underlies the Pre-action Protocol for Construction and Engineering Disputes. It should be noted that this is the only pre-action protocol which requires a meeting between the parties before they resort to litigation."
He also added at [29] "Given the level of co-operation between opposing parties, which is a normal feature of TCC litigation, I would not expect an order for pre-action disclosure to be appropriate in most cases which come before this court."
41. I fully endorse those views and cannot usefully add to them, other than making the following two observations, the first of which will be expanded upon in Section E of this judgment. The Collaboration Agreement between the parties in this case contains an expert determination provision, expert determination being a type of alternative dispute resolution or ADR. ADR has a vast number of advantages to parties to commercial agreements. It enables parties to have their disputes decided privately, by specialists either chosen by the parties jointly or, in default of agreement, by a body specifically appointed for that purpose. It is almost always far quicker than litigation, and almost always far cheaper, to have disputes resolved in this way. The court in all cases will be astute to prevent pre-action disclosure being used either to frustrate, impede or interfere with contractually agreed ADR mechanisms.
42. The second observation is to note that the parties in this case participated in the pre-action protocol, and TW attended the meeting of the parties required under the protocol, about one calendar year *before* requesting these documents. This is a factor relevant to the exercise of the court's discretion.

D. *The jurisdictional threshold*

43. Miss Briggs submitted in her written skeleton argument that the threshold necessary for jurisdiction was not crossed by TW on this application. This was because HH had indicated, through its solicitors, that it did not intend to issue proceedings in the High Court, and had instead sought to resolve the dispute through the expert determination process contained in clause 24 of the Collaboration Agreement. I do not accept that submission, which was the subject of some direct criticism by Mr Owen. The stated current intention by HH is not binding in the sense that HH would not be permitted in law to issue a claim at any time before the expiry of the limitation period, nor does it create a jurisdictional hurdle. I consider that the jurisdictional threshold is crossed. As Rix LJ stated in *Black*, it is not a high hurdle. However, this disavowal by HH of an intention to commence proceedings against TW is a factor relevant to the exercise of the discretion. The next stage of the process therefore requires consideration, namely whether the order for pre-action disclosure ought to be made in the exercise of the court's discretion.

E. *Discretion*

44. This is an entirely routine commercial dispute between two parties. There is certainly nothing unusual or out of the normal run of things in this case. There are two particular features which, however, will not be present in many commercial disputes, which in my judgment are central to the exercise of the court's discretion.
45. These are as follows. Firstly, the fact that the respondent HH is attempting to have the dispute resolved by the contractual mechanism contained in clause 24 which provides for expert determination. Secondly, the fact that TW is attempting to avoid that process by taking jurisdictional objections. Whether these objections will prove to be ultimately well-founded or not is not something that can be resolved on this application. However, it is notable, in my judgment, that the documents which TW seeks are clearly those that could be obtained within that expert determination process. This is because, as explained at [24] above, the expert's powers contained in Schedule 10 to the Collaboration Agreement clearly give the expert the ability to order production of these documents. Mr Owen accepted that the expert would have the power to order production of these documents. In one sense, this application could be seen as an interference with that expert process. However, whether it is or not, the attempts by HH to adopt the contractually agreed mechanism to resolve the dispute, rather than issue proceedings in the High Court, is an important factor.
46. A further feature is that the parties to this dispute have already engaged in the pre-action protocol process, including holding a meeting pursuant to that protocol in February 2019. TW evidently did not consider the documents which it seeks in this application to be particularly germane to that process, as although it did request some documents during the protocol period (which were provided), it did not request those the subject of this application. Yet a further feature relevant to the exercise of the discretion is that HH have said, through their solicitor, that HH does not intend to issue proceedings.
47. HH maintained that this application was what it termed a "fishing expedition". What that term is usually taken to mean is that a party is seeking documents in the hope that

something of use *might* turn up. I doubt that this is the aspiration with which expert fishermen and fisherwomen embark upon their trips; but given the court's experience in this respect is strictly limited to the term as it is used in disclosure applications, I am confident that HH and Ms Briggs do not intend the description to be a complimentary one.

48. Mr Owens sought to persuade me that TW was, as he put it "outside the loop", an expression taken from the dicta of Jackson J in *Birse*. I disagree with that categorisation. They are not remotely outside the loop. Both TW and HH were jointly involved in attempting to resolve the drainage issues initially, in terms of investigations on site. TW is a party to the Collaboration Agreement. In any event, the Collaboration Agreement agreed expressly which of the parties would be responsible for which elements of the collaboration, and for which elements of the works. HH was designated to be the contact with Yorkshire Water, for example. Mr Owen also submitted that there were, as he put it, potentially decisive points of principle on liability and causation which could not be determined without the documents. I disagree with him about that too. The dispute between these parties seems to me to be one that would turn upon expert analysis, and there is an expert determination procedure available to do precisely that. That submission is somewhat undermined by the fact that TW did not consider these documents to contain potentially decisive points of principle on liability and causation until February 2020, even though the pre-action protocol process started in late 2018.
49. So far as the reference to expert determination is concerned, Mr Owen did his best to persuade me either that this was not particularly relevant, and/or that because a letter of claim had been sent by HH under the pre-action protocol, proceedings were still contemplated by HH. He also stated, referring to the commencement of the expert determination process (in paragraph 42 of TW's skeleton) "However, clause 38.2 of the Collaboration Agreement contains an exclusive jurisdiction clause in favour of the courts of England and Wales."
50. All that provision in the contract does is the same as explained by Thomas LJ in *Barclays Bank v Nylon Capital LLP* [2011] EWCA Civ 826 where, in the context of an agreement that contained both an expert determination clause and an exclusive jurisdiction of the court clause, the future Lord Chief Justice explained the following at [28]:
"In contradistinction [to arbitration clauses] expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the court (or if there is an arbitration clause by arbitrators). The rationale of *Fiona Trust* does not therefore apply, as the parties have agreed to two types of dispute resolution procedure for disputes which might arise under the agreement. The LLP agreement illustrates this: the parties agreed by Clause 26.2 to submit to the exclusive jurisdiction of the English courts, but reserved specific disputes under Clause 26.1 to the expert. They carved out of the exclusive jurisdiction of the English courts, to which they had submitted all disputes between the parties, a limited class of dispute."
51. Without finally determining the point, because the issue on this pre-action disclosure application does not require final determination of any challenge to the jurisdiction of any expert appointed to undertake the expert determination procedure, the dispute

between the parties as it was explained to the court in the evidence appears to me, at least *prima facie*, to be precisely the type of dispute that falls within the expert determination procedure agreed by the parties in clause 24.

52. Mr Owen also sought to persuade me that, because clause 24 required a decision from the expert within 28 days, that was another reason why I ought to make the order TW seek on the application. I reject that submission. There is nothing in the evidence submitted by TW to support that submission. Further, 28 days is the contractually specified period for the expert determination process. Yet further, deadlines such as that can be extended by agreement. Finally, in the age of electronic communications, with almost instantaneous transmission of documents, 28 days is a generous period. All of these points also simply reinforce how any order on application in the terms sought is not justified.
53. I consider that all the facts of this case demonstrate how unlikely it is that the disclosure stage of any litigation in the TCC will be reached in this case. In arriving at that conclusion, I have taken into account the full chronology of the dispute, including all the correspondence, together with the parties' earlier intention to litigate, and the more recent reference by HH to expert determination. HH's stated intention to use expert determination rather than litigation is one of the factors that I have considered, but it is not the determinative point.
54. Despite Mr Owen's polished submissions, I consider that there is nothing in this case that would justify an order in TW's favour in any event, even absent the ongoing expert determination reference. When one takes that expert determination reference into account, however, it is plain that this application ought not to succeed for this reason. Making such an order would run the very real risk of contravening the principle which I have explained at [41] above, namely allowing pre-action disclosure to be used either to frustrate, impede or interfere with the contractually agreed ADR mechanisms contained in the Collaboration Agreement. It would also undoubtedly do the opposite of what Jackson J identified in [25] of *Birse*, namely promote settlement. It would, in my judgment, impede the expert determination process, and interfere with and undermine any expert appointed to determine the dispute, and also directly impact upon the contractually agreed timetable for that to occur.
55. Nor does it matter, in my judgment, whether such interference is intentional, or whether it be merely a side-effect of making such an order. Here, the documents necessary or desirable for the proper conduct of the expert determination reference are a matter for the expert, not for the court. They certainly are not desirable (still less necessary) within the test contained in CPR Part 31.16. I therefore dismiss the application.
56. Finally, although this is not determinative, I consider it notable that TW did not request these documents during the pre-action protocol period itself, which ran until February 2019.

F. Conclusion

57. It follows therefore that the application by TW must fail. I indicated this result to the parties at the conclusion of the hearing, and therefore dealt with costs on that

occasion. Accordingly, there are no consequential matters that remain to be dealt with. I am grateful to both counsel and solicitors for their helpful submissions, and the cooperative and constructive approach to the remote hearing. Such hearings are not entirely straightforward, and require greater flexibility and co-operation than parties to litigation – even specialist litigation – are used to.