TRANSCRIPT OF PROCEEDINGS

Ref. HT-2019-000475

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2022] EWHC 2116 (TCC)

7 Rolls Buildings
Fetter Lane
London

Before MRS JUSTICE O'FARRELL DBE

IN THE MATTER OF

(1) NORTHUMBRIA HEALTHCARE NHS FOUNDATION TRUST
(2) NORTHUMBRIA HEALTHCARE FACILITIES MANAGEMENT LIMITED — **Claimants**

- and -

(1) LENDLEASE CONSTRUCTION (EUROPE) LIMITED
(2) LENDLEASE CONSTRUCTION HOLDINGS (EUROPE) LIMITED — **Defendants**

- and -

BALFOUR BEATTY KILPATRICK LIMITED — **Third Party**

BALFOUR BEATTY GROUP LIMITED — **Fourth Party**

MPB STRUCTURES LIMITED — **Fifth Party**

KEPPIE DESIGN LIMITED — **Sixth Party**

BRIGGS AMASCO LIMITED — **Seventh Party**

IKO UK LIMITED — **Eighth Party**

HORBURY BUILDING SYSTEMS LIMITED

Ninth Party

HORBURY JOINERY LIMITED

Tenth Party

HORBURY GROUP LIMITED

Eleventh Party

MR S BRANNIGAN QC, MS GILLIES, MR P HENNESSEY and MR N HIGGS instructed by Addleshaw Goddard LLP, appeared on behalf of the Claimants
MR V MORAN QC and MS L GARRETT QC instructed by Cameron McKenna Nabarro Olswang LLP, appeared on behalf of the Defendants
MS D RAWLEY QC (instructed by Shepherd and Wedderburn LLP) appeared for the Third and Fourth Parties (BBK)
MR B QUINEY QC (instructed by DAC Beachcroft LLP) appeared on behalf of the Sixth Party (Keppie)
MR A GUPTA (instructed by Knights) appeared on behalf of the Eleventh Party (HGL)

JUDGMENT
13th JULY 2022

MRS JUSTICE O'FARRELL:

Specific disclosure

1. This is the defendants' application dated 22 June 2022 for specific disclosure, pursuant to CPR 31.12, of documents that concern the claimants' claim for the costs of decanting the hospital into a specially constructed four storey building during the remedial works that are the subject of these proceedings.

2. The application is supported by the first and second witness statements of Mr Mark Breslin, solicitor for the defendants, dated 28 June 2022 and 6 July 2022 respectively. The defendants' application is also supported by the Third and Fourth Parties ("BBK") and the Sixth Party ("Keppie").

3. The application is opposed by the claimants; their response is set out in the fourth witness statement of Mr John Emerton, solicitor acting on behalf of the claimants, dated 8 July 2022.

4. The documents that are sought are set out in Appendix 1 to the application. Appendix 1 identifies some 27 separate categories of documentation sought.

5. Following a letter dated 1 July 2022 from the claimant, together with a tranche of a further 95 documents and the claimants' response to the application, the issues have somewhat narrowed. There now remain two broad issues that are in dispute, summarised by Ms Garrett QC, leading counsel for the defendants, in her skeleton argument:

a. whether the claimants' assertion to privilege is correctly asserted in respect of requests 1, 2, 3, 4, 15, 19, 20, 21 and 24; and
b. whether the documents generated by or for the claimants' consultant team considering decant are relevant and disclosable - requests 9 and 12.

6. The court makes the following observations before considering the merits of the application.

7. First of all, the application is very late indeed, given that this matter is due to be tried on 24 October of this year with an estimate of eight trial weeks. The proceedings were started in December 2019. The decant claim by the claimant was advised to the defendants in 2019 and pleaded by mid-2020 with a value of some £50 million; that has increased now to some £73 million. But the decant claim has always been a significant issue in these proceedings and indeed is the largest value item in the claim.

8. Secondly, disclosure was given, by way of extended disclosure, in November 2020. The parties agreed the disclosure issues for the purpose of extended disclosure and agreed the custodians, the search terms and other parameters. Perhaps surprisingly, given the value of the claim, there was no agreed search term relating to 'decant'. Unsurprisingly, therefore, relatively little by way of documentation was produced by way of decant issues, although 456 documents in respect of the decant scheme were disclosed. However, it was not until January 2022 that the defendants raised any issue with regard to the scope of disclosure in relation to the decant issue.

9. Thirdly, in the disclosure of November 2020 the claimants set out the general basis on which privilege was asserted, not by listing every document over which privilege was

claimed but by reference to various categories of documents. A similar approach was taken by the defendants. Again, no issue was taken with the way in which privilege had been asserted until earlier this year.

10. Fourthly, the court is concerned that, given the proximity to the trial, no application for specific disclosure was made at the two-day case management conference held on 18 and 19 May 2022, at which there would have been time to consider the arguments before the court today and have the application dealt with in the written judgment that was handed down on 25 May 2022.

11. It is recognised that the above delays do not preclude the defendants from making an application for specific disclosure at this stage but it is a significant fact that the court will take into account, as is set out in paragraph 31.12.1.1 of the White Book.

12. A further observation that the court makes is that the documents sought in Appendix 1 comprise very broad categories of documents; they are not, for the most part, specific documents that have been identified in witness statements or other documents but rather are classes of documentation that have been referred to in other documents or that the defendants would expect to find in disclosure on this case. It is the sort of application that might have been expected, firstly, under the CPR 31 regime, which does not apply in the Business and Property Courts where the disclosure pilot applies, and, secondly, it is the sort of application that the court might have expected in the early stages of the proceedings following disclosure in November 2020.

13. Again, that is not in itself a reason for dismissing the application, but it does mean that the court will scrutinise carefully the categories of documentation sought against the available timescale for any disclosure to be met.

14. Turning, then, to the first issue that is in dispute, that concerns the issue of privilege. The test that is applicable was set out by this court in the judgment that it handed down following the last CMC: *Northumbria v Lendlease* [2022] EWHC 1266 (TCC):

> [80] Paragraph 14.1 of the disclosure pilot at Practice Direction 51U provides that a party who wishes to claim a right or duty to withhold disclosure or production of a document, part of a document, or class of documents, which

would otherwise fall within its disclosure obligations, may exercise that right by describing the document or class of document and explaining the grounds on which it claims that right or duty. Paragraph 14.2 provides that a party who wishes to challenge the exercise of such a right or duty must apply to the court by application notice supported where necessary by a witness statement.

[81] The scope of legal privilege was described in *Three Rivers District Council v Governor and Company of the Bank of England (No.6)* [2004] UKHL 48 per Lord Scott at [10]:

"Litigation privilege covers all documents brought into being for the purposes of litigation. Legal advice privilege covers communications between lawyers and their clients where legal advice is sought or given."

[82] The requirements for litigation privilege were set out in *Three Rivers* per Lord Carswell at [102]:

"… communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied:

(a) litigation must be in progress or in contemplation;

(b) the communications must have been made for the sole or dominant purpose of conducting that litigation;

(c) the litigation must be adversarial, not investigative or inquisitorial."

[83] In *Starbev GP Ltd v Interbrew Holding BV* [2013] EWHC 4038 (Comm.) Hamblen J (as he then was) stated that the legal requirements of a claim to litigation privilege could be summarised as follows:

"(1) The burden of proof is on the party claiming privilege to establish it – see, for example, *West London Pipeline and Storage v Total UK* [2008] 2 CLC 258 at [50].

(2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative and are evidence of a fact which may require to be independently proved. The court will scrutinise carefully how the claim to privilege is made out and the witness statements should be as specific as possible – see, for example, *Sumitomo Corporation v Credit Lyonnais Rouse Ltd* (14 February 2001) at [30] and [39] (Andrew Smith J); *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) at [52], [53], [86] (Beatson J); *Tchenguiz v Director of the SFO* [2013] EWHC 2297 (QB) at [52] (Eder J).

(3) The party claiming privilege must establish that litigation was reasonably contemplated or anticipated. It is not sufficient to show that there is a mere possibility of litigation, or that there was a distinct possibility that someone might at some stage bring proceedings, or a general apprehension of future litigation – see, for example, *United States of America v Philip Morris Inc* [2004] EWCA Civ 330 at [68]; *Westminster International v Dornoch Ltd* [2009] EWCA Civ 1323 at paras [19] – [20]. As Eder J stated in *Tchenguiz* at [48(iii)]: "Where litigation has not been commenced at the time of the communication, it has to be 'reasonably in prospect'; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility".

(4) It is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. If there is another purpose, this test will not be satisfied: *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583, 589-590 (cited in *Tchenguiz* at [54]-[55]); *West London Pipeline and Storage Ltd v Total UK Ltd* at [52].”

[84] Paragraph 31.3.6 of the White Book states that the test for legal advice privilege is whether the communication or other document is made confidentially for the purpose of legal advice. Those purposes have to be construed broadly. Communications passing between a party and its solicitors are privileged from production, provided they are confidential and written to, or by, the solicitor in their professional capacity, and for the purpose of getting legal advice or assistance for the client.

[85] In *R (Jet2.com Ltd) v The Civil Aviation Authority* [2020] EWCA Civ 35, the Court of Appeal confirmed at [95] that for communications or documents to fall within the scope of legal advice privilege, they had to be created or sent for the dominant purpose of seeking legal advice, i.e. that the test is the same as the test for litigation privilege in that particular respect, and communications covered by legal advice privilege include documents which evidence the substance of such confidential communications.

[86] Such privilege extends to internal communications where an employee has been tasked with seeking and receiving such legal advice: *Jet2.com Ltd* per Hickinbottom LJ at [47]:

“… where the relevant client is a corporation, documents or other materials between an employee of that corporation and a co-employee or the corporation's lawyers, even if required or designed to equip

those lawyers to give legal advice to the corporation, do not attract LAP unless the employee was tasked with seeking and receiving such advice on behalf of the company."

[87] In *West London Pipeline and Storage Ltd v Total (UK) Ltd* [2008] EWHC 1729, Beatson J set out the approach that the court should take in cases where a claim to privilege was challenged at [86]:

"(1) The burden of proof is on the party claiming privilege to establish it: see *Matthews & Malek on Disclosure* (2007) 11-46, and paragraph [50] above. A claim for privilege is an unusual claim in the sense that the party claiming privilege and that party's legal advisers are, subject to the power of the court to inspect the documents, the judges in their or their own client's cause. Because of this, the court must be particularly careful to consider how the claim for privilege is made out and affidavits should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect: *Bank Austria Akt v Price Waterhouse*; *Sumitomo Corp v Credit Lyonnais Rouse Ltd* (*per* Andrew Smith J)."

(2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in an affidavit are not determinative and are evidence of a fact which may require to be independently proved: *Re Highgrade Traders Ltd; National Westminster Bank plc v Rabobank Nederland.*

(3) It is, however, difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from:

(a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed: *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co*, per Lord Esher MR and Chitty LJ; *Lask v Gloucester Health Authority.*

(b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect: *Neilson v Laugharane* (the Chief Constable's letter), *Lask v Gloucester HA* (the NHS Circular), and see *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co,* per A L Smith LJ.

(c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points: Jones v Montivedeo Gas Co; Birmingham and Midland Motor Omnibus Co v London and North West Railway Co; National Westminster Bank plc v Rabobank Nederland."

[88] In the subsequent case of *WH Holding Ltd v E20 Stadium LLP Ltd* [2018] EWCH Civ 2652), the Court of Appeal emphasised that the court has a general discretion in such cases – that is, it does not have to

> accept an affidavit as conclusive. However, the examples given by Beatson J of situations where the court would not be satisfied in relation to legal advice privilege, are indicative namely, where: (i) from the statements of the party making it, it is reasonably certain that he has erroneously represented or has misconceived the character of the documents in respect of privilege claimed; (ii) the evidence of the person who directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect; or (iii) other evidence before the court shows that the affidavit is incorrect or incomplete on the material points.
>
> [89] Where the court is not satisfied that the right to withhold inspection is established, the court may order inspection; it may order a further witness statement to deal with those matters; it may inspect the documents, although this should be a last resort, in part, because of the danger of looking at documents out of context at the interlocutory stage; and the court may, in certain circumstances, order cross-examination of the person who has made the witness statement.

15. Those principles are equally applicable to the application before the court today.

16. The first area for consideration is a group of clinicians who were convened in what has been termed the Small Project Group to consider decant options. That issue is dealt with by Mr Emerton in his witness statement, where he indicates the issues that arose in relation to decant and the fact that it would be very rare for the detail of such issues to be discussed at board level:

> "40. The Trust is governed by the Trust Board, which is comprised of Non-Executive and Executive Directors. The Trust Board aims to meet on a monthly basis. The Trust's focus upon patient well-being is confirmed on any analysis of the Trust's Board Minutes, amongst other documents, which overwhelmingly focus on clinical issues. Unlike businesses such as the Defendants, litigation with other parties will rarely form the focus of the discussions held between Board members. This is not to say that the claim against the Defendants is not important; it is. It is simply not the most important thing that the Trust does and does not occupy any significant amounts of discussion at Board level.
>
> 41. …The Claimants became aware as early as 2018 that the remediation of the catastrophic defects at NSECH would likely require decant (however undesirable the prospect of decant is).
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> 42. Having resolved in early 2018 that some form of decant of NSECH will be required to enable the defects to be remediated, whilst continuing to operate the Hospital and provide the vital public services, the Board has not had to engage further and separately to this litigation with the minutiae of planning such a process. The principle that decant is required has never changed and

> there is little more to be said or discussed at Board level beyond the acknowledgement that it is now known that it needs to occur and that the precise form of decant will need to be "sorted out" through the litigation. It is clear also that the Defendants hold an ingrained belief and expectation that documents (such as board minutes) will discuss, in some detail, matters which are significant in the claim. Those assumptions are misplaced. Board meetings at Trust level will rarely, in my experience, discuss matters relevant to litigation in any great detail and that is particularly the case with regards to the question of decant. This is because, at a high level, the principle of decant is a straightforward one in that the Claimants have demonstrated that, because of the criticality and practicalities of delivering clinical care, they cannot reasonably remediate NSECH without patients being decanted to another facility."

17. Mr Brannigan QC, leading counsel for the claimant, has explained to the court that the Trust Board took the decision that decant was necessary. The document relating to that decision has been disclosed, but, as Mr Emerton sets out in his witness statement, there was no significant involvement by the Trust following that decision; they were more concerned with dealing with the operation of the hospital and the welfare of those who worked or resided in the hospital.

18. However, the Small Project Group was set up to respond to a request for further information, initially raised in 2020, and thereafter to provide further material and information for the purpose of the pleadings. Mr Emerton explains that Mr Beasley, then at Turner & Townsend, was instructed to assist the claimants in further developing and advancing the decant scheme. :

> 44. … Mr Beasley, assisted by Addleshaw Goddard, worked with the Trust, (including a group of clinicians led by Andrea Stoker) to provide responses to the queries raised in the RFI. The Claimants' response to that RFI was issued on 19 June 2020 and it was concluded, following the work Mr Beasley and the Trust had carried out, that a three-storey decant facility, as originally envisaged would be insufficient and instead there was a need for the decant facility to be four-storey.

19. As Mr Emmerton asserts, given those discussions were carried out in conjunction with Mr Beasley and Addleshaw Goddard and for the purposes of responding to the RFI, issued as part of the litigation, they are plainly privileged.

20. Documents produced for further meetings held by the Small Project Group are also dealt with by Mr Emerton:

> "45. Following the Claimants' response to the Defendants' first RFI, Mr Beasley continued to work for the Claimants and the small project group of clinicians, led by Andrea Stoker and Beth Godwin, to further understand and consider the decant scheme as initially set out in the Claimants' response to the Defendants' RFI.
>
> 46. In January 2021, at my firm's request, Mr Beasley and the small project group of clinicians led by Andrea Stoker and Beth Godwin were finalising what decant scheme was workable in the clinical environment that exists at NSECH and should, therefore, be pleaded, supported by a statement of truth."

21. Mr Emerton then deals with the fact that there were further RFIs in relation to the decant scheme:

> "48. For context, the small project group of clinicians led by Andrea Stoker and Beth Godwin only met six times between February 2021 and the RFI being served on 13 August 2021. The purpose of those meetings was to deal specifically with responses to requests for further information issued by the Defendants and to finalise the decant scheme that was going to be included in the Claimants' pleadings. The Claimants ultimately provided an amended decant scheme by way of an amended response to the Defendants' first RFI on 13 August 2021."
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> 49. As I have now explained, all of these meetings were convened by my firm at our request to allow us to develop and plead the decant scheme that would be needed in our answers to the RFIs and our pleadings. I do not understand how it can be said that those meetings and any minutes or notes of them are not privileged."

22. I agree with that last sentence. It is clear to the court that the Small Project Group was formed for the express purpose of dealing with the RFIs and the pleading of the claimants' case on decant. It did not have a secondary purpose, let alone a dominant purpose of considering the appropriate decant scheme for the purpose of operating the hospital, or indeed for the purpose of reporting to the Trust Board so as to obtain a decision as to any specific works to be carried out.

23. As Mr Brannigan has explained to the court, the Trust is not in a financial position to carry out the remedial works which would necessitate any decant scheme, if any. Therefore, at this stage the plans that have been put forward are to specifically produce a claim that can be made within these proceedings so as to obtain the necessary funding for the Trust to carry out an appropriate remedial scheme.

24. Ms Garrett QC, leading counsel for the defendants, has suggested that parts of the documents produced and/or discussed by the Small Project Group might not be covered by privilege. It is accepted that such an assumption might be made if the court were concerned with meetings of other general groups, for example the Trust Board, whose purpose covers a range of issues. But it is not apt where the group has been formed specifically for the purpose of the conduct of litigation, which is the position in this case.

25. For those reasons, the court is satisfied that all relevant Trust Board documents have been disclosed and the claimants have made out a good claim for privilege in relation to the documents relating to the Small Project Group.

26. Turning to the other categories of documents identified in Appendix 1 and in dispute, documents concerning the suitability of the McAvoy Building, an additional wing of the hospital, for the purposes of the decanting option. Use of the McAvoy Building is an alternative option that is being put forward by some of the other parties as something that the Trust could and should have considered and/or decided upon as an alternative to a new temporary four-storey building, which is now the contemplated and preferred option by the Trust in this case.

27. Mr Emerton explains in his witness statement at paragraph 68 that the claimants considered the potential use of the McAvoy Building as a decant facility in 2018 but did not pursue it. It is common ground that the claimants have disclosed documentation indicating that potential use of the McAvoy Building as a decant facility was contemplated in 2018 but by mid/late 2019 that option had been discarded. There is nothing in the evidence before the court that indicates that there are additional documents regarding any consideration of the McAvoy building that have not been disclosed.

28. On that basis, the court is not prepared, particularly at this late stage, to make an order either that the claimants produce a witness statement, setting out the searches carried out, or carry out further searches for further disclosable documents.

29. I then turn to the second category of documents, which is those relating to documents generated by or for the claimants' consultant team appointed to develop and consider the decant scheme, requests 9 and 12:

a. Request 9: Reports, advice, design documents and minutes of meetings from and/or involving P+HS, Lichfields, Milestone and Mott MacDonald in relation to the space options on the existing NSECH site, decant options and decant generally.
b. Request 12: Reports, advice, minutes of meetings, notes and correspondence between and/or involving the Trust, P+HS, Lichfields, Milestone and Mott MacDonald in relation to the long-term use for the decant facility generated in the period April 2020 to date (including internal Trust documents).

30. It is not sufficient on an application for specific disclosure to explain to the court that the documents sought are generally relevant to the issues, in this case decant. It is important that where the court is considering an application for specific disclosure, particularly in the light of the disclosure pilot and the regime that applies, that an application for specific disclosure identifies the disclosure issue against which such disclosure is requested, which is not the same as the pleaded issues in the case.

31. The claimants' position is that generally documents have been disclosed where they are relevant, responsive, and not covered by privilege.

32. The defendants have not identified in their application any specific documents arising from identified meetings or in relation to specific issues that have not already either been disclosed, or that go to specific disclosure issues that the court will have to resolve.

33. For those reason, the defendants' application for specific disclosure is dismissed.

Disclosure issue raised by Keppie

34. I have considered the disclosure issues raised by the other parties. Mr Quiney QC, leading counsel for Keppie, has raised a specific concern regarding Mr Beasley, who is the claimants' decant expert. The concern is that, as I set out in the quotation from Mr Emerton's witness statement, Mr Beasley was involved in the discussions with the other

members of the Small Project Group. Mr Quiney's concern is that as a result of that involvement, Mr Beasley might have acquired information, and/or obtained documents, that he might rely upon in forming his opinion, but which is not available to the other experts. Mr Quiney understandably is concerned that there should be an equality of arms as between the experts and that Mr Beasley should not have any unfair advantage.

35. The court accepts that general principle. However, at this stage there is nothing to suggest that Mr Beasley does have any information and/or documents that are not available to the other experts.

36. Mr Brannigan has stressed that Mr Beasley will not rely on any evidence that is not available to the other experts. Mr Quiney fairly responded that Mr Brannigan could not tie the hands of his expert in that way.

37. However, it is clear that if the experts are all discharging their duties to the court, they should, in their without prejudice meetings, disclose any information and/or documents that they have that they will be relying upon for the purpose of forming their opinions. Certainly, if the experts express specific opinions in their reports they must identify the source of their information and any documents that they rely upon in arriving at those opinions.

38. Therefore, the court will not make any specific order at this stage about documents relating to Mr Beasley's discussions and/or meetings with the Small Project Group; it simply reminds the parties at this stage as to the obligations on the part of the experts. If it transpires that Mr Beasley is relying on information and/or documents that have not been made available to the other experts, then that is a matter, first of all, that the court will take a poor view of, but, secondly, that would give rise to an application for specific disclosure that would be met by the court with a sympathetic ear.

Disclosure issue raised by BBK

39. Finally, on disclosure, I turn to the issue of BBK. Ms Rawley QC, leading counsel for BBK, has raised a point that, although not the subject of a formal application for disclosure, is a matter that has been raised with the claimants and which she wished to raise before the court.

40. The claimants have provided continuity plans to BBK that consider the position of the claimants in the event that there were to be a disruption to its BMS and/or other facilities.

41. The significance of that is that it has very recently been pleaded against BBK that if it is found to be liable for firestopping defects, that it would then have imposed on it responsibility for the decant scheme, whether in full or in part. BBK has met that new claim with a further re-amended defence and counterclaim in which it calls into question whether the firestopping defects, if established, would give rise to congestion and pinch points during the course of any remedial scheme that would require decant, as opposed to being capable of being carried out during planned shutdowns.

42. It is for that reason that BBK seeks documentation that considers emergency responses by the claimants in the event of any loss of significant facilities.

43. It has now been established that, in fact, the place where that information is to be found is not in the continuity plans, but in a document entitled Emergency Response Plan. Unfortunately, there are a number of those documents. Ms Gillies, counsel for the claimants, has explained that there are some 43 documents, not all of which will be remotely relevant to the issues that BBK is interested in.

44. The claimants have indicated that they are prepared to disclose relevant Emergency Response Plans. Apparently there are four such documents that have been identified as being relevant, in that they are referred to in the continuity plan. Those can be provided to BBK, along with an index to all the Emergency Response Plans. From that the parties can discuss, and hopefully agree, the relevant areas that are of significance and the key words to use in order to identify the documents that should be disclosed.

45. Given that level of engagement between the parties, I will not make any formal order at this stage; indeed, there is no formal application before the court. I will indicate that there should be liberty to apply by either party if it is necessary for the court to resolve any outstanding dispute. If it turns out that there is a relatively short dispute on that particular issue, it could be dealt with by the court through an electronic application, rather than dragging the parties back to court.

46. That resolves the issues raised by the parties in respect of disclosure issues.

Eleventh Party's application to strike out or for summary judgment

47. The Eleventh Party, Horbury Group Ltd ("HGL"), has issued an application dated 4 July 2022 for summary judgment and/or an order striking out the Part 20 claim against it by the defendant.

48. The issue, in general terms, is whether there was any valid executed parent company guarantee issued by HGL in respect of the work carried out by the Ninth Party, Horbury, which carried out the dry lining and internal partition works, and the external render works.

49. The issue is pleaded in the defendants' Re-Re-Amended Additional Claim against the Horbury Parties as follows:

> 151A. Lendlease has an executed deed in the terms of the Horbury Group Guarantee. A copy of this document has been provided to Horbury, HJL and Horbury Group. The said document does not identify on its face whether it relates to the Horbury Dry-Lining Sub-Contract or the Horbury Render Sub-Contract.
>
> 151B. In a witness statement signed by Mr Worth on behalf of Horbury, HJL and Horbury Group dated 3 December 2020 Mr Worth states that Horbury Group has no record of having provided a parent company guarantee to Lendlease.
>
> 151C. In a witness statement signed by Mr Wragg on behalf of Horbury, HJL and Horbury Group dated 3 December 2020 Mr Wragg states of the document provided by Lendlease that it may be that the document relates to another project.

50. In its Amended Defence, HGL pleads as follows:

> 2. … Horbury Group's case is that it has not provided any relevant parent company guarantee and is not liable to Lendlease…
> …
>
> 6. LL-C paragraph 151A is denied save as follows:

6.1 Whilst it is admitted that Lendlease has produced the document to which it refers, paragraph 157 above is repeated; the document relied upon by Lendlease does not identify the project or subcontract to which it may relate, is unsigned by Lendlease and is undated.

6.2 It is averred that Lendlease does not plead whether, on its case, the document does or does not constitute a valid parent company guarantee on the terms of the Horbury Group Guarantee in respect of Horbury's obligations under the Horbury Dry-Lining Sub-Contract and/or under the Horbury Render Sub-Contract. The case is embarrassing.

7. LL-C paragraph 151B is admitted…

8. LL-C paragraph 151C is admitted … The relevant passage of the Witness statement of Mr Wragg dated 3 December 2020 … stated at paragraphs 24 to 25:

> … I have looked in our files for a parent company guarantee provided to Lendlease in relation to the project and have been unable to find one, or any evidence that one was ever requested or sent.
>
> … I understand that Lendlease has provided to our solicitors a copy of an uncompleted guarantee under cover of a letter dated 2 December 2020. Having looked at that document, it does not refer to any particular sub-contract or even the works at Cramlington. HBSL has carried out other work with Lendlease, and so it may be that this document relates to another project.

51. The application is not before the court today for disposal. Mr Gupta, counsel on behalf of HGL, seeks the court's directions with a view to listing its summary judgment/strike out application before the trial, either in vacation, if possible, or perhaps at the pre-trial review currently listed in September of this year.

52. Mr Gupta submits that the summary judgment application is primarily concerned with the construction of documents, namely the purported parent company guarantee document relied upon by the defendants, and a couple of emails under which presumably the document was sent to the defendants and/or there was a discussion about it. Mr Gupta submits that this is primarily a question of legal argument. No witness evidence has been served in respect of the application on either side in relation to this issue and the matter could, therefore, be dealt with by a hearing estimated to last half a day. If that could be accommodated by the court, Mr Gupta's clients would, if successful, avoid any participation in the trial, which is listed to commence in October of this year with an estimate of eight weeks.

53. The application for the summary judgment/strike out application be listed prior to trial is opposed by the defendants. Mr Moran QC, leading counsel for the defendants, submits that the issue is not as straightforward as portrayed by Mr Gupta. There is a witness statement which has been produced by Mr Wragg, of the Ninth Party, in which Mr Wragg has stated that Horbury has no record of having provided a parent company guarantee to the defendant. Mr Moran's position is that if this summary judgment application is to be dealt with, then the defendants would want to have an opportunity to cross-examine Mr Wragg on his statement. Therefore, it will not simply be a question of construing a few documents.

54. Mr Moran makes the following points in respect of the timing of the application. First, the application could have been made at any time over the last 18 months but HGL has waited until a short period until the start of the trial. Second, this application would cause huge disruption to the defendants' legal team were they to have to deal with these issues separately and out of sequence. The defendants need to focus on the expert evidence on decant, quantum and valuation, none of which has yet been served. Third, the half day estimate given by HGL in its application notice is unrealistic; the application raises a number of potentially complicated legal and factual issues. Fourth, there is a real risk that the parties would not have the result before the start of the trial in any event. Fifth, it would be possible to timetable the trial such that those representing HGL need only attend the trial for opening submissions relating specifically to the claim against it and, to the extent relevant, the evidence of Mr Wragg.

55. It is clear that that the defendants' complaint about lateness is well made. The re-amended Particulars of Claim against HGL were made in September or October of 2021. The Horbury defence was filed in December 2021 and the reply in January 2022. Therefore, it was open to HGL to issue the application for summary judgment/strike out from at least the autumn of 2021. It did not need, in fact, to wait to put in a defence. It could have issued the application at any time from 2021 onwards.

56. The court is not persuaded by the argument that HGL needed to wait until witness statements were served in March 2022. If the application for summary judgment had been made earlier, of course it would have been incumbent on both sides to produce whatever witness statements they wished to rely upon. If the application had been issued last autumn

then the court would easily have been able to find a relevant date in order to resolve the issue well in advance of the trial.

57. Unfortunately, it is now made at a time when it is not possible to fit in even a half day, let alone a whole day, application for summary judgment before the end of term. It is difficult to list things during vacation and, as Mr Moran has stated, the parties in this litigation have an awful lot to do before the start of the trial. Indeed, at the last CMC in May, by agreement the start date of the trial was pushed back by three weeks in order to give the parties a bit more time to prepare for the trial. Since that CMC, there has been more slippage and a few more applications, so things are very tight indeed.

58. If the defendants were required to accommodate a summary judgment hearing between now and the start of the trial, that would involve them in additional work and the application of additional resources that would disrupt their preparation for the trial. In the context of the lateness of the application, it would not be fair or reasonable to require the defendants to accommodate that level of disruption in this case.

59. Further, it seems to the court that this might not be a short or simple issue to resolve in any event. It is common ground that the defendants were sent a document that purports to be a parent company guarantee. There is a real possibility that the court might be invited to consider that the parent company guarantee that was sent to the defendants must relate to this project, in part because of the timing at which it was sent, but also because if Horbury was not doing any other work for the defendants then the guarantee could only relate to this project. If HGL wishes to rely on other projects which Horbury carried out for the defendants, as intimated in its defence, which could potentially have explained the parent company guarantee, then presumably evidence would be required in that regard. Therefore, the factual evidence is unlikely to be confined to a few short statements and limited documentation.

60. Finally, I accept Mr Moran's submission that the liability of HGL under the parent company guarantee, if there is one, is dependent on findings against Horbury. Horbury has admitted a breach in failing to provide and execute a parent company guarantee to the defendants. Those are matters that will be dealt with at the trial. It would be unsatisfactory

for HGL not to have the opportunity to be present at the trial and, therefore, not to be bound by those findings.

61. For all those reasons, the court rejects the application for the summary judgment application to be heard before the trial.

62. HGL has agreed to clarify for the other parties what participation, if any, it intends to have in the forthcoming trial. It can then be factored into the timetable that will be discussed by the parties for the trial. That will mean that attendance by HGL, and the costs, can be limited to what it consdiers necessary. It may be that the summary judgment application could be dealt with within the trial timetable, if that can be accommodated. For all those reasons, the court declines to list the summary judgment application at any stage prior to the start of the trial.
