



Neutral Citation Number: [2022] EWHC 275 (TCC)

Case No: HT-2020-000074

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

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

Date of Hearing: Tuesday, 18<sup>th</sup> January 2022

**Before:**

**MR. JUSTICE WAKSMAN**

**Between:**

**CAMBRIDGESHIRE COUNTY COUNCIL**

**Claimant**

**- and -**

**(1) BAM NUTTALL LIMITED**

**(2) KONINKLIJKE BAM GROEP N.V**

**(a company incorporated in the Netherlands)**

**(3) ZURICH INSURANCE PUBLIC LIABILITY  
COMPANY**

**(a company incorporated in the Republic of Ireland)**

**Defendants**

**MR. PIERS STANSFIELD QC and MS. SARAH WILLIAMS** (instructed by **BDB  
Pitmans LLP**) for the **Claimant**.

**MR. PATRICK CLARKE and MR. CHRISTOPHER REID** (instructed by **Addleshaw  
Goddard LLP**) for the **Defendants**.

**APPROVED JUDGMENT**

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**MR. JUSTICE WAKSMAN :**

1. I am asked to give guidance on the approach to the formulation of the issues for disclosure which of course form a fundamental part of the disclosure review document. Both sides have already spent substantial amounts of time and costs in seeking to agree this document, and the counsel themselves have tried hard to try and reach agreement. However, there is something of an issue of principle which divides them and effectively it is this, that in many of the cases the claimant's approach to what the disclosure issue is, is to pick up the essential pleas but without going into the particulars which are set out in the pleading.
2. For example, taking issue 4, the allegation here is that the LBUs, which effectively constitute the track on which the guided buses would run, have behaved more stiffly or inflexibly than they should have done, to be in accordance with the settlement tolerances under the accepted design, and that has all sorts of consequences.
3. The plea in response to that is that that is not the case and in fact the approach to the design of the guideway allowed for the alignments to be maintained in the form of maintenance by adjustments going forward, and in that way it would be wrong to say that any initial inflexibility, if there was any, was a defect. I am summarising very broadly and simplistically there.
4. In the particulars of claim, that was the introductory paragraph and then there were numerous subparagraphs as well. The claimants say that the approach they have taken is sufficient to capture the issue for disclosure which arises in relation to paragraphs 76 to 84 of the particulars of claim.
5. The defendants' approach is to be more granular (to use an often used word) in the sense that the broad allegation which is framed in the terms of saying that the stiffness was too much and whether that constitutes a defect and has otherwise caused or contributed to a breach of the contract on the part of Bam Nuttall is too broad and would, on any view, as the particulars that come afterwards show, raise questions of matters which are solely the province of the expert, and also possibly matters of law, both sides, and therefore the approach should be much more specific.
6. The claimants disagree with that, but their fallback position is that if one is going to do that, there are a lot more specific matters that need to go in and that is why we have 4B, 4C and 4D. Both sides have relied upon the *McParland* decision as favouring their approach. It is undoubtedly correct that the Chancellor, as he then was, was making the general point that a list of issues should not be too granular or complex. I appreciate that he made those remarks generally. He is however not dealing with a very substantial construction contract claim which is highly technical in nature and where the whole question of design, for which there will obviously be documents, is a critical issue.
7. He accepted the parties' relatively granular issues as they had chosen, in that case, which was a standard breach of confidence case in relation to an employee and termination and so on. Although he accepted the parties' formulated issues, of which there were 16, he said in fact you could reduce them to three: What was the commercial relationship, and how and when did they succeed, one company succeed the other; what did the defendant do over the two-year period which was in breach;

and three, what loss did one or other of the claimants suffer as a result of those breaches? That is really the way that the Chancellor would have decided if he had started from a blank piece of paper.

8. At the same time, he makes the point that under the old regime looking at documents that simply support a party's case was far too broad. There is clearly much room for nuance, and it depends in my judgment to a significant extent on the type of case that it is.
9. I can see the force of Mr. Stansfield's point in one sense, because it can be said that if you simply say that is what the breach is, then the other party should be able to discern which disclosure matters would be for the expert and which are not. But on the other hand, it has already been shown by the limited argument that we have had today that there would be a question as to whether 4B, which the claimants would put in the alternative, is in fact implicit within 4 overall, because Mr. Reid had some misgivings about that, although I think we were able to resolve most of them.
10. What I think in a case of this kind I am influenced by is, one, there is a significant amount of work that has gone into this document which I would prefer not to be wasted; secondly, I do think here that the claimant's formulae are too general and it is possible they would give rise to disputes further down the line as to what is included within, for example, item 4 or not.
11. The parties having invested the time in it, it seems to me that the way forward is to finish off this process. After all, we have now reached the stage where the claimants have actually, as their alternative, put in the extra green bits. That has been done. I am not suggesting it is a five minute job, but what remains is effectively to tweak those green bits.
12. For example, when Mr. Reid said that 4B is wholly unfocused, actually it is not, because it is only talking about a range of documents relating to the specific point that is made by way of defence in relation to 8.6. It is not asking for all design documents in relation to anything. So it seems to me that, with a bit of cooperation by both sides, it would be possible to finish off this exercise in the way that I have suggested.
13. Mr. Stansfield makes a separate point, which is that he does not know what categories of documents the defendant might have that might relate to these matters, and he is concerned that documents would be overlooked. I adopt what Mr. Reid says, I am not regarding this as some deliberate attempt by the defendants to resist disclosure. We will come on to design in a minute. I think the way to deal with it in fact is not to categorise at this stage the documents. You just simply say "documents relating to" that particular feature. That, I think, strikes a balance between giving the defendants the help of being more specific on each category than just a generalised item 4 type approach, but giving the claimants the security of knowledge that, at least at this stage, the category of documents is not going to be narrowly defined, which might run the risk that something does not get disclosed that should be disclosed. So that is my guidance going forwards.

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**This Judgment has been approved by Waksman J.**

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