



LEGAL BRIEFING

McLennan Architects Ltd v (1) Jeremy Jones; and (2) Helen Roberts

[2014] EWHC 2604 (TCC), Mr Justice Akenhead

The Facts

McLennan Architects ("the Claimant") claimed for payment in relation to architectural and project administration services as well as for work as a contractor carried out at the home of Mr Jones and Ms Roberts ("the Defendants") in Oxford ("the Property"). The amount of the claim was £235,875.54.

In response the Defendants served a defence which included allegations of fraud on HMRC and overseas. They denied any liability for further payment. The Defendants also issued a Counterclaim for £325,544.33 for breach of contract by the Claimant. The Claimant's Reply and Defence to Counterclaim vigorously denied any allegation of wrongdoing and noted that *"the suggestion that a trail of invoices would assist the Claimant to obtain international work, which by that time it was not seeking, is absurd."* Any losses occasioned to the Defendants by employing others to finish the works were *"a product of their own breach and irrecoverable."*

The costs budgets were £316,000 for the Defendants and £201,000 for the Claimant meaning that the costs on each side broadly equated to the sum in issue. The parties had earlier in the year attempted to resolve the claims amicably but with no success. The Court was now asked to determine two applications, one being an application by the Claimant to grant access to their IT expert to the Defendants' electronic devices to investigate and report on the creation and parts of specific emails ("the IT Application").

The expert put forward by the Claimant was said to have found no evidence at the Claimant's end of tampering with the emails at the centre of the fraud allegation. The application, when initially mooted, had been made for access to the Defendants' electronic devices, and in particular the laptop owned by Mr Jones and a company apparently owned by him. The application had initially included taking a copy of the entire hard drive of that laptop.

The Issue(s)

The most interesting issue arising out of the Judgement was whether the IT Application should be granted, and what factors should be taken into account when dealing with an application for the inspection of property.

The Decision

The Judge noted, before reviewing the case law and the Civil Procedure Rules ("CPR"), that the application had, following a strong judicial hint at an earlier hearing, reduced the request for access to four e-mails and the associated metadata. The objections to the application therefore appeared largely to have been waived prior to the hearing.

However the Judge took the opportunity to review the key case law on this issue (*M3 Property Ltd v Zedhomes Ltd* [2012] EWHC 780 (TCC)) and give guidance on such applications in the future. He noted that in order for the Court to have the power to make an order under CPR 25.1 it must be satisfied that the order is *"both necessary and proportionate"* and that it is consistent with the Overriding Objective of the CPR.

Mr Justice Akenhead noted the following factors which *"might properly and legitimately be taken into account"*:

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- (a) The scope of the investigation must be proportionate;
 - (b) The scope of the investigation must be limited to what is reasonably necessary in the context of the case;
 - (c) The searches authorised should exclude disclosure of privileged or confidential documents which have nothing to do with the case in question;
 - (d) Regard should be had to human rights legislation if the information has nothing or little to do with the case;
 - (e) Access to a complete hard drive would rarely be granted unless dedicated to a particular contract or project;
 - (f) The court should also require a confidentiality undertaking from any expert or person given access to the electronic devices covered by the order.

Commentary

In a world when applications for access to specific electronic data and associated metadata are becoming increasingly common, it is worth noting the practical guidance for a party seeking to make such an application that can be taken from this Judgment. Most importantly, don't be greedy and/or launch a fishing expedition. Any application should be narrowed down to what is really required to prove (or disprove) a claim.

Further, by offering to put in safeguards to ensure that confidentiality and privacy are protected (for example, by proactively offering confidentiality undertakings on behalf of an expert and ensuring both parties have a copy of what is taken) the Courts are much more likely to view any such application favourably.

Finally, Mr Justice Akenhead took the opportunity to emphasise once again that in relatively low value cases where the costs are in line with what is in issue, the Courts will encourage parties to reach a settlement amicably whenever possible.

Claire King
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