

Legal Briefing

Ted Lowery considers an application for disclosure under Practice Direction 57AD

Irwell Riverside Developments Limited v Arcadis Consulting (UK) Limited [2023] EWHC 2864 (TCC)

In the Technology and Construction Court

Before Neil Moody KC sitting as a Deputy Judge of the High Court

Judgment delivered 15 November 2023

The facts

IRDL appointed Arcadis to design, amongst other elements, the concrete podium slabs for three apartment blocks at Upton Riverside in Salford. The Arcadis appointment was novated to the main contractor and Arcadis provided IRDL with a collateral warranty.

During June 2020, following the pouring of the podium slab for block C, Arcadis identified a problem with its design and in consequence, remedial works were required to the block C slab and the design for blocks A and B was revised. IRDL subsequently brought proceedings against Arcadis under the collateral warranty claiming some £21 million including damages for delay, remedial works costs, loss of sales, loss of development opportunity and extended finance charges.

The case management directions were agreed in an order dated 9 December 2022 and provided for extended disclosure in accordance with Practice Direction 57AD. The Disclosure Review Document agreed between Arcadis and IRDL set out the list of issues, the custodians, the search methodology and confirmed that IRDL would carry out Model D disclosure.

IRDL's external provider initially harvested 961,346 documents: applying the agreed date ranges and search terms yielded 22,768 documents, reduced to 20,232 documents after de-duplication. Following a manual review for relevance by solicitors, IRDL disclosed some 2,079 documents. Arcadis queried the paucity of the disclosure so IRDL provided access to the 23,000-odd

documents produced when applying the date ranges and search terms. Arcadis nonetheless contended that many documents remained missing. IRDL maintained that it had given Arcadis all the documents that had been generated by the process agreed in the Disclosure Review Document so there was nothing more that it could or should do: that expected documents had not been identified did not mean there had been a failure to comply with the 9 December order.

Arcadis issued an application under paragraphs 17 and 18 of PD57AD seeking orders that, in relation to sixteen categories of documents, IRDL should serve a further Disclosure Certificate, carry out further searches, prepare a revised list and serve a witness statement explaining why certain documents did not exist or could not be located.

The issue

Was Arcadis entitled to any of the orders applied for?

The decision

Where Arcadis did not dispute the agreed search terms, custodians or disclosure issues and was not looking to vary the 9 December order, the judge considered that the application properly concerned only paragraph 17 in PD57AD. The judge also noted that the application did not clearly link the documents sought with the issues for disclosure listed within the Disclosure Review Document, nor explain why there had been a failure to comply with the order. He further observed that the cooperation between the parties required by PD57AD had been absent and that the present application had the appearance of an (inappropriate) application for specific disclosure under CPR 31.12.

Following these initial observations the judge considered each of the sixteen categories, taking into account how the application was framed, the relevance of the documents sought to the Disclosure Review Document issues and overall proportionality.

The judge declined to make any orders in relation to nine of the document categories, including on grounds that Arcadis had not explained what it wanted IRDL to do, had not identified specific documents for disclosure or could carry out their own searches of the documents that had been disclosed. In relation to the remaining seven categories, the judge made orders for further searches pursuant to paragraph 17.1(2) in PD57AD,

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primarily because he accepted the possibility that IRDL could have taken an erroneous approach to relevance when manually reviewing documents and not fully complied with the 9 December order. He directed that where any further documents were found, they should be produced pursuant to paragraph 17.1(4), a further list prepared under paragraph 17.1(3) and insofar as any documentation falling within these categories could not be found or was said not to exist, this should be explained in a witness statement by IRDL's proper officer in accordance with paragraph 17.1(5).

Commentary

PD57AD came into force in the Business and Property Courts on 1 October 2022 with the aim of ensuring that time and costs spent on disclosure are proportionate.

This case illustrates how the court will approach applications for relief under the new disclosure regime: the judgment includes guidance on the form and substance of such applications - in particular the need to be clear as to what has not been done and what needs to be done - and highlights the importance of cooperation between the parties.

Ted Lowery
December 2023