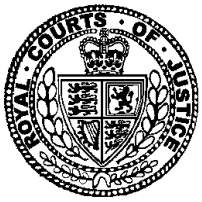

Neutral Citation Number: [2018] EWHC 311 (TCC)

Case No: HT-2018-000364
HT-2018-000015

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

7 Rolls Buildings, Fetter Lane
London EC4A 1NL

Date: Friday, 9th February 2018

Before:

MR. JUSTICE FRASER

- -

Between:

CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES, S.A.	**Claimant**
- and -	
HIGH SPEED TWO (HS2) LIMITED	**Defendant**

- -

MS. FIONNULA McCREDIE QC, MR. EWAN WEST and MR. JACK WILLIAMS (instructed by **Stephenson Harwood LLP**) for the **Claimant**
MS. SARAH HANNAFORD QC and Mr. SIMON TAYLOR (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

- -

Approved Judgment

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MR. JUSTICE FRASER:

1. I am going to give a short judgment on this situation about contested disclosure, and the claimant's applications in this respect. My views I will express at the end but they will become obvious during this ex tempore judgment.

2. This case is a procurement challenge brought by the claimant against HS2. The subject matter of the procurement is for the rolling stock necessary for the HS2 Project. This is a project which, as everybody knows, is a very high profile public infrastructure project to link London to other more distant parts of the country with high speed trains. It is a project of national importance and the overall cost of the whole project is measured in many tens of billions of pounds.

3. The procurement challenge is not to the award of the contract for the rolling stock itself, it is in respect of the decision by HS" that the claimant not be shortlisted as one of the bidders to participate in the invitation to tender ("ITT") exercise for that rolling stock. The ITT is to be sent out to the shortlisted bidders in April 2018. The Expression of Interest ("EOI") that was lodged by the claimant was 29 June 2017 and it was notified by HS2 that it had not been shortlisted on 1 November 2017. Thereafter there has been an extraordinarily tendentious series of correspondence between solicitors acting for the claimant and those acting for HS2 concerning disclosure. It does not make for edifying reading. It is very lengthy, and extremely tendentious, litigation by correspondence. In my view a watershed date in this case is indeed the date that the claim was actually issued which was 30 November 2017. Whatever the position of those advising HS2, and HS2 itself, prior to 30 November 2017, it was obvious that as of 30 November 2017, and the issue of the claim form on that date, that a procurement challenge had in fact been commenced by the claimant. That was followed by a very lengthy document, the Particulars of Claim in the first claim, which is dated 7 December 2017. Legal proceedings were as of that date underway, and cooperation was needed in order to determine those proceedings sensibly.

4. As a result of that pleading being served, it must have been obvious (and I am using this particular document as an example for what has come next, and also as an example of an obstructive attitude, in my judgment, on the part of HS2 and/or its advisers) that certain highly relevant and obvious documents connected with the procurement evaluation, such as the full rationale document including all the moderations to scoring of the claimant's EOI, were properly discloseable documents. As I have said, this is merely an example. But when the parties came before me for the very first time on 20 December 2017, that document had still not been disclosed by HS2. Indeed, what has happened in the run up to each of these hearings – and I genuinely have lost count of the number of times these parties have been before me in the last month and a half arguing about disclosure, but it is likely to be in double figures – is that an unhelpful attitude has been adopted by HS2 in respect of different criticisms of its disclosure before every single hearing.

5. This has invariably then been followed by an actual hearing before me, at which Ms. Hannaford, leading counsel for HS2, presents usually a very reasonable picture which will almost always involve very sensible offers on behalf of HS2. This will be either for further steps to be taken by HS2 in this respect, or for disclosure to take place in due course of documents in question, that have been hotly contested prior to the hearing. I have reminded myself of my notes of the hearing of 20 December 2017 because on that

occasion the parties asked at a very early stage in this action for an expedited trial. This was because the invitation to tender is being distributed by HS2 to the shortlisted bidders at the end of April 2018.

6. I was persuaded that it was therefore going to be necessary to have a trial either in very late February or very early March, so that a decision could be made by the court as to whether the claimant could participate in that stage of the bid process. This is a very tight timetable. Given this is a project of national importance, delaying the tender process for the procurement of the rolling stock may well delay completion of the whole HS2 project. I ordered an expedited trial. In those circumstances it seemed to me when I came in to court that day that it was, frankly, astonishing that the full rationale document had not already been disclosed to the claimant showing how its EOI had been scored by HS2. Ms. Hannaford told me on that first occasion, as part of an exchange about disclosure, that disclosure of various documents would take place either later that day or the next day, and therefore it looked as if a reasonable attitude had in fact broken out. It should be remembered that this was three weeks *after* the claim had been issued, and only (approximately) 10 weeks before the parties were saying a trial had to be held to avoid disrupting the whole programme of the HS2 procurement.

7. I can see now with hindsight of what has occurred from 21 December through to today, 9 February, that that approach to disclosure by HS2 has been repeated, if I may say so, again and again and again. I do not accept that it is justifiable, or explicable, simply because of a very tight expedited timetable. This is a timetable which, it has to be said, has gone completely to pieces as a result of the claimant not obtaining early and prompt disclosure of obviously relevant documents. The parties agreed, if not proposed that timetable to trial, and central to it was the concept of co-operation between them. The shorter the timetable, the greater the degree of co-operation expected.

8. In respect of the number of applications that the parties have been before me on disclosure, there have been the following witness statements. They are numerous. They are the fifth witness statement of Mr. Thwaite for the claimant, dated 30 January 2018; the second witness statement of Ms. Zar for HS2, dated 26 January 2018; the third witness statement of Ms. Zar dated 30 January 2018; the sixth witness statement of Mr. Thwaite dated 1 February 2018 and the fourth witness statement of Ms. Zar dated 1 February 2018. There was a hearing at the end of last week before me where I ordered another witness statement from Ms. Zar to deal with two factors in particular which had seemed to me to be rather surprising. One was that the in-house lawyer at HS2 who was (I was told in submissions) supervising this exercise had not had her or his involvement properly identified to the court. The second was that it appeared on the face of the evidence before the court on that occasion that the procurement lead himself – the person in charge of the procurement exercise under challenge - was the person who was deciding the relevance of his own documents to disclose. That led to another witness statement of Ms. Zar, the date of which escapes me but I believe it was earlier this week, which was her sixth witness statement. That was preceded by a trip to court by both junior counsel on Monday 5 February who told me that actually that witness statement was going to take, or was taking, longer than was ordered, which meant that the hearing of the disclosure application then had to be moved. That witness statement was served, and itself raised some new, very serious and obvious points which led to the seventh witness statement of Mr. Thwaite dated 7 February. That means there are at total of seven witness statements on disclosure thus far from <u>both</u> parties. They are

very detailed. They include within them both claim and rebuttal of what I consider to be really an extraordinary situation on disclosure.

9. This disclosure application which has, in the end, gone over two days, has yet again been dealt with reasonably on the day (or rather on the two days) in the sense that most of the points argued by the claimant have been agreed by Miss Hannaford. However, it is wrong for HS2 to believe that by doing so, they have effectively either "won" on the application or that there has been some sort of a "tactical draw" outcome on the application. Ms. McCreedie describes the disclosure exercise to date by HS2 (and I am using her expression) as "a shambles". She also says it takes it well out of the norm.

10. I simply would draw the parties' attention to the detailed terms of the order that is going to emerge from yesterday and today's application because there is the need, yet again, for another witness statement from Ms. Zar for HS2 dealing with some quite important points. There are about six or seven of these points. They are dealt with, in the body of the order. I am not going to go through them in detail. Some of them simply should not come up at all on a properly conducted disclosure exercise, even one performed on a tight timetable such as this one. As an example, the independent evaluators (namely those not employed by HS2) have not even, until yesterday, been asked by HS2 or its advisers to confirm that they have no personal notes of the procurement scoring exercise in their possession or on their laptops.

11. In my judgment this disclosure exercise genuinely has been something wholly out of the norm. I do not accept it is normal case management to have to deal with applications of this nature, either in terms of frequency or content. I do not accept that it has arisen as a result of the timetable. I do not accept that it is effectively just something that can be, or should be, expected if there is an expedited trial. In my judgment it requires and justifies an unusual order.

In your short order, Ms. McCredie, paragraph 3, should that not be "applications" or is there just one application?

MS. McCREDIE: It should be plural, my Lord.

MR. JUSTICE FRASER: Thank you.

12. I am going to grant the claimant its costs of the disclosure applications and its attendances at the hearings which were identified in that paragraph of the draft Order, on an indemnity basis, which I summarily assess today in the sum of £135,780.37. The fact that I have troubled to identify that figure down to, and including, the pence is to make it clear that every single penny that has been claimed I am awarding. I am not, however, prepared to order the defendant to pay the claimant's costs of that disclosure exercise between those dates in the form sought, but I am going to make an order that the costs of the disclosure exercise between 26 January and 9 February 2018 be the claimant's costs in case subject to a detailed assessment on the indemnity basis. The effect of that is, if the claimant wins in its procurement challenge, it will have its costs of the disclosure exercise during that period on an indemnity basis. If it fails in the procurement challenge it will not recover them, but the defendant will not be able to recover its costs either.

13. I am just going to add the following exhortation to the parties. It may be that I have inadvertently encouraged this heretofore and I want to make it clear what the situation is going forward. We are now going to deal with the trial timetable. There is going to have to be regular attendance at court to check that the action remains on the rails – and that is an unintended pun. However, it is not intended to encourage the parties to come to court on a short notice basis, practically every week, sometimes twice a week, without issuing applications in proper time and without serving upon one another their evidence in proper time. There has been so much last-minute material in this case that leading counsel for HS2 does not even have the bundle in the same form as the rest of those in court and, in particular, me. There have been so many late witness statements I genuinely have lost count of them. I do not think more than one or two have been served with the notice required by the CPR itself, and the last minute nature of this approach has been to increase costs and disrupt the hearings themselves. The court is prepared to be flexible and constructive, particularly where a timetable is so compressed and where the project the subject matter of the dispute is so valuable and important. But that does not mean that normal standards of behaviour are not expected of the parties; rather to the contrary, in fact.

14. From now on going forward this action is going to proceed, please, on a proper basis and observing proper time limits. This is an instruction and not a request. I am not saying there will not be circumstances where emergencies will not crop up very occasionally from time to time, but the court should not be seen as some sort of a standing resource available to this case at the expense of other court users, and will iron out every single minor quibble between the parties that could and should, with a degree of good sense and professionalism, be resolved by agreement. There is obviously a fundamental issue to be resolved at the trial and that is the claim for the procurement challenge. If the parties keep continuing like this, this trial is not going to take place any time soon this side of Christmas and it has to stop as of today, please.

(For continuation of proceedings: please see separate transcript)

This transcript has been approved by Mr. Justice Fraser.

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