



Case No: HT-2019-000282

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (QBD)**  
**[2020] EWHC 2443 (TCC)**

Royal Courts of Justice  
Rolls Building  
Fetter Lane, London

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**Before:**

**MRS JUSTICE O'FARRELL**

**Between:**

**LONDON AND HERTFORDSHIRE LTD**

**Claimant**

**- and -**

**SECRETARY OF STATE FOR  
COMMUNITIES AND LOCAL GOVERNMENT**

**Defendant**

**MR M SEFTON QC** (instructed by **Mishcon de Reya LLP**) for the **Claimant**

**MS K HELMORE** (instructed by **Kinghts plc**) for the **Defendant**

**APPROVED JUDGMENT**

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**MRS JUSTICE O'FARRELL :**

1. The issue between the parties at this first CMC is whether disclosure model B or D should be used for disclosure issues 2 and 5. The parties have managed to reach general agreement on most of the other issues but not on these two issues.
2. Disclosure issue 2 is that the claimant claims that the loss and damage suffered includes the cost of works required to remedy the breaches. The defendant asserts that the claimant has not suffered the loss and damage alleged; the nature and extent of the work done was unnecessary to achieve the standard of repair required by the leases, the prices stated are not reasonable and that supersession applies by reason of the works amounting to improvements.
3. Disclosure issue 5 is that the claimant accepts that section 18 of the Landlord and Tenant Act 1927 operates to cap the defendant's liability for damages. There is a dispute as to the diminution in value of the claimant's reversion.
4. The dispute concerns a terminal dilapidations' claim relating to an office building in St Albans. The claim is based on the value of the diminution in value of the property on a notional basis, with and without the dilapidations identified by the claimant. The value of the claim is said to be limited to just over £2 million, based on the alleged likely cost of works required to remedy the dilapidations of £2.3 million but capped at the notional diminution in value of the reversion of £2 million.
5. In terms of the principles to be applied, I do not think that there is any real dispute between the parties. Under the disclosure pilot which applies to this case it is necessary for the parties, first of all, to identify the issues for disclosure; that is the issues that need to be determined by the court with some reference to

contemporaneous documents in order for there to be a fair resolution of the proceedings.

6. The disclosure sought must be reasonable and proportionate. The court must be satisfied that there are likely to be documents existing that will have some probative value. The court must take into account the overriding objective, namely, that these matters must be dealt with fairly and at proportionate cost. The court must take into account, in particular, the ease and expense of the searches that would be involved were the court to order any form of extended disclosure.
7. Mr Sefton QC, leading counsel for the claimant, seeks an order from the court that model B would be appropriate. The basis for that submission is the nature of the claim, which is put in conventional terms. First of all, the court has to determine the reasonable cost of carrying out the works that would be necessary to remedy the tenant's breaches of its repairing covenant regardless of whether any such works were in fact carried out or will in fact be carried out and regardless of any actual costs of any works carried out. Having reached that value, the court then has to consider the hypothetical diminution in value based on the amount by which the tenant's breaches of covenant diminished the value of the landlord's interest in the building on the date that the tenant's lease expired. Again, that is done by reference to hypothetical sales on the basis either of no breach of covenant as against the breaches that are alleged but regardless of any actual property transactions.
8. On that basis, Mr Sefton's submission is that the common law basis of damages and the section 18 cap on the damages recoverable will both be by reference to expert valuation evidence, which it is agreed both parties will rely upon at trial. Indeed, I understand that draft reports have been exchanged between the parties at least on a

preliminary basis. His submission, therefore, is that it is not necessary for further disclosure to be made, although he accepts the point that I put to him during his submissions that insofar as the experts might have regard to the tenders for the remedial works schedule that was drawn up at the end of the tenancy, it might also be reasonable for those experts to consider as one of the factors any actual costs that were incurred in carrying out any of those works.

9. For the defendant, Ms Helmore submits that the disclosure that she seeks is both reasonable and necessary and proportionate. The two issues against which she seeks disclosure are agreed disclosure issues. Therefore, she satisfies the first part of the test for extended disclosure.
10. In relation to the disclosure issue 2, the documents that she seeks are documents such as tenders and building contracts for the works alleged to have been undertaken. She submits these are central to the dilapidations' claim, particularly where the claim made is on the basis that the cost of the works allegedly undertaken represent the loss suffered as a result of the alleged breaches of covenants and the pleaded defence is that the works that have been carried out far exceeded what was required to remedy the alleged breaches.
11. In relation to issue 5, the defendant's position is that it is entitled to additional categories of documents that go to the section 18 part of the case, namely, valuations, workings of valuations, reports by surveyors and share transaction documents, all of which Ms Helmore submits would be relevant to the issue of the diminution in value pursuant to section 18.
12. The basis of disclosure sought is model D which is a search based model of disclosure. Mr Sefton submits that such an exercise would result in significant

additional expense, some £100,000, and that figure has been broken down in the claimant's cost budget and is based on the use of an electronic document platform and e-disclosure by way of search terms and has set out the basis on which the costs have been estimated for that exercise.

13. As against that, Ms Helmore's submission is that in a case where there is a level of mistrust between the parties as to the failure to provide key documents based on the defendant's perception of the case, the simplest and most appropriate course would be for the court to order disclosure model D for the issues that have been identified. The issues are relatively discrete and well-defined and it would not lead to unreasonable or disproportionate costs.
14. First of all, taking disclosure issue 2, the issue is that the claimant's case in relation to the common law damages that would be recoverable is, at least on the face of the pleadings, by reference to the cost of the works required to remedy the breaches. The schedule that is attached to the particulars of claim is based on the terminal schedule of dilapidations prepared by the surveyors on behalf of the landlord following an inspection in October 2018. It has then taken into account various exchanges and the cost element of that schedule is said to be based on the landlord's lowest tender for the works.
15. As has been accepted by Mr Sefton this morning, insofar as the tenders for the works are at least one of the factors that would appear to be relevant to the surveyors' valuations of the common law basis of damages and will be a matter considered in their reports for the purposes of the trial, it seems to me that it would be legitimate for the defendant's surveyor at least to consider the actual costs of those works insofar as

any of the works have been carried out on a like for like basis in comparison with the remedial works identified in the schedule.

16. The court notes that the claimant has carried out a different scheme of remedial works which it accepts will include an element of what might be called betterment. However, it is likely that there will be a number of items in the works that have been carried out that overlap to a significant extent with the remedial works that are identified in the schedule.
17. I am not going to order extended model D because I am not satisfied that it is necessary for the court to determine the issues in a fair and proportionate way. However, I will order extended model C so as to include documents evidencing the costs of any of the remedial works in the schedule of dilapidations that were carried out, whether as part of the alternative remedial scheme adopted by the claimant or otherwise. I will invite any comment on that proposed wording later.
18. In relation to disclosure issue 5, diminution in value, Ms Helmore seeks disclosure of three separate categories of document.
19. The first is in relation to a loan security report prepared by the claimant's surveyors, Allsopp, for Investec in October 2018. The claimant has disclosed the Investec report but the defendant seeks the workings on which the valuation in the Investec report was based. The short point is that the claimant does not have such workings. I accept Mr Sefton's submission that insofar as the Investec report indicates discrepancies between any of the valuation elements in the report as against those that are being claimed by the claimant, then the surveyors can be cross-examined on this. If they have not produced any workings to back up their valuations, they may find themselves in difficulties but I am not satisfied that it is necessary to order the

workings to be disclosed, particularly as the claimant does not have them and there is no reason why they would wish to acquire them.

20. The second category of documents is the claimant's building surveyor's report and costs that are referred to in the Allsopp valuation reports and the Investec report relating to the condition of the premises and works actually undertaken by the claimant. I am told this morning by Mr Sefton, and I accept, that the Investec report relates to the proposed refurbishment costs for the purpose of considering whether any reasonable allowance has been set aside; that is, that it was concerned with whether or not there was adequate security for the works that were necessary. I am not satisfied that it is necessary or reasonable for those underlying documents to be produced, particularly given that I am going to order documents evidencing any works that have been carried out and the costs of those works if and to the extent that they overlap with the remedial schedule. So I will not make any further order in that regard.
21. The third item is the share transaction documents relating to the sale of 51 per cent of the shares in the claimant company in November 2018, that is at the time of the termination of the lease. I accept Mr Sefton's submission that there is no evidence that the defendant's expert surveyors or valuers need these documents. I am not satisfied that they are likely to disclose information that would be relevant or necessary to the court's determination of the issues in dispute.
22. So for those reasons I will order disclosure by reference to model C in relation to issue 2 but model B is sufficient for disclosure in relation to issue 5.

(After a short time)



23. I am not going to make an order for a response to the request for further information. It seems to me that both paragraph 1 and paragraph 2, which relates to the professional fees, should be answered by reference to the model C disclosure that I have ordered in relation to any costs actually carried out.
24. In relation to items 3 and 4, both relating to diminution in value, at the moment the parties are intending to deal with this by expert evidence. If and insofar as the experts identify that further information is required for the purpose of producing their opinions, then certainly the court would be prepared to order for further information to be provided. However, I am not satisfied that that is necessary at this stage.
25. So the court will not make any order now but if it turns out that the experts need more information or indeed more documents in order to properly produce their valuation reports, then the defendant should, first of all, make a request to the claimant and, if not satisfied, then come back to the court.
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