



Neutral Citation Number: [2024] EWHC 177 (TCC)

Case No: HT-2022-000193

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

Rolls Building  
Fetter Lane, London EC4A 1NL

Date: 1 February 2024

**Before :**

**THE HONOURABLE MR JUSTICE PEPPERALL**

**Between :**

**EXCELERATE TECHNOLOGY LIMITED**

**Claimant**

**- and -**

**(1) WEST MIDLANDS AMBULANCE SERVICE NHS**  
**UNIVERSITY FOUNDATION TRUST**  
**(2) NHS ENGLAND**

**Defendants**

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**Simon Taylor and Tom Walker** (instructed by **Clarke Willmott LLP**) for the **Claimant**  
**Alan Bates** (instructed by **Mills & Reeve LLP**) for the **First Defendant**  
**Jonathan Lewis** (instructed by **Hempsons LLP**) for the **Second Defendant**

Hearing date: 29 January 2024  
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**Approved judgment**

This judgment was handed down remotely on 1 February 2024  
by circulation to the parties and by release to the National Archives.

**THE HONOURABLE MR JUSTICE PEPPERALL:**

1. Over the course of a half-day hearing, I have given guidance on a number of disclosure issues that have arisen in this public procurement case. This short judgment is limited to an issue of more general application, namely the proper way to seek the court's assistance upon disclosure issues. It also briefly explains my costs order.

2. Applications for the court's guidance on disclosure issues in the Business & Property Courts are generally made pursuant to paragraph 11 of Practice Direction 57AD. Public procurement claims are, however, outside the scope of that practice direction. The court not having ordered otherwise, this case is therefore subject to the usual disclosure rules in Part 31 of the Civil Procedure Rules 1998. Part 31 does not have a bespoke procedure for disclosure guidance hearings but Practice Direction 31B does provide, at paragraph 17:

“If at any time it becomes apparent that the parties are unable to reach agreement in relation to the disclosure of Electronic Documents, the parties should seek directions from the court at the earliest practical date.”
3. At a Case Management Conference on 21 April 2023, O'Farrell J ordered that the parties should give standard disclosure by 30 November 2023. At paragraph 9 of her order, the judge ordered:

“By 5pm on 2 June 2023, the parties shall agree directions in relation to the scope of electronic disclosure and keyword searches. If the parties are unable to reach agreement in relation to the same, the parties are to request that a hearing be fixed to determine any outstanding disclosure issues between the parties.”
4. Time for disclosure was subsequently extended to 21 March 2024. By a consent order made on 12 July 2023, the court ordered that the parties were to request the court to fix a hearing to determine outstanding disclosure issues.
5. Subsequently Excelerate Technology Ltd wrote to the court asking it to fix this hearing. No formal application was issued on form N244, and the letters requesting the hearing failed to articulate the questions on which guidance was sought. Instead, the court has been expected to trace the parties' evolving position on disclosure through four bundles running to a combined 1,578 pages.
6. Paragraph 11.2 of Practice Direction 57AD provides that disclosure guidance is obtained by issuing an application notice identifying the point upon which guidance is sought and confirming that the point is one on which (a) there is a significant difference between the parties; (b) the parties require the court's guidance without a formal determination; and (c) the point is suitable for guidance either on the papers or, save in substantial claims, within a one-hour hearing with no more than 30 minutes' pre-reading time. While there is no similar provision in Practice Direction 31B, the practice of the Business & Property Courts gives useful guidance which parties should consider following even in cases under Part 31. Most fundamentally, the parties should issue an application notice clearly identifying the disclosure issue on which guidance or further directions are sought.
7. In this case, the failure to issue an application notice led to delay while the court did not understand why a hearing was required. More importantly, the failure to issue an application meant that all the court and the other parties knew was that Excelerate was seeking some guidance on unidentified disclosure issues on which it then took an undetermined position. The actual issues on which my guidance was sought only became clear from a series of letters written between 24 and 29 January 2024 and through the exchange of skeleton arguments for the hearing. That complete lack of focus meant that it was difficult for the parties to agree or narrow issues. Any realistic prospect of avoiding this hearing was lost. Further, it

deprived the court of the ability to determine whether it could properly give guidance or directions solely upon the papers.

8. The lack of any application notice also appears to have led the parties to think that they had carte blanche to make any application they chose on the hoof without issuing application notices or filing any evidence. While counsel wisely backed away from most of these positions, the correspondence and arguments filed in the days before this hearing indicated that I might be asked to direct that Excelerate would be deemed to have complied with its standard disclosure obligation in respect of quantum by serving an unseen expert's report (for which it did not have permission) and unspecified and unseen supporting documents; to order that sensitive commercial documents might be disclosed in confidence; to order the inspection of a key electronic document disclosed pursuant to r.31.14, or to approve Excelerate's continued but unexplained refusal to give such inspection; to suspend disclosure altogether; to stay the proceedings for, and/or direct, mediation; and to vacate the trial date. It is important to make clear that this is not acceptable practice.
9. Ordinarily the costs of disclosure guidance hearings held under Practice Direction 57AD will be in the case: PD57AD, para. 11.5. It was agreed that such an order was appropriate as between Excelerate and West Midlands Ambulance Service. Both accepted that there were proper criticisms of the way in which they had dealt with their disclosure obligations. NHS England was, however, in a different position. It had sampled the search terms proposed by Excelerate and set out the detail of its position in a letter dated 1 September 2023. Excelerate wholly failed to engage with that letter or otherwise set out its concerns in respect of NHS England's position until the flurry of activity in the days before this hearing. Excelerate's complete lack of timeous engagement and its failure to issue an application notice clearly articulating the precise points on which it sought guidance meant that the search terms were neither agreed nor were the parties ready to argue their respective positions on the matters that turned out to be in issue. While some useful progress was made in respect of the disclosure issues between Excelerate and West Midlands Ambulance Service, nothing useful was achieved in respect of the case against NHS England which was therefore put to unnecessary and avoidable cost. Accordingly, I ordered that Excelerate should pay NHS England's costs of this hearing but not the ordinary litigation costs of engaging through correspondence on the disclosure issues.