Commercial Court dislikes pre-action disclosure in prof neg claims: even in mega-auditor's negligence action

In Carillion v KPMG, the liquidators of this once substantial company sought pre-action disclosure from its former auditors. They intend to bring professional negligence proceedings for not detecting that the financial statements were unreliable. The Commercial Court refused the application. One might think that given auditors' negligence claims in large part turn on professional judgment as to the audit procedures performed, the evidence obtained and the conclusions drawn, clear sight of the materials produced and relied on by the auditors would enable better focussed pleadings. Nonetheless the Commercial Court refused the application (which had admittedly spun into a substantial hearing with apparently more than £500,000 costs on each side). It pointed out that generally such applications were unlikely to succeed in Commercial Court cases and on the facts was not appropriate. The Judge seems to have been most impressed by the fact that Carillion had been able to articulate a detailed case in negligence already, rendering pre-action disclosure perhaps redundant and likely to be duplicated when it came to conventional disclosure.

This is significant. If the Commercial Court is not willing to entertain such applications, claimants might want to consider their forum more carefully. The general QBD is the natural alternative and is also not part of the pilot disclosure scheme. If pre-action disclosure is needed, make sure it is a properly focussed request. It may also be better to avoid articulating a detailed case in negligence first, else it be used against the claimant later by way of resisting pre-action disclosure. Defendants should also be aware of this decision: resisting early disclosure can make a claimant's life more difficult and might fend off parts of a claim. Focussing on the risk of duplication, satellite litigation, and the costs and breadth of the documents sought can be highly persuasive in resisting a pre-action disclosure application. The Judge also said that protocol letters of claim which are not comprehensive are not compliant and so defendants might seek to use that process to pin claimants down.

Background

Carillion – the UK's second largest construction company - collapsed spectacularly in early 2018 and there was much speculation about its accountancy practices. KPMG was its auditor. There was correspondence between the solicitors instructed on both sides and subsequently argument about whether or not such correspondence constituted a formal protocol compliant LoC. In the end the Judge decided that there had not been a formal LoC, partly because Carillion had not ruled out making further allegations. KPMG refused to hand over documents and so Carillion applied for pre-action disclosure.

Decision

The Judge (Jacobs J) said that he was referred to no recent examples of successful applications for pre-action disclosure in the Commercial Court and that notwithstanding that the documents sought might be core documents for ordinary disclosure, *"pre-action disclosure of audit working papers is not viewed as the norm for audit negligence in the Commercial Court"*.

He said that Carillion had not sent a formal LoC and so the protocol obligation to exchange key documents was not engaged. But even if it was *"it would be surprising if in most cases the "key" documents could not fit very comfortably within one lever arch file".* Although a request for key documents can be made prior to sending an LoC, for example in a case where a claimant knows something has gone wrong but does not know what, how or why, it must be reasonable. The Judge found that Carillion had made overly broad requests. When, shortly before the hearing, they made a narrower request this meant that amendments to pleadings became more likely and so the overall prospect of reducing costs and disposing of issues was less likely to be achieved. This was on the basis that the less you get by way of pre-action disclosure then the more likely it is an amendment will be required when you see the material you did not get, which in turn means it's less likely that there will be any costs saving in getting the little you are asking for. One might find this reasoning less than persuasive but the Judge said it did cause him to hesitate.

Ultimately, as a matter of discretion, the Judge took the view that since Carillion had access to its own records and had been able to put together a detailed articulation of the claim in negligence, pre-action disclosure was not appropriate especially where it was not the norm. The prospect of future pre-action disclosure applications was also an unpalatable one. Much better, the Judge said, for Carillion to get on and issue proceedings after proper compliance with the protocol.

Prepared by Imran Benson
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