



## LEGAL BRIEFING

### *PHD Modular Access Services Ltd v Seele GmbH* [2011] EWHC 2210, TCC, Mr Justice Akenhead

In this judgment, the TCC addressed the issue of to what extent, if at all, it is necessary to show that proceedings are actually contemplated in order for a party to be awarded Pre-Action Disclosure under CPR 31.16.

#### *The Facts*

Seele GmbH ("Seele") was employed as the principal contractor working on the substantial refurbishment of Kings Cross Station. They in turn employed PHD Modular Access Services Ltd ("PHD") to carry out scaffolding works necessary for Seele's works in connection with the installation of the main concourse roof. A significant dispute arose between the parties with PHD arguing it was entitled to substantially more money for additional works and in relation to delays caused to its works.

At the time PHD made its application for Pre-Action Disclosure, seven adjudications had been started by PHD. Following Adjudication 6, Seele purported to terminate the employment of PHD under their subcontract and, as a consequence of this, PHD launched Adjudication 7 seeking a declaration that the termination was wrongful, unlawful or otherwise unjustified.

On 10 June 2011, the claims consultants instructed on behalf of PHD served an advance notice of pre-action application pursuant to CPR 31.16.

CPR 31.16(3) provides:

*"The court may make an order under this Rule only where –*

- (a) the respondent is likely to be a party to subsequent proceedings; and*
- (b) the applicant is also likely to be a party to those proceedings."*

The application was then issued on 24 June 2011. It fell to Mr Justice Akenhead to consider whether or not to grant the order requested.

#### *The Issue*

To what extent, if at all, is it necessary to show that proceedings are actually contemplated (or likely or less than likely) in order for a party to obtain Pre-Action Disclosure?

#### *The Decision*

Mr Justice Akenhead declined to issue the order for Pre-Action Disclosure. He formed the view that it is important there is more than a faint possibility that proceedings will happen. Just because there are issues between the commercial parties, and there is the possibility that at some time in the future there might be litigation between the parties, does not mean Pre-Action Disclosure will be granted.

He further noted that the Court must form the view that disclosure before proceedings have started is desirable in order to dispose fairly of anticipated proceedings, to assist the dispute to be resolved without proceedings or to save costs in accordance with CPR Part 31.16 3 (d). This envisaged that proceedings were more than "anticipated". As such there must be a real prospect, if not a certainty or likelihood, that there will be proceedings between the parties. Further the Overriding Objective must be taken into account so that parties are not put to unnecessary expense especially where proceedings have not actually been commenced.

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Mr Justice Akenhead took account of the fact that, to date, PHD had been successful in their adjudications and there was therefore no evidence that PHD was threatening or even necessarily wishing to take the matter further. In his experience adjudication often had the effect of encouraging the final resolution of disputes. He further noted that it would be odd for PHD to be seriously contemplating proceedings in a situation where it had been successful in its adjudications to date. Finally, the documents requested went to extensions of time and payment issues which had been looked and addressed by adjudicator's to date.

Mr Justice Akenhead then gave the following guidance to those considering an application for Pre-Action Disclosure whilst also adjudicating:

*"It is important that parties who are adjudicating, who have adjudicated or who are thinking about adjudicating do not see CPR Part 31.16 as some sort of procedural support and a tactical weapon for the purposes of adjudication. This is partly because it is only available when court proceedings are anticipated and partly because the Court should not interfere with the parties' contractual relationship where the contract itself does not as such give either party a right to documentation. The Court should be cautious about granting per-claim disclosure where the parties are actively pursuing for better or for worse the contractual or statutory adjudication route unless it is clear that notwithstanding this proceedings are anticipated."*

#### **Comment**

Following this judgment parties to adjudication proceedings, or those contemplating adjudicating proceedings, should think very carefully before seeking Pre-Action Disclosure. Only if Court proceedings are actually anticipated is it likely that such an order will be granted. In circumstances where you are the successful party in previous adjudications the Court are less likely to hold that proceedings are anticipated.

**Claire King**  
**November 2011**

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