



## LEGAL BRIEFING

### *Travelers Insurance Company Ltd (“Travelers”) v Countrywide Surveyors Ltd (“Countrywide”)* [2010] EWHC 2455 (TCC)

#### *The Facts*

Countrywide, a provider of residential surveying services, took out a professional indemnity insurance policy in respect of which Travelers was the lead underwriter. A former Countrywide surveyor, Mr Morley, and two of his colleagues allegedly carried out numerous potentially fraudulent valuations. Claims had been made against Countrywide arising from those valuations. Travelers was considering avoiding the policy for misrepresentation and/or non-disclosure. The relevant exclusion clause in the policy contained an arbitration agreement, although general conditions in the policy provided for all other disputes to be litigated in court.

Travelers sought disclosure of documents from Countywide in order to assess whether or not to seek to avoid the policy. The documents were said to be relevant to the extent to which the possibility of fraud was known to Countrywide at the time the policy was agreed.

In response to threats from Travelers of an imminent application for pre-action disclosure, Countrywide provided a large number of documents to Travelers. Travelers maintained that there were still relevant documents which Countrywide had not provided.

Travelers filed an application pursuant to Civil Procedure Rule (CPR) 31.16 for pre-action disclosure, maintaining that as a matter of construction of the policy, the potential underlying dispute between the parties would be litigated in the High Court.

Countrywide argued that the court did not have jurisdiction to make the order sought, because the court’s power to order pre-action disclosure does not extend to a situation where the dispute between the parties will be determined in arbitration.

#### *The Issues*

Would the arbitration agreement apply to the potential underlying dispute between the parties?

Was Travelers entitled to an order for pre-action disclosure pursuant to CPR 31.16 if the dispute between the parties would be determined in arbitration?

#### *The Decision*

The Judge decided that the arbitration agreement would apply to the potential underlying dispute. The Judge also held that, as a matter of construction of section 33(2) of the Senior Courts Act 1981, the existence of the arbitration agreement deprived the court of the power to make an order for pre-action disclosure under CPR 31.16. The application for pre-action disclosure was dismissed.

#### *Comment*

The court has wide powers to order pre-action disclosure of documents in civil litigation. However, the court’s jurisdiction under CPR 31.16 does not extend to instances where the underlying dispute between the parties will be referred to arbitration. In this case the

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underlying dispute was whether Travelers could avoid the policy for alleged fraudulent misrepresentation and/or non-disclosure. If such a dispute arose, it would be referred to arbitration.

The Arbitration Act 1996 does give the court the power to provide assistance in support of arbitral proceedings, including, in a case of urgency, a power for the purpose of preserving evidence or assets. This does not extend to an application for pre-action disclosure.

It is common in arbitration proceedings for a party to seek early production of documents once the arbitral tribunal has been appointed. For this reason, if informal disclosure has been sought before referring the dispute to arbitration, there may be little benefit to the opposing party in refusing to disclose such documents. In the construction industry, this may include detailed work programmes in electronic format. It will inevitably be a commercial decision for a party to make as to what material to disclose to the other side before a dispute is referred to arbitration.

Andrew Hales  
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