



IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 November 2023

Before :

NEIL MOODY KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Between :

IRWELL RIVERSIDE DEVELOPMENTS LIMITED	<u>Claimant</u>
- and -	
ARCADIS CONSULTING (UK) LIMITED	<u>Defendant</u>

Felicity Dynes (instructed by **Arch Law Limited**) for the **Claimant**
David Pliener KC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the
Defendant

Hearing date: 13th October 2023

APPROVED JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 15 November 2023 at 10.30am

NEIL MOODY KC:

Introduction

1. This is an application for disclosure orders pursuant to paragraphs 17 and 18 of Practice Direction 57AD which now governs disclosure in the Business and Property Courts.
2. The case arises from the construction of three blocks of apartments at Upton Riverside in Salford. The apartments were of modular construction built on a concrete podium. The Claimant (“IRDL”) is a property development company. It is a SPV company set up by Property Alliance Group (“PAG”). The Defendant (“Arcadis”) is a firm of structural engineers who were engaged by IRDL to design, amongst other elements, the podium slabs. The main contractor was originally FK Building Group Limited (“FKG”), but its subsidiary FK Building Limited (“FKB”) was subsequently engaged. The Arcadis appointment was novated to FKB and Arcadis provided IRDL with a collateral warranty which forms the basis of the claim.
3. In June 2020 Arcadis identified a problem with its design of the podium slab. At that time the slab had not been poured for blocks A and B and the design was corrected in time. However the slab had already been poured for block C. Arcadis says that the result was that remedial works were required to block C and design changes to blocks A and B. It is common ground that these defects caused some delay to the project, but the extent of the delay is disputed. The total claim is put at about £21 million. Apart from damages for delay, IRDL also claims the cost of remedial works, £3.67 million for loss of sales, £1.8 million

for loss of a different development opportunity, and £4.9 million for extended finance charges.

The Background to the Application

4. Case management directions were agreed by consent, set out in an order dated 9 December 2022 and approved by Waksman J. Those directions required the parties to give extended disclosure in accordance with PD57AD. The parties sensibly agreed the list of issues for disclosure, custodians, and search methodology. IRDL was required to carry out Model D disclosure. This was all set out in the Disclosure Review Document (“DRD”). The parties subsequently gave extended disclosure. Arcadis considers that IRDL’s disclosure is inadequate in material respects and thus brings this application. In support of the application, Arcadis has served witness statements dated 25th July and 6th October 2023 from Caroline Hall, a solicitor at CMS Cameron McKenna Nabarro Olswang LLP. In response, IRDL has served witness statements dated 8th and 11th October 2023 from Sally Marsden, a solicitor at Arch Law Limited.
5. Ms Dynes, Counsel for IRDL, told me that an external provider was engaged to carry out the disclosure harvesting exercise. 961,346 documents were harvested initially. The agreed date ranges and search terms were applied and this yielded 22,768 documents. After de-duplication, this was reduced to 20,232 documents. These were then manually reviewed for relevance by two solicitors and 2,079 documents were disclosed. IRDL served its Disclosure Certificate and Extended Disclosure List on 5th April 2023.
6. Arcadis considers it to be self-evident that IRDL has not captured documents which would clearly be relevant and yet are nowhere to be seen. After extensive

but unproductive debate in correspondence, IRDL gave Arcadis access to the entire set of 23,000 odd documents, save for 35 documents which were withheld on grounds of privilege. Arcadis describes the 23,000 documents as a “data dump”. Arcadis has not reviewed them all; they say that is IRDL’s job and they should not have to do it. However, Arcadis has reviewed a sample and the result of that review is that they have identified a small number of additional documents which they say are relevant. Ms Marsden denies that those new documents are relevant. Nonetheless, Arcadis submits that there remains no sight of almost any of the “evidently missing” documents they seek and which are the subject of this application. As Mr Pliener KC for Arcadis put it, there are missing documents which “simply must exist”.

7. IRDL says that it has given Arcadis all the documents which were generated by the disclosure process agreed between the parties and embodied in the DRD and so there is nothing more that they can or should do. As Ms Marsden put it “there are no more documents available for disclosure, Arcadis has had every document answerable to the DRD search parameters.” Ms Dynes submits that IRDL has “bent over backwards” to address Arcadis’s concerns, including by offering to supply a witness statement, and that it is very difficult to see precisely what Arcadis wants it to do. She submits that since IRDL applied the agreed search terms over the agreed date ranges in respect of the agreed custodians, the fact that expected documents may not have been identified, does not mean there has been a failure to comply with the order. She further submits that the application does not make any clear allegations of non-compliance, the draft order does not seek any orders by reference to the existing order, and there is no proper basis for going behind the agreed process.

Practice Direction 57AD

8. The relevant parts of PD57AD provide as follows:

6.4 In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—

- (1) the nature and complexity of the issues in the proceedings;
- (2) the importance of the case, including any non-monetary relief sought;
- (3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;
- (4) the number of documents involved;
- (5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
- (6) the financial position of each party; and
- (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

17. Failure adequately to comply with an order for Extended Disclosure

17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to—

- (1) serve a further, or revised, Disclosure Certificate;
- (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;
- (3) provide a further or improved Extended Disclosure List of Documents;
- (4) produce documents; or
- (5) make a witness statement explaining any matter relating to disclosure.

17.2 The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4).

17.3 An application for any order under paragraph 17.1 should normally be supported by a witness statement.

18. Varying an order for Extended Disclosure; making an additional order for disclosure of specific documents

18.1 The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.

18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4).

18.3 An application for an order under paragraph 18.1 must be supported by a witness statement explaining the circumstances in which the original order for Extended Disclosure was made and why it is considered that order should be varied.

18.4 The court's powers under this paragraph include, but are not limited to, making an order for disclosure in the form of Models A to E and requiring a party to make a witness statement explaining any matter relating to disclosure.

9. It may be seen therefore that the two rules serve different purposes. Paragraph 17 addresses the situation where there has or may have been a failure to comply with an existing order. In that situation the Court may make such further orders as may be appropriate, but the applicant must satisfy the Court that the order sought is reasonable and proportionate. Paragraph 18 addresses the situation where a party seeks to vary the existing order including by seeking specific

documents. The burden on the applicant is more onerous under paragraph 18 because it must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings as well as being reasonable and proportionate.

The Application

10. The application states that it is advanced under paragraphs 17 and 18. It seeks the following relief:

1. *That IRDL should serve a further Disclosure Certificate to include a statement that all known adverse documents have been disclosed;*
2. *That IRDL should carry out a search of the scope specified below for the documents listed in Appendix 1*
3. *That IRDL should serve a further and/or improved Extended Disclosure List of Documents clearly identifying any additional documents being disclosed as a result of the searches referred to, together with a copy of each of the documents contained in the list;*
4. *That to the extent that IRDL does not have, or cannot with a reasonable and proportionate effort find, the documents listed in Appendix 1 to this order, IRDL shall serve on Arcadis's solicitors a witness statement in which IRDL provides details of why those documents do not exist or cannot be located;*

11. I explored with Mr Pliener KC for Arcadis whether the application was advanced under paragraph 17 or 18 or both. Ms Hall’s evidence referred to both provisions. However, paragraphs 1 to 4 of the application are clearly referable to sub-paragraphs (1), (2), (3) and (5) of paragraph 17.1. Mr Pliener pointed out that disclosure of “specific documents” could be obtained under paragraph 18 of PD57AD, but I understood him to advance the application primarily under paragraph 17. He said that paragraph 18 was a “fall-back position”. In reality – as will be seen – a key element of Arcadis’s complaint was that IRDL had taken the wrong approach to relevance at the time of the manual review. I did not understand Mr Pliener to submit that there was anything wrong with the agreed search terms, custodians or disclosure issues. He did not propose new search terms or submit that the existing order needed to be varied in any way. No argument was addressed to the question of the just disposal of the proceedings. Thus it seems to me that this is an application to be determined under paragraph 17.
12. Appendix 1 of the application lists 16 categories of documents which are sought. I have used Arcadis’s numbering but grouped them under sub-headings for clarity.

Indemnity Documents

1. *If they exist, documents pertaining to discussions regarding the need for an indemnity agreement which are not already disclosed;*
2. *If they exist, documents pertaining to the basis on which losses or costs were claimed under the indemnity agreement. This would, for example, cover demands by FK and FK Group of PAG/ the Respondent;*

Loan Documents

3. *If they exist, documents properly pertaining to the loan agreements (internal and external), the lender's requirements, and attribution of loss to a given entity;*
4. *Some form of substantiation for the interest charged for internal lending, for example through M/A system Sage accounting records;*
5. *Cash flow forecast or equivalent to explain/ allow Arcadis to assess the lending required for the project versus the lending drawn;*

Remedial Works

6. *Documents evidencing the remedial solution adopted and rationale for it;*
7. *Documents relating to damage to the modules, including investigation of them and work undertaken on them;*
8. *Proof of payment or liability, and certification/ approval for remedial works or module damage works incurred subsequent to production of Irwell's quantum expert report (expected to be from 2021 onwards up until completion of the Development);*

Miscellaneous documents

9. *Provision of the 857 documents listed in Irwell's list sent on 5 April 2023;*

10. *The missing attachments and incomplete documents listed in Schedule 1 to this application (save for the limited documents disclosed on 30 June 2023);*

Delay documents

11. *All progress reports regardless of custodian;*

12. *All site meeting minutes (including those from the Employer's Agent, Bakers Hollingsworth);*

13. *(To the extent that there are no minutes or reports available for specific periods of time all notes and internal emails (including from FK) regarding progress;*

14. *All dilapidation and inspection reports relating to Ideal Modular;*

15. *Documents pertaining to Ideal Modular's insolvency, the readiness (or not) and quality (or not) of the modules, likely to include documents regarding the appointment of the new subcontractors (Elements) and documents regarding remedial works to and storage of the modules (both of which constitute specific claims for loss);*

16. *The images and construction programmes not previously disclosed.*

13. Before engaging with the application and the supporting witness statements, I make the following observations. First, the application does not clearly link the documents sought with the issues for disclosure as set out in the DRD. Second, the application does not explain why there has or may have been a failure to comply with the pre-existing order. Essentially Arcadis points to documents

which they say they would expect to see but which have not been disclosed. It is said that an erroneous approach was taken to relevance in respect of delay and I deal with that specific point below. Otherwise no specific criticism appears to be made of the searches, key words or custodians, and of course these were all agreed anyway. Third, where initial searches throw up too many or too few responsive documents, the disclosure process provided for by PD57AD can be an iterative one, best undertaken by co-operation between the parties. That has been notably absent in this case. Whilst the application seeks further searches it does not spell out what those searches should entail; rather Arcadis says simply that it seeks the documents falling within the sixteen categories in Appendix 1. Fourth, the application has the appearance of an application for specific disclosure under CPR 31.12. It appears that its genesis may be a list of documents sought by Arcadis's experts. That is not the right approach. As Sir Geoffrey Vos C remarked in *UTB llc v Sheffield United Ltd* [2019] EWHC 914 (Ch) at [75]: "The Pilot [which preceded PD57AD] is not simply a rewrite of CPR 31. It operates along different lines driven by reasonableness and proportionality."

14. I therefore have some sympathy with IRDL when it says that having supplied Arcadis with all the documents which responded to the agreed search terms, and having further offered a witness statement to explain its approach, it does not know what more it should do. In my judgment, a party seeking an order under PD 57AD 17.1 should generally seek to identify with precision (and by reference to the DRD) the alleged failures of compliance with the existing order for Extended Disclosure. Furthermore, where a party seeks further or more extended searches so as to ensure compliance, that party should generally

indicate what the proposed searches should entail, for example by reference to search terms, date ranges or custodians.

Analysis

15. Mr Pliener focussed heavily on the documents relating to delay (categories (11) to (16)), but I will address the documents sought in the order they are set out in the application.

Indemnity Documents

1. *If they exist, documents pertaining to discussions regarding the need for an indemnity agreement which are not already disclosed.*
 2. *If they exist, documents pertaining to the basis on which losses or costs were claimed under the indemnity agreement. This would, for example, cover demands by FK and FK Group of PAG/ the Respondent.*
16. The relevant background here is that the defects in the podium slab were identified before IRDL entered into the construction contract with FKB. FKB therefore refused to enter the contract without an agreement from IRDL and PAG to indemnify FKB in relation to any claim arising from the defects. IRDL's case is that, pursuant to the indemnity, it is obliged to indemnify FKB against certain costs which FKB would otherwise have recovered from Arcadis. According to paragraph 45 of the Particulars of Claim, these are the costs resulting from Arcadis's breach over and above the original contract price, together with fees and expenses incurred by FKB, its sub-contractors and consultants. The additional direct costs are said to be £5.6 million, and the prolongation costs are said to be £2.3 million. Arcadis says that PAG may have

paid these costs. Arcadis's Defence at paragraph 96 puts in issue that IRDL was liable to pay such sums. The following disclosure issues are relevant to these requests:

Issue 5: The circumstances in which the indemnity agreement and the building contract were agreed.

Issue 6. What the losses incurred under the indemnity agreement were and by which party they were incurred initially and pursuant to the indemnity.

17. Mr Pliener submits that the indemnity agreement is dated two weeks after the building contract and so the timing of the contracts does not appear to tally. Furthermore he says that the indemnity agreement allows for a recovery which is wider than the cost of the remedial work caused by Arcadis's breach. He submits that the indemnity agreement only bites where there is a liability and demand from FKB to IRDL and no such claim or demand is evidenced. Accordingly he submits that Arcadis needs to see the basis and detail of any costs claimed under the indemnity agreement in order to know whether it is a relevant cost for this dispute. Ms Dynes for IRDL says that all the documents responding to these disclosure issues have been disclosed. The DRD process was agreed and IRDL has searched the relevant custodians against the agreed search terms and date ranges. IRDL has further already offered a witness statement to explain the position.
18. In my judgment Arcadis has not explained what it wants IRDL to do. In his skeleton argument, Mr Pliener concedes that "of all the categories addressed in the application this is the one where it does appear plausible that there were no such documents in existence (leaving aside for the moment what impact that

might have on IRDL's ability to recover the losses claimed.)” In these circumstances I am not persuaded that there has or may have been a failure to comply adequately with the order for extended disclosure in this respect, and I make no order in respect of these categories.

Loan Documents

3. If they exist, documents properly pertaining to the loan agreements (internal and external), the lender's requirements, and attribution of loss to a given entity.

4. Some form of substantiation for the interest charged for internal lending, for example through M/A system Sage accounting records.

5. Cash flow forecast or equivalent to explain/ allow Arcadis to assess the lending required for the project versus the lending drawn;

19. The underlying issue here is that there is a claim for £4.9 million for extended finance charges said to be due to the delay. The Disclosure Issues included the following:

Issue 3: The basis on which and discussions pursuant to which the loan agreements with Wellesley and Property Alliance Group were concluded.

Issue 4: What the funding arrangements for the project were and what the requirements of the funders were initially and at the point of refinance.

Issue 17: How the losses and damages were incurred, by whom, at what time and for what.

20. This is addressed at paragraphs 80 to 88 of Ms Hall's first statement. She says that IRDL has provided some documents relating to the external lending arrangements but these are very limited; they are essentially the loan agreements. There are a handful of cash flow statements but these are incomplete, so Arcadis cannot compare the funding which would have been available on the one hand, with that which was in fact utilised. She says that IRDL has not provided documents showing when particular loans were drawn upon and how that related to the design defects complained of. Ms Marsden says that cash flow forecasts comprise a new category not covered by any existing order for disclosure. Nonetheless, Ms Dynes told me that IRDL had agreed to search for cash flow forecasts. I will make an order to that effect respect of category 5.
21. In relation to category 3, in my judgment there is a lack of clarity as to what Arcadis requires IRDL to do in terms of further searches. Ms Marsden says that documentation evidencing the attribution of the loss to a particular entity was all supplied with its expert's quantum report. I am not satisfied that there has or may have been a failure to comply with the order for extended disclosure in this respect, and I decline to make an order in relation to category 3. In reaching this conclusion I bear in mind that Arcadis has been supplied with the entire pot of documents that responded to the agreed searches, and so Arcadis can carry out additional searches itself if necessary. This is a further reason why I consider that it would not be appropriate to make an order in this category.
22. As for category 4, I consider that this is a relevant issue covered by Disclosure Issue 4. I note that when asked about this in correspondence (Ms Marsden's

email of 28th September 2023, para 16(d)) IRDL pointed simply to 8% being interest charged under the *Late Payment of Commercial Debts Act 1998*. That does not seem to me to be an answer to the point since Arcadis reasonably seeks documentary substantiation for the interest charged. Possibly such documentation was not responsive to the search terms applied, but I consider that there has or may have been a failure to comply with the order for extended disclosure in this respect. Having regard to paragraph 6.4 of PD57AD and in particular to the sums in issue, I consider that it would be appropriate to make a further proportionate order. I therefore order IRDL to carry out further or more extended searches for the documents sought in category 4 pursuant to paragraph 17.1(2).

Remedial Works

6. Documents evidencing the remedial solution adopted and rationale for it;

23. Disclosure Issue 2 is: the rationale for the remedial works selected, including the choice of sequencing and re sequencing of the blocks.
24. Arcadis complains that relatively few documents have been disclosed in this respect. They say there are only 451 documents where “remedial” and “work” are found in proximity. Arcadis have not identified specific documents or categories of documents which should have been disclosed but have not been disclosed. No specific complaints are made about the searches made, and no specific new searches are sought. I can see no basis for concluding that there has or may have been a failure adequately to comply with the pre-existing order for Extended Disclosure in this respect. I make no order in relation to this category. In any event, since Arcadis has been supplied with the entire pot of

responsive documents, they can conduct their own searches if they consider them to be justified. This is a further reason why I consider that it would not be appropriate to make an order in this category.

7. Documents relating to damage to the modules, including investigation of them and work undertaken on them;

25. The following Disclosure Issues are relevant:

Issue 10: The circumstances surrounding damage to the modular units and action taken in response.

Issue 17: How the losses and damages were incurred, by whom, and at what time and for what.

26. The position as explained to me is that IRDL was obliged to store the modules while a remedial scheme was designed and enacted. The modules were damaged as a result. Ms Hall says (paras 66 and 67 of her first witness statement) that she has not seen documents relating to why the modules were damaged, and very little pertaining to the remedial works alleged to have been necessary. Again no particular complaints are made about the searches made, and no specific new searches are sought.

27. IRDL says that it carried out the agreed searches and “module” was a specific search term. Accordingly, I am not satisfied that there has or may have been a failure adequately to comply with the pre-existing order for Extended Disclosure in this respect and I make no order in relation to this category. Again, to the extent that Arcadis consider that further searches are justified then they have been supplied with the entire pot of responsive documents and they can

conduct their own search. This is a further reason why I consider that it would not be appropriate to make an order in this category.

8. Proof of payment or liability, and certification/ approval for remedial works or module damage works incurred subsequent to production of Irwell's quantum expert report (expected to be from 2021 onwards up until completion of the Development):

28. Mr Pliener said that in light of some further documentation being supplied by IRDL, this category was now limited to “inspection/ condition records and invoices relating to the module units and crane costs”. According to Ms Dynes this is a new request not covered by the existing order for disclosure. This is because the documents sought are outside the agreed date range (which for “module” was to September 2021). She says that relevant documents have already been disclosed with IRDL’s expert report which was served without prejudice. She says further that IRDL listed the documents and invited Arcadis to list any further documents that it expected to see so that IRDL could take instructions, but Arcadis has not responded by identifying narrow and identifiable categories of documents. Ms Marsden’s second statement (in the schedule at pp 16-17) shows what has already been provided. Arcadis has not specified what has gone wrong with the previous searches nor precisely what additional searches are now required. As a result, I am not satisfied that there has or may have been a failure adequately to comply with the pre-existing order for Extended Disclosure in this respect and I make no order in relation to this category. Again, to the extent that Arcadis considers that further searches are justified then they have been supplied with the entire pot of responsive

documents and they can conduct their own search, and this is a further reason why I consider that it would not be appropriate to make an order in this category.

Miscellaneous documents

9. Provision of the 857 documents listed in Irwell's list sent on 5 April 2023;

10. The missing attachments and incomplete documents listed in Schedule 1 to this application (save for the limited documents disclosed on 30 June 2023);

29. I understand that category 9 is no longer proceeded with as the documents have been provided. As to category 10, Mr Pliener did not press this. The documents sought cover two different sub-categories. First, it is said that there are specific documents disclosed where there were missing attachments. Secondly, it is said that there are specific documents missing where it is clear from the documents that have been disclosed that further related documents must exist. In respect of the first sub-category Mr Pliener concedes that they will presumably have formed part of the 22,000 documents which have been disclosed. He requests that IRDL should confirm this. That can be done in correspondence, and no order is required. As to the second sub-category, he says that these are specific examples of documents which would fall under one of the other categories in this application and so, to the extent that the Court makes an order in relation to the other disclosure categories, he does not press for an order under category 10.

Delay

30. Disclosure Issue 8 is: The events which led to the Project becoming delayed and for how long.

31. This is the area where Mr Pliener placed greatest emphasis during the hearing. The underlying issue here is that Arcadis says that IRDL has failed to disclose documents which establish causes of delay other than the podium design defect. It appears that the development is still not complete. Arcadis relies in particular upon the fact that Ideal (who supplied the modules) became insolvent and an alternative supplier of the modular units had to be found. At one point it appeared that IRDL was taking a pleading point to the effect that Arcadis had not positively pleaded alternative causes of delay. See for example page 3 of Ms Marsden's email of 8th June 2023, and her letter of 30th June 2023 which referred to Arcadis "phishing" for other delays. Furthermore, IRDL adopted the position that programmes and other documents predating the Arcadis error (ie before Revision I) were not relevant on the basis that any delays predating Revision I were accounted for in that programme. (It appears that the project was already in delay by 14 weeks at that point.) Ms Dynes maintained that position. She thought that earlier Revisions did exist but may not have been given to IRDL. I consider it reasonable to conclude that that if IRDL does not have them, FKB or FKG has them and IRDL would be entitled to call for them.
32. In my judgment, in order to determine the causative effect of Arcadis's breaches on the delay to the project, it is necessary to consider other potential causes of delay. I further consider that Arcadis is entitled to examine programmes predating their error in order to analyse any pre-existing causes of delay and to establish whether they were indeed accounted for in Revision I. IRDL may be right that Revision I properly accounted for all pre-existing delay, but Arcadis should not have to take that on trust. It follows therefore that in relation to this part of the case and Disclosure Issue 8, there is evidence that IRDL may have

taken an erroneous approach to relevance when manually reviewing documents. They may also have failed to search the FKB and/or FKG custodians for the missing programmes, again because of an erroneous approach to relevance. I consider therefore that there was or may have been a failure adequately to comply with the pre-existing order for Extended Disclosure in this respect. Where I make further orders below for documents relating to delay, I do so having regard to the considerations in PD57AD paragraph 6.4 and noting in particular the technical complexity and value of the claim.

11. All progress reports regardless of custodian

33. Ms Hall says that very few progress reports have been disclosed. In her email of 11th May 2023 Ms Marsden says that the relevant ones were disclosed. Ms Dynes makes the point that this was not a public procurement project and much was not written down. She says that the project was affected by Covid, and business was frequently transacted over the phone. However, in light of my conclusion above that IRDL may have taken an erroneous approach to relevance when reviewing documents relating to delay, I am satisfied that there may have been a failure adequately to comply with the pre-existing order for Extended Disclosure in that relevant progress reports may have been omitted. Accordingly, I order that IRDL should search the existing pot of documents for all progress reports.

12. All site meeting minutes (including those from the Employer's Agent, Bakers Hollingsworth);

34. Ms Dynes told me that Baker Hollingsworth did not go to site and so there are no meeting minutes. Ms Hall (statement 6th October, para 33) said that there are

nine design meeting minutes from the architect but from “seemingly random weekly periods” and four minutes from Baker Hollingsworth. Again, in light of my conclusion above that IRDL may have taken an erroneous approach to relevance when reviewing documents relating to delay, I am satisfied that may have been a failure adequately to comply with the pre-existing order for Extended Disclosure in that relevant site minutes may have been omitted. Accordingly, I order that IRDL should search the existing pot of documents for all site meeting minutes.

13. (To the extent that there are no minutes or reports available for specific periods of time all notes and internal emails (including from FK) regarding progress;

35. This category is vague and unfocused. Arcadis has not identified how such a search should be carried out, whether by way of new search terms or in respect of additional custodians. A search for “all notes and emails regarding progress” is likely to generate many irrelevant responses. Ms Dynes submits that relevant documents would already have been harvested to the extent they were responsive to the search terms. I accept that submission. As a result, I am not satisfied that there was or may have been a failure adequately to comply with the pre-existing order for Extended Disclosure in this respect. I make no order in relation to this category.

14. All dilapidation and inspection reports relating to Ideal Modular;

15. Documents pertaining to Ideal Modular’s insolvency, the readiness (or not) and quality (or not) of the modules, likely to include documents regarding the appointment of the new subcontractors (Elements) and documents regarding

remedial works to and storage of the modules (both of which constitute specific claims for loss);

Disclosure Issue 9 is: IRDL's communications with Ideal concerning the discovery of the design defects, suspension of the works and the appointment of Elements (a subcontractor replacing Ideal).

Disclosure Issue 10 is: The circumstances surrounding Ideal's insolvency and IRDL's communications with Ideal.

36. Ideal Modular were the contractor responsible for supplying the modules. They became insolvent during the project and were replaced by a company called Elements. Ideal Modular's insolvency is relevant in that it potentially gives rise to an alternative cause of delay. Ms Dynes points out that "module" was a search term and so was "Elements". However, Ms Hall (statement 6th October para 24) has cited examples of documents relevant to Ideal's delay which Arcadis has found in IRDL's pot. She says that only three reports of inspections of the modules have been disclosed, and it appears that there should be more (statement 6th October, para 33). Once again, in light of my conclusion above that IRDL may have taken an erroneous approach to relevance when reviewing documents relating to delay, I am satisfied that may have been a failure adequately to comply with the pre-existing order for Extended Disclosure in that relevant documents relating to Ideal may have been omitted. Accordingly, I order that IRDL should search the existing pot of documents for documents falling within categories 14 and 15.

16. The images and construction programmes not previously disclosed.

37. The application for “images not previously disclosed” is vague and unfocussed. There is no explanation as to what images are required or why they are relevant. I am not satisfied that there was or may have been a failure adequately to comply with the pre-existing order for Extended Disclosure in this respect. I reject the application for an order in respect of images. Since Arcadis has been supplied with the entire pot of responsive documents, they can conduct their own search, and this is a further reason why I consider that it would not be appropriate to make an order in this category.
38. However, the construction programmes are of central relevance to the delay claim. I was told that only programmes identified as F, I, J and K have been disclosed. Since I have concluded above that IRDL may have adopted an erroneous approach to relevance when reviewing construction programmes, there may have been a failure adequately to comply with the pre-existing order for Extended Disclosure in this respect. IRDL should therefore carry out a search for all programmes including any as-built programme and all programmes predating Revision I. For the avoidance of doubt, this should include searching FKG and FKB custodians where appropriate.

Inequality of arms between experts

39. Arcadis additionally seeks an order “to address the apparent inequality of arms between experts since [they] have not had the opportunity to understand [IRDL’s] case as pleaded, specifically with regards to delay and quantum.” It is not clear to me what is being sought here, and Mr Pliener did not press this part of his application. IRDL’s draft quantity surveying and delay reports have already been disclosed on a without prejudice basis. All the documentation

IRDL's experts have seen has also been disclosed. I see no basis to make any order in relation to an "inequality of arms".

40. I adjusted the timetable for expert meetings and reports at the hearing.

Conclusion

41. I have made orders for further searches in relation to categories 4, 5 (by consent), 11, 12, 14, 15 and 16 (programmes, not images). This is pursuant to paragraph 17.1(2). In relation to category 4, I encourage the parties to agree the means by which the search is to be undertaken. Where further documents are found, they should be produced pursuant to paragraph 17.1(4), and a further list produced pursuant to 17.1(3). Insofar as documentation falling within these categories cannot be found or is said not to exist, then this should be explained in a witness statement confirmed by IRDL's proper officer in accordance with paragraph 17.1(5).
42. The new approach to disclosure in the Business and Property Courts relies heavily upon the parties' co-operation. The parties should therefore co-operate to agree a suitable order giving effect to this judgment. This should include the time for compliance, the category 4 searches and any other consequential matters including costs. I am conscious that the expert process is to commence soon. To the extent that an order cannot be agreed within 10 days of hand-down of this judgment, then short written submissions should be exchanged and I will decide any residual disputes on the papers.
43. Finally, I note that I was supplied with an extensive bundle of dense correspondence on these disclosure issues. As Mr Pliener remarked, it gives the

impression of ships passing in the night. Paragraph 11 of PD57AD provides that the parties may seek guidance from the Court on the operation of the Practice Direction “where there is a significant difference of approach between the parties.” That provision deserves to be more widely utilised and could perhaps have provided a solution at an earlier stage in this case.