Pre-action disclosure: Show trial

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Countrywide Surveyors describe themselves on their website as "one of the UK's premier surveying and valuation practices operating from locations nationally". They are involved in residential property valuations – lots and lots of them. They have an army of surveyors. Unfortunately, three members of that army were, allegedly, involved in several hundred fraudulent valuations. Countrywide parted company with them and made a claim under their professional indemnity insurance.

Travelers were the lead underwriter. They thought that there was a whiff of something fishy, particularly as many of the surveys were carried out for the same commercial property company. They contemplated avoiding the policy for misrepresentation and non-disclosure. They asked Countrywide to produce documents so that they could assess the fishiness and decide whether to refuse to pay. Countrywide released some of their files, but not all. Travelers were not satisfied.

CPR (the civil courts' procedure rules) enable a party to potential future litigation to apply to the court before starting full-blown proceedings for disclosure of documents in the possession of another potential party. Relevant documents will have to be disclosed in the course of the litigation anyway, but only after expensive preliminary steps have been taken. Typically the parties will spend several months following what is known as the "pre-action protocol" and will then issue the proceedings. They will then draft and serve voluminous pleadings, probably taking more months and certainly costing huge amounts of money, before the disclosure stage is reached. Sometimes a sight of all the papers early on can make all that unnecessary. The Claimant finds out that the case is not worth pursuing, or the Defendant realises that the game is up.

Travelers thought that this procedure was just what they needed. They made an application to court for disclosure of the material that was being withheld. It came on before Mr Justice Coulson in the Technology and Construction Court in September.

The judge wanted to agree. This was just the sort of case, he said, when an order for pre-action disclosure was appropriate and should be made. There was just one problem, an arbitration agreement.

The policy contained a provision that any dispute about misrepresentation or non-disclosure would be referred to arbitration. Arbitration is not litigation, and so it could not be said that the parties were likely to be involved in litigation on the point. That was a necessary precondition for an order to be made for early disclosure. The application therefore failed.

This should not have come as a great surprise to Travelers. Lawyers have advised consistently since the procedure was introduced that it did not apply to arbitration. To be fair to their legal team, they also argued that the arbitration clause did not bite on their dispute, but that failed as well.

The lack of a pre-action disclosure procedure has been a standard criticism of arbitration which leads some people to suggest that arbitration should be avoided. That criticism is wrong, and comes from a lack of understanding of the flexibility of the arbitration process. It used to be an inefficient and expensive private version of High Court litigation, but the reforms of the 1996 Arbitration Act and the experience of construction arbitrators in dealing with snappy adjudications have worked wonders.

The court procedure rules are aimed at getting as much done as possible before the court action starts. There is some sense in that. The courts should not be clogged up with cases that are developing slowly with neither side really sure about their arguments. The courts find it difficult to deal with a stop/start procedure.

Arbitrators do not have that problem. They can adopt a timetable that is tailor made for the dispute. A party can start the arbitration and apply for an order that the other side produce specific documents or classes of documents before any pleadings are exchanged. The arbitrator is required by Section 33 of the Arbitration Act to "adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined". Early and / or staged disclosure is a perfect example of the way in which arbitrators can do what the Act requires.

If you have an arbitration clause in your contract, don't be afraid to use it. If the contract does not provide for arbitration, it may suit both parties to take the dispute to arbitration anyway to avoid the costs and publicity of High Court action.

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