

MACFARLANES

E-DISCLOSURE BLUES

LITIGATION AND DISPUTE RESOLUTION

INTRODUCTION

In this article we look at the recent case of *West African Gas Pipeline Company Limited v Willbros Global Holdings Inc* [2012] EWHC 396 (TCC) in which the court made adverse costs orders against the claimant because of its failure to provide adequate e-disclosure.

THE UNDERLYING DISPUTE

The underlying dispute related to the construction of a pipeline to supply natural gas from Nigeria to Benin, Togo and Ghana. The claimant, West African Gas Pipeline Company Limited (WAPCo) engaged an EPC contractor for the onshore works of the pipeline. The defendant, Willbros Global Holdings Inc (WGH), provided a guarantee in relation to the contract between WAPCo and the contractor. WAPCo subsequently terminated its contract with the contractor before the pipeline was completed and issued proceedings against WGH, seeking payment of \$273,748,113 under the guarantee.

THE DISCLOSURE ORDERS

At a case management conference on 6 October 2011 (the 6 October CMC), WGH applied for, and obtained, orders which required WAPCo, in very broad terms, to search for missing documents, give further disclosure, review redacted documents and to provide a further disclosure statement about certain issues raised by WGH. The judge ordered that the costs of WGH's application should be "costs in the case" (meaning that the costs would be paid at the end of the dispute by the losing party). At a subsequent case management conference on 1 December 2011 (the 1 December CMC), further orders for disclosure were made against WAPCo.

SHORTCOMINGS IN E-DISCLOSURE PROCESS

It subsequently became clear that there were a number of shortcomings in the disclosure provided by WAPCo. The most important problems were:

- ◆ Part of the review of WAPCo's documentation had been undertaken by an outsourced litigation support company based in India. After WGH spotted a missing email in WAPCo's disclosure (it was part of an email chain, the rest of which had been disclosed), WAPCo's solicitors instructed the Indian litigation support company to re-review all of the documents which had previously been identified as not being disclosable. This led to the disclosure of a significant number of additional documents, which should have been disclosed at an earlier stage.

- ◆ Due to misunderstandings between WAPCo and its solicitors, Herbert Smith, a complete set of documents was not "harvested" for search and review at the beginning of the e-disclosure process. As a result, a large number of documents were disclosed late.
- ◆ WAPCo's solicitors had engaged a London based external litigation support and data processing provider to assist with the e-disclosure process. As a result of (i) human error by personnel at the external provider and (ii) a technical problem with the software used by the external provider, the de-duplication process did not work properly and a substantial number of duplicates were included in the disclosure provided by WAPCo.
- ◆ A number of documents which had been disclosed with redactions had also been disclosed without redactions.

THE APPLICATION FOR COSTS

WGH submitted that the entire process of WAPCo's disclosure had been wholly inadequate and that, as a result of this, its own solicitors and litigation support provider had been required to do additional work. It argued, therefore, that it was entitled to recover the extra costs incurred and applied for an order that:

- ◆ the costs order made at the 6 October CMC should be varied to provide that WAPCo would pay the costs of WGH's disclosure applications in any event;
- ◆ WAPCo should pay the costs of the disclosure applications made at the 1 December CMC; and
- ◆ WAPCo should pay WGH's costs that had been wasted in dealing with WAPCo's disclosure.

THE DECISION

Ramsey J recognised that disclosure in international construction projects was always difficult but he had no doubt that WAPCo's e-disclosure had caused a number of additional problems and that these problems had been so serious that they had resulted in time and costs being wasted. The serious failure in the de-duplication process (a not uncommon problem, which was also the cause of the inconsistent redactions), the inadequate initial review and gathering together of a complete set of electronic documents and the failure properly to review documents all justified the making of a costs order against WAPCo.

Therefore, Ramsey J ordered WAPCo to pay (i) 80 per cent of WGH's costs of dealing with approximately 40,000 duplicate documents wrongly included in its disclosure; (ii) 80 per cent of WGH's costs of dealing with redacted documents disclosed by WAPCo; and (iii) 50 per cent of WGH's costs of dealing with and reviewing documents that had not been properly gathered together and had thus had a disruptive effect on the disclosure process. The judge also ordered that WGH should have the costs of its disclosure applications made at the 1 December CMC.

However, the judge declined to vary the costs order made at the 6 October CMC. This was because the court should only exercise its power to vary or revoke a costs order if the original order was made on the basis of erroneous information or subsequent events have destroyed the basis on which the order was made. Whilst extra information about the failings of WAPCo's disclosure had come to light since the 6 October CMC, the change in circumstances did not satisfy these criteria.

FINANCIAL CONSEQUENCES

In a witness statement, made in support of their application for costs, WGH said that the costs wasted as a result of WAPCo's inadequate disclosure were approximately £1.8m. They are unlikely to be granted this amount on a detailed assessment (not least because the judge did not grant their applications in full) but the final figure is likely to exceed the £135,000 that the judge ordered WAPCo to pay on account.

Furthermore, WAPCo's liability to pay WGH's costs is only part of the picture. WAPCo will undoubtedly have incurred substantial costs in trying to rectify the problems identified by WGH. It is unlikely that those costs will be recoverable even if WAPCo goes on to win the case as it will be difficult for WAPCo to show that the costs were reasonably incurred.

COMMENT

The case is a useful reminder of the following points:

- ◆ A failure to identify and "harvest" all potentially disclosable documents at the beginning of a dispute is likely to give rise to a need to repeat parts of the process and may expose a party to an adverse costs order.
- ◆ Technology will play an important part in any large e-disclosure exercise and the judiciary has high expectations of it. In the final report of his Review of Civil Litigation Costs, Jackson LJ said that he had attended a demonstration of a number of systems developed by e-disclosure providers and he described them as "extremely impressive". However, there is sometimes a gap between theory and practice and it should not be assumed that technology can solve all issues.
- ◆ In a suitable case, and with proper supervision, outsourcing the disclosure process can save costs. However, this may not be appropriate in very complex cases where there is need for constant communication between solicitors and paralegals conducting the review.

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