

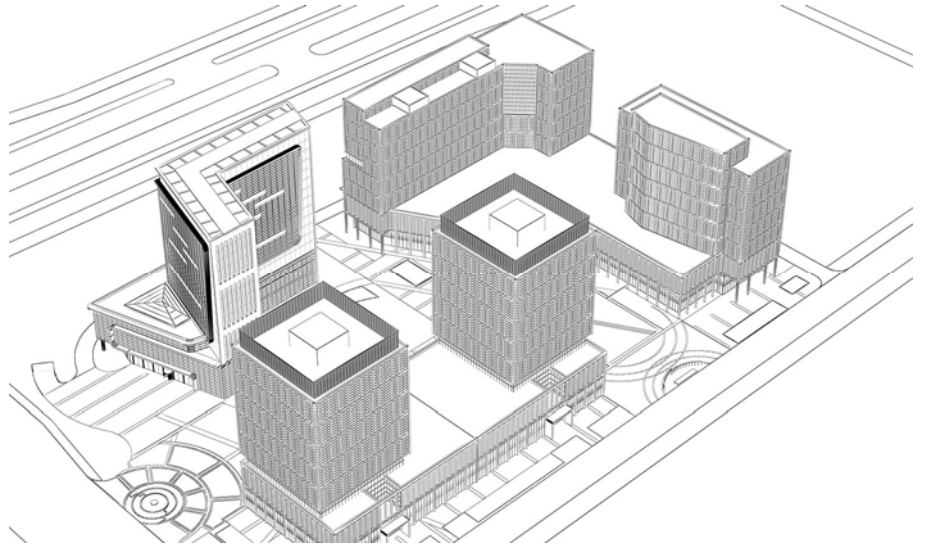
# WATSON FARLEY & WILLIAMS

BRIEFING

## BLOCKING ACCESS TO BIM?

OCTOBER 2017

- WILL EMPLOYERS HAVE A CONTINUED RIGHT TO ACCESS BIM DATA WHEN A DISPUTE ARISES WITH A BIM CO-ORDINATOR?
- OWNERSHIP OF BIM DATA YET TO BE DETERMINED BY ENGLISH COURTS



In *Trant Engineering Ltd v Mott MacDonald Ltd*<sup>1</sup> the Technology and Construction Court (the “TCC”) considered whether an employer has a continued right to access electronically stored design documents, project contracts and other documents, as well as the associated data relating to a project, when a dispute arises between an employer and its subcontracted Building Information Modelling (“BIM”) co-ordinator.

“BIM IS AN IMPORTANT INSTRUMENT WHICH IS INCREASINGLY USED IN CONSTRUCTION PROJECTS.”

BIM is an important instrument which is increasingly used in construction projects. Its take up has steadily increased as the industry has realised that its use can significantly increase the ability of a project’s various teams to work efficiently and effectively together. *Trant* is significant as it is apparently the first time that a dispute concerning access to BIM data has come before the TCC.

### The BIM system and CDEs

BIM is a system used to create and model visual data in a construction project. BIM presents project data in a three dimensional way, and is popular due to its ability to actively illustrate building components. The advantage of BIM is that it signals conflict detection, allowing parties to ascertain where there may be ‘clashes’ between structural or architectural designs. The ability to signal conflict detection at various stages of a project allows participants to effectively manage information and accurately programme critical paths throughout the life of a project. BIM data is usually uploaded to a Common Data Environment (“CDE”) enabling data, design, contracts and other important project documents to be shared between employers, contractors and consultants.

<sup>1</sup> [2017] EWHC 2061 (TCC)

“BIM DATA IS USUALLY UPLOADED TO A COMMON DATA ENVIRONMENT ENABLING DATA, DESIGN, CONTRACTS AND OTHER IMPORTANT PROJECT DOCUMENTS TO BE SHARED BETWEEN EMPLOYERS, CONTRACTORS AND CONSULTANTS.”

### Background to the Case

The Claimant, Trant Engineering Limited (“Trant”) was employed by the UK Ministry of Defence to construct a power station at the Mount Pleasant Complex (the “Project”), which is the main military base for British Forces in the Falkland Islands.

During the preparation of its tender for the Project, Trant engaged the Defendant, Mott MacDonald Limited (“Mott”) to provide design consultancy services. The intention was that, should Trant’s bid be successful, Mott would continue to provide services throughout the Project. BIM was to be used to assist with the design, preparation and integration of different designs as well as management of the design and construction process. In addition to its consultancy services, Mott provided, maintained and controlled access to a CDE on which all documents and data relevant to the Project were hosted.

In May 2016, Trant was awarded the contract for the Project. Mott was notified and in July 2016, Mott sent Trant a contract which identified a lump sum fee payable in respect of Mott’s services (the “Contract”), together with scheduled monthly payments. Trant received the documents, but never signed or returned them.

Approximately one year into the project, Trant refused to pay sums claimed in two invoices issued by Mott. On 30 May 2017, Mott issued a notice stating that it would suspend performance within seven days unless payment was made, pursuant to an express provision of the Contract giving them such a right to suspend. Trant made no payment and so on about 2 June Mott revoked all access to the CDE and on 9 June it suspended all work on the Project.

Trant made an application to the TCC for a mandatory interim injunction that Mott provide access to the data and documents stored in the CDE. Without such access, Trant claimed that progress on the Project would have to stop and that it would have to start from scratch in respect of all design, planning and programme work.

### Decision

O’Farrell J applied the test set out in *American Cyanamid Co v Ethicon Ltd (No.1)*<sup>2</sup> as to whether to grant an interim injunction. This requires assessment of:

1. whether there is a serious question to be tried;
2. if there is, whether damages would be an adequate remedy for the party injured by the court’s false grant of or failure to grant an injunction; and
3. if damages are not an adequate remedy, whether the balance of convenience lies in granting or refusing the injunction.

Here, the first limb of the test was satisfied. There was a serious question as to whether the Contract existed, and so the terms of the express rights and obligations that existed between the parties (although the judge did not actually decide the merits of that dispute). The second limb of the test was also satisfied, as damages would not be an adequate remedy for Trant due to amounts recoverable from Mott being capped at £1m. The amount of loss to Trant was likely to exceed this cap if access to the BIM data was not permitted. On the other hand, damages would be an adequate remedy for Mott if it was later decided that the injunction was falsely granted. Therefore, the judge had to consider the third limb of the test, and whether

<sup>2</sup> [1975] AC 396

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the balance of convenience lay in granting or refusing the injunction. The judge found that the balance of convenience lay in granting the injunction because if Trant was prevented from accessing the data, the Project would have to be started from scratch having lost a year of progress. Conversely, if the injunction was granted there would be little harm done to Mott as it would simply be required to provide access to data that it had already provided in pdf form.

O'Farrell J, in reaching her decision, also recognised that the harm caused to Mott would be relatively low if Trant was later ordered to pay compensation, whereas the loss to Trant would be considerable if access to the CDE was restricted. This was because without access to the CDE, the Project could not progress further. Trant would therefore be forced to start the Project anew, resulting in extensive delays, and considerable wasted fees. The judge favoured preserving the 'status quo' by granting an injunction, allowing Trant re-access to the design data that had previously been completed and uploaded to the CDE by Mott.

The mandatory injunction was accordingly granted. Mott was required to allow Trant access to the public folders on the CDE, whilst Trant was ordered to make a payment into court of £475,000 plus VAT (the amount of the first unpaid invoice), pending resolution of the underlying dispute.

### Conclusion

This decision is of interest to those in the construction sector who are involved in or plan to get involved in projects where BIM will be employed. The decision highlights the need for employers to take care when deciding who should take on the role of BIM co-ordinator, as if the same party maintains the associated CDE, they may have the ability to restrict access. If a dispute with the BIM co-ordinator arises and they withdraw access, this can clearly have serious repercussions for the project. Where BIM services are to be outsourced, the employer should therefore seriously consider retaining control of the associated CDE and/or giving control to another third party such as the engineer or contract administrator.

It should, however, be noted that, as a decision on an application for an interim injunction, O'Farrell J's judgment is of limited assistance in determining who owns, has a non-exclusive license and/or a right to access the BIM data and other design documents hosted on a CDE. Although not specifically set out in the judgment, it nevertheless appears that the Contract, if validly entered into, will be subject to adjudication or arbitration provisions. If so, it is unlikely that these issues will reach the TCC again and we will need to await another case for further useful guidance on this interesting question.

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## FOR MORE INFORMATION

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Should you like to discuss any of the matters raised in this Briefing, please speak with one of the authors below or your regular contact at Watson Farley & Williams.



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