

# BIM IN PRACTICE: OWNERSHIP OF DESIGN DATA AND ACCESS TO THE CDE

**Shona Frame & Tim Atwood**

Building Information Modelling (BIM) is a technological solution intended to facilitate the sharing of design information in real time amongst the project team by means of a common software platform (sometimes referred to as the Common Data Environment), and its use is now mandatory on all UK government projects. A recent case saw a claimant being denied access to the BIM platform by its consultant in a dispute over unpaid fees, and seeking an interim mandatory injunction to restore it.

## **Trant Engineering v Mott MacDonald**

Trant was employed by the Ministry of Defence to construct a £55 million power station at the Mount Pleasant Complex in the Falkland Islands. Trant employed Mott MacDonald Ltd ("MML") to provide design consultancy and principal designer services, including the implementation and use of a BIM platform

called ProjectWise to enable the design team to manage, share and distribute design data.

A dispute over payment and scope emerged between the parties, as well as an argument over the correct terms of the contract between them (or whether one existed at all). MML applied for a payment of £475,000 in respect of which no pay less notice was given and no payment was made.

MML threatened to suspend services in respect of the unpaid application and three days later denied Trant access to the ProjectWise platform. Trant applied for a mandatory interim injunction requiring MML to restore its access on the basis that it would otherwise suffer substantial losses on the project. MML claimed that there was no contract between the parties and that Trant had no contractual right to access ProjectWise in those circumstances or at least in the absence of payment.



## Injunction granted

Applying established principles, the court considered whether there was a serious question to be tried and whether the balance of convenience favoured the granting of an injunction.

The court noted that MML's liability would be capped at £1 million if the contract terms Trant argued for applied – a sum which would be far exceeded if it had no access to the design information for a year. This supported the grant of an injunction, but was balanced by the fact that MML would lose considerable bargaining power if it were forced to restore access to ProjectWise immediately – if MML were successful in showing that Trant had no entitlement to access ProjectWise it would be able to ask for a premium price in respect of the design data.

Ultimately the court found that there was a high degree of assurance that Trant was entitled to the design data held in the ProjectWise system and that the balance of convenience was in favour of granting the injunction.

## Conclusions and implications

The case offers no new developments on the granting of injunctions, but it should get parties thinking about how their BIM platforms are managed. It is not uncommon for consultants to include provisions that the use of intellectual property is contingent on payment of its fees, and under the Construction Act there is a statutory right to suspend services for non-payment of fees due.

It is worth stressing here the importance of payment notices and pay less notices to avoid

payments unintentionally falling due and risking the suspension of services if the amount applied for is not paid.

In the BIM context, though, this case highlights that there are a number of questions around contractual provision for use of data. There is a clear conflict, evident from the issues arising in this case, between the wish for open data sharing amongst parties and the wish of the creators of the data to protect both their ownership rights but also to maintain their other contractual protections.

There are other issues concerning use of data on BIM projects including the need to contract for who is entitled to use, update and alter data and where liability for this sits, bearing in mind that the data is envisaged as being used throughout the life cycle of the building. There may need to be an ability to transfer rights from party to party. In addition, there is of course the issue of what data is required long-term to facilitate the operation, maintenance, refurbishment or alteration of the building where too much data may be as bad as too little.

Future proofing of data also requires to be considered – storage methods becoming obsolete (remember floppy discs?), where will data be stored, who is responsible for maintaining and paying for this, what if data is lost or corrupted, how is access to data provided and to who, what security arrangements are in place to stop data falling into the wrong hands?

None of these issues arose in this case but parties would be well advised to consider them in their contractual arrangements.



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