Birse Construction Ltd v HLC Engenharia E Gestäo De Projectos Sa [2006] Adj.L.R. 05/02

JUDGMENT : Mr Justice Jackson. TCC. 2nd May 2006.

1. This judgment is in seven parts, namely part 1, introduction; part 2, the facts; part 3, the present proceedings; part 4, the law; part 5, categories (a) to (e); part 6, categories (f) to (h); part 7, conclusion.

Part 1: Introduction

2. This is a claim for pre-action disclosure. The applicant is Birse Construction Limited, to whom I shall refer as "Birse". The respondent is HLC Engenharia e Gestäo de Projectos SA, to whom I shall refer as "HLC SA". One of the companies related to the respondent is called HLC (Neath Port Talbot) Ltd. I shall refer to this company as "NPT".

3. The issue which arises in this litigation is whether Birse has satisfied the various tests for pre-action disclosure as set out in CPR Rule 31.16(3) in respect of all or any of the categories of documents set out in its application notice. If Birse has satisfied those tests, then the court must consider how it should exercise its discretion. In the course of this judgment I shall refer to the Supreme Court Act 1981 as "the 1981 Act". After these brief introductory remarks it is now time to turn to the facts.

Part 2: The Facts

4. In September 2000, NPT agreed with Neath Port Talbot County Borough Council to sort, treat and dispose of municipal waste for a term of 25 years. In order to perform this function, NPT required the construction of a waste recycling facility. Accordingly, in September 2000, NPT engaged HLC SA as main contractor to construct a fully integrated waste materials energy recovery centre (generally referred to as "the MERC") at Crymlyn Burrows in South Wales.

5. The main contract between NPT and HLC SA included the following conditions:

Clause 29.2

"When the works or a section thereof have passed the tests on completion and are complete (except in minor respects that do not affect their use for the purposes for which they are intended) the engineer shall issue a certificate to the contractor and to the purchaser (hereinafter called the taking-over certificate). The engineer shall in the taking-over certificate certify the date upon which the works or the relevant section thereof passed the tests on completion and were so complete. The purchaser shall be deemed to have taken over the works on the date so certified. Except as permitted by Clause 30 (use before taking over) the purchaser shall not use the works before they are taken over."

Clause 29.3

"With effect from the date of taking over as stated in the taking-over certificate, risk of loss or damage to the works or to the section to which the taking-over certificate relates (other than any part thereof excluded by the terms of the taking-over certificate) shall pass to the purchaser and he shall take possession thereof."

Clause 30.1

"If by reason of any default on the part of the contractor a taking-over certificate has not been issued in respect of the whole of the works within one month after the time for completion, the purchaser shall be entitled to use any section or part of the works in respect of which a taking-over certificate has not been issued provided the same is reasonably capable of being used. The contractor shall be afforded the earliest possible opportunity of taking such steps as may be necessary to permit the issue of the taking-over certificate. The provisions of subclause 43.1 (care of the works) shall not apply to any section or part of the works while being so used by the purchaser, and clause 36 (defects liability) shall apply thereto as if a taking-over certificate had been issued from the date on which the section or part was taken into use."

Clause 43.1

"The contractor shall be responsible for the care of the works or any section thereof until the date of taking over as stated in the taking-over certificate applicable thereto. The contractor shall also be responsible for the care of any outstanding work which he has undertaken to carry out during the defects liability period until such outstanding work is complete. In the event of termination of the contractor's employment under the contract in accordance with the conditions, responsibility for the care of the works shall pass to the purchaser upon expiry of the notice of termination whether given by the purchaser or by the contractor."

Clause 43.2

"In the event that any part of the works shall suffer loss or damage whilst the contractor has responsibility for the care thereof, the same shall be made good by the contractor at his own expense except to the extent that such loss or damage shall be caused by the purchaser's risks. The contractor shall also at his own expense make good any loss or damage to the works occasioned by him in the course of operations carried out by him for the purpose of completing any outstanding work or of complying with his obligations under clause 36 (defects liability)."

6. Clause 47 of the main contract required HLC SA and NPT jointly to take out project insurance. On 5th September 2000, HLC SA entered into a subcontract with Birse for the design and construction of civil, mechanical and electrical engineering elements of the MERC. Birse's subcontract works included the construction of an amenity building and a process building. HLC SA engaged other subcontractors to install specialist plant in those buildings.

7. Clause 3 of the conditions of the subcontract between HLC SA and Birse provided that the conditions of the main contract should be incorporated into the subcontract. The subcontract conditions included the following:

Clause 3.2A

"Where clauses of the main contract which are incorporated into the subcontract mutatis mutandis provide for the engineer to issue a taking-over certificate, then such clauses shall be incorporated into the subcontract on the basis that the aforesaid taking-over certificate is to be issued by the contractor to the subcontractor…"

Clause 9.2
"The term 'variation in the contractor's requirements' means a change in the contractor's requirements which makes necessary the alteration or modification of the design, quality or quantity of the subcontract works (otherwise than such as may be reasonably necessary for the purposes of rectification pursuant to subclause 5A.5) entailing the following:
(a) The addition, omission or substitution of any work;
(b) The alteration of a kind or standard of any of the materials or goods to be used in the subcontract works;
(c) The removal from the site of any work executed or materials or goods brought thereon by the contractor for the purposes of the works other than work, materials or goods which are not in accordance with the subcontract."

Clause 9.3
"A contractor may issue instructions affecting a variation in the contractor's requirements. No variation affected by the contractor shall vitiate the subcontract."

Clause 12.1
"The contractor shall, in accordance with the provisions of subclauses 47.1 (insurance of the works) and 47.2 (extension of works insurance) of the conditions, maintain in force the policy of insurance in respect of the works, details of which are given in part 1 of the seventh schedule hereto. Save where clause 12.1A, applies in the event that the subcontract works are destroyed or damaged in such circumstances that a claim is established in respect thereof under the said policy of insurance, then the subcontractor may be paid by the contractor the amount of such claim or the amount of his loss, whichever is the less, and shall apply such sum in replacing or repairing that which was destroyed or damaged. The subcontractor shall observe and comply with the conditions contained in the said policy of insurance."

Clause 13.1
"The subcontractor shall, until the expiry of the defect liability period, be responsible for making good any defect in or damage to the subcontract works to the like extent as the contractor is responsible to make good defects or damage under the main contract. If any damage made good by the subcontractor under the provisions of this clause was caused by any breach of this subcontract by the contractor, his servants or agents, the subcontractor shall be entitled to be paid by the contractor the reasonable costs of making good such damage together with a reasonable allowance for profit."

Clause 16.1
"If for any reason (which is not the responsibility of the contractor) the subcontractor… (k) despite previous warnings in writing from the contractor, is not executing the subcontract works in accordance with the subcontract or is failing to proceed with the subcontract works with due diligence or is neglecting to carry out his obligations under the subcontract works so as to affect adversely the carrying out of the subcontract works… then, subject to clause 16.2 and the direct agreement, the contractor may, without prejudice to any of its other remedies under the subcontract and without prejudice to any rights of action which shall accrue or shall have already accrued to the contractor at the contractor's sole option, terminate the subcontract by not less than 21 days' notice ('termination notice'). The contractor shall have no liability to pay compensation."

Clause 16.2
"…before serving a termination notice pursuant to clause 16.1, the contractor shall serve a notice ('warning notice') (which shall specify the specific breach that has occurred) on the subcontractor requiring the subcontractor to demonstrate within 21 days following the date of the warning notice to the satisfaction of the contractor that the subcontractor has rectified the cause of the deficiencies in the performance of the subcontract works or other breaches of the subcontract or is undertaking the necessary remedial work or action. The contractor may only terminate the subcontract pursuant to clause 16.1 by serving a termination notice following the 21st day if it is not satisfied in its sole and unfettered discretion that the deficiencies or breaches have either been fully rectified or the subcontractor is undertaking the necessary remedial work or action with due diligence and effort."

Clause 16.4
"Should the contractor choose to terminate the subcontract under subclause 16.1 or to operate the provisions of subclause 16.3, the contractor shall not be liable to make any further payments to the subcontractor until the costs of execution and all other expenses incurred by the contractor in completing the subcontract works or effecting alternative or additional works to the extent required to satisfy the tests on completion and post takeover tests have been ascertained and the amount payable certified by the contractor (herein called the 'cost of completion')."

8. Between 2000 and 2002, Birse proceeded with the execution of the subcontract works. Birse achieved completion of the final stage of the works, as certified by the engineer, on 8th March 2002. On 6th June 2002, Birse ceased to act as principal contractor and HLC SA took over this responsibility. By January 2003, Birse had demobilised from the site. Unfortunately, during late 2002 and early 2003, substantial disputes emerged between Birse and HLC SA concerning the proper valuation of Birse's subcontract works.

9. On 10th August 2003 a fire occurred in a part of the process building known as the biofilter. On 31st October 2003, HLC SA sent a letter requesting Birse to provide a schedule of rates for establishing the scope of the fire

reinstatement works. Thereafter, correspondence ensued in which HLC SA requested or instructed Birse to carry out the necessary works. Initially, HLC SA relied upon clauses 12.1 and 13.1 of the subcontract conditions as obliging Birse to do those works. Ultimately, however, when HLC SA pinned its colours to the mast, HLC SA asserted that Birse's obligation to do the fire reinstatement works arose under clause 9 on the basis that Birse had to comply with a variation instruction.

10. On 20th February 2004, HLC SA sent a warning notice to Birse pursuant to clause 16.2 of the subcontract. By a letter to Birse dated 16th March 2004, HLC SA determined, or purported to determine, the subcontract. HLC SA's letter dated 16th March 2004 included the following passage:

"It is clear that you are failing in your obligation in respect of the outstanding and defective works. In light of the above and following the issue of our warning notice of 20th February 2004, please treat this letter as our termination notice pursuant to clause 16.1 and/or 16.2 of the subcontract in that you are not executing the subcontract works in accordance with the subcontract and/or are failing to proceed with the subcontract works with due diligence and/or are neglecting to carry out your obligations under the subcontract so as to affect adversely the carrying out of the subcontract works.

In order to avoid any misunderstanding and in relation to your contention that we may not terminate your subcontract in accordance with clause 16.1, your argument is contingent upon a finding that the instruction of 31st October is not included within the definition of 'subcontract works'. Our view is that your contention is wrong as the instruction given to you on 31st October effects a variation within the meaning of clause 9.2 of the subcontract in that it instructs an addition to your original scope of works and varies the contractor's requirements, which of course form part of the third schedule of the subcontract and accordingly fall within the definition of 'subcontract' works at clause 1.1."

11. Birse responded to this letter by denying HLC SA's entitlement to terminate and asserting that HLC SA had repudiated the subcontract. A year later, on 30th March 2005, Birse submitted its claim for payment to HLC SA. This claim amounted to £6,481,615. One component of the monies said to be due was damages or compensation for wrongful termination.

12. On 12th May 2005, HLC SA referred to adjudication the question whether it had been entitled to terminate the subcontract in March 2004. Birse defended the adjudication on the grounds that the MERC had been taken into use prior to the fire. Accordingly, HLC SA was not entitled to give any instruction to Birse in relation to fire reinstatement works.

13. As the adjudication proceeded, both parties submitted evidence, which, for present purposes, it is not necessary to summarise. Having considered that evidence, the adjudicator concluded that the activities on site up to 10th August 2003 were part of the commissioning procedures. Accordingly, the works could not be treated as having been taken over. In all the circumstances, HLC SA was entitled to issue a variation instruction under clause 9 of the subcontract conditions in respect of the fire reinstatement works. In the adjudicator's view, HLC SA was also entitled to issue such an instruction under clause 13. The adjudicator's final conclusion, as set out at paragraphs 6.8 to 6.27 of his decision, was that HLC SA had validly determined the subcontract in March 2004.

14. Birse does not agree with the adjudicator's decision. Birse wishes to bring proceedings in the Technology and Construction Court for a declaration that HLC SA's purported termination of the subcontract was not valid. However, Birse maintains that it is hampered by lack of relevant documentation. Birse had left site before the fire occurred. Birse was not privy to events on site during the period January to August 2003. The only documents available to Birse are those which its solicitors, with some ingenuity, have managed to obtain and those which HLC SA chose to put forward in the adjudication.

15. Birse's solicitors, in correspondence, have requested pre-action disclosure. However, only limited documentation was provided in response to that request. Birse is aggrieved by HLC SA's refusal to comply with the requests for pre-action disclosure. Accordingly, Birse commenced the present proceedings.

Part 3: The Present Proceedings

16. By an application issued in the Technology and Construction Court on 16th March 2006, Birse applied for pre-action disclosure of eight categories of documents. The application was made pursuant to section 33(2) of the 1981 Act and rule 31.16 of the Civil Procedure Rules. The eight categories of document sought may be summarised as follows. Categories (a) to (e) are documents which are likely to shed light on the scale of use of the MERC and the purposes for which it was being used in the period before the fire; categories (f) and (h) comprise of documents which are likely to shed light on the cause of the fire and responsibility for it; category (g) is the insurance policy which was in force at the time of the fire.

17. Birse's grounds, as set out in paragraph 2(c) of the application notice, read as follows:

"The applicant is hampered, as it was in the adjudication, by not being in possession of documents that it needs both to plead its case and to assess its position. The respondent has been uncooperative in providing documentation to the applicant, despite the encouragement given by the courts to early exchange of information pre-action."

18. Birse's application is supported by four ring files of evidence containing approximately 1,500 pages. The hearing of this application was listed, at the request of Birse's solicitors, at 2pm on Friday, 28th April. I am bound to say that a one-day time estimate would have been more appropriate for a matter of this complexity. Counsel's submissions occupied the whole of Friday afternoon. I said that I would consider the matter over the Bank Holiday weekend and give judgment at 9am on Tuesday morning. This I now do.

Part 4: The Law

19. Section 33(2) of the 1981 Act provides:

"On the application, in accordance with rules of court, of a person who appears to the high court to be likely to be a party to subsequent proceedings in that court, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim –

(a) to disclose whether those documents are in his possession, custody or power; and

(b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order –

(i) to the applicant's legal advisors..."

20. Rule 31.16 of the Civil Procedure Rules provides:

"(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where –

(a) the respondent is likely to be a party to subsequent proceedings;

(b) the applicant is also likely to be a party to those proceedings;

(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to –

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs."

21. The operation of rule 31.16(3)(d) was considered by the Court of Appeal in ***Black v Sumitomo Corporation*** [2001] EWCA Civ 1819; [2002] 1WLR 1562. Rix LJ gave the leading judgment, with which May LJ and Ward LJ agreed. At paragraphs 79-83, Rix LJ said this:

"79. This is a difficult test to interpret, for it is framed both in terms of a jurisdictional threshold ('only where') and in terms of the exercise of a discretionary judgment ('desirable').

80. Three considerations are mentioned in paragraph (3)(d): disposing fairly of the anticipated proceedings; assisting the dispute to be resolved without proceedings; and saving costs. The first of this trio obviously contemplates the disposal of proceedings once they have been commenced – in that context the phrase 'dispose fairly' is a familiar one (see e.g. RSC Ord 24, r 8); the second as clearly contemplates the possibility of avoiding the initiation of litigation altogether; the third is neutral between both of these possibilities.

*81. It is plain not only that the test of 'desirable' is one that easily merges into an exercise of discretion, but that the test of 'dispose fairly' does so too. In the circumstances, it seems to me that it is necessary not to confuse the jurisdictional and the discretionary aspects of the paragraph as a whole. In **Bermuda International Securities Ltd v KPMG** [2001] Lloyd's Rep PN 392-397 para 26, Waller LJ contemplated that paragraph (3)(d) may involve a two-stage process. I think that is correct. In my judgment, for jurisdictional purposes the court is only permitted to consider the granting of pre-action disclosure where there is a real prospect in principle of such an order being fair to the parties if litigation is commenced, or of assisting the parties to avoid litigation, or of saving costs in any event. If there is such a real prospect, then the court should go on to consider the question of discretion, which has to be considered on all the facts and not merely in principle but in detail.*

82. Of course, since the questions of principle and of detail can merge into one another, it is not easy to keep the two stages of the process separate. Nor is it perhaps vital to do so, provided however that the court is aware of the need for both stages to be carried out. The danger, however, is that a court may be misled by the ease with which the jurisdictional threshold can be passed into thinking that it has thereby decided the question of discretion, when in truth it has not. This is a real danger because first, in very many if not most cases it will be possible to make a case for achieving one or other of the three purposes, and secondly, each of the three possibilities is in itself inherently desirable.

83. The point can be illustrated in a number of ways. For instance, suppose the jurisdictional test is met by the prospect that costs will be saved. That may well happen whenever there are reasonable hopes either that litigation can be avoided or that pre-action disclosure will assist in avoiding the need for pleadings to be amended after disclosure in the ordinary way. That alternative will occur in a very large number of cases. However, the crossing of the jurisdictional threshold on that basis tells you practically nothing about the broader and more particular discretionary aspects of the individual case or the ultimate exercise of discretion. For that, you need to know much more: if the case is a personal injury claim and the request is for medical records, it is easy to conclude that pre-action disclosure ought to be made; but if the action is a speculative commercial action and the disclosure sought is broad, a fortiori if it is ill-defined, it might be much harder."

22. In ***XL London Market Ltd v Zenith Syndicate Management Ltd*** [2004] EWHC 1182 (Comm) Mr Justice Langley made an order for pre-action disclosure in litigation between the managing agents of various Lloyd's syndicates. The facts of that case are not material for present purposes. In relation the test of fairness, Mr Justice Langley said this at paragraph 31:

"In general, where the relevant information is held by the respondent and not otherwise available to the applicant, I think it is likely that if the first two tests are passed so will be the test of fairness. To determine if they have a claim and to formulate it, XL London and Brockbank need access to the second category of documents. I also think that disclosure will save costs. It will enable further investigation of the reserves to be focused rather than random. If a claim is made it can be expected to be presented with particularity."

23. In ***Briggs & Forrester Electrical Ltd v The Governors Of Southfield School for Girls*** [2005] BLR 468 Judge Coulson QC ordered pre-action disclosure of quantum documents (but not the other documents sought) in relation to a claim for asbestos contamination. The judge took the view that such disclosure would assist settlement negotiations and save costs. The judge then carefully evaluated the conflicting factors which bore upon the exercise of his discretion.

24. In ***First Gulf Bank v Wachovia Bank National Association*** [2005] EWHC 2827 (Comm) Mr Justice Christopher Clarke refused to make an order for pre-action disclosure in relation to a prospective claim for fraud concerning letters of credit. The judge was particularly influenced by the fact that the applicant had obtained much relevant information from the pleadings, evidence and skeleton argument in related litigation. In the concluding section of his judgment, Mr Justice Christopher Clarke said this:

"24. I have reached that conclusion as a result of a combination of reasons. Firstly I remind myself that such an order, even if not exceptional, is unusual. Secondly, as I have said, this is not, in my view, a case in which First Gulf cannot start proceedings without pre-action disclosure and in which the court should, on that account, be disposed to assist them to do so. On the contrary they would, as a result of the previous litigation, appear to enjoy a number of advantages over the ordinary litigant. Thirdly, I take the view that a reconciliation between the concerns that Rix LJ identified and to which I refer in paragraph 18 above, is most appropriately met by requiring First Gulf to plead such case as they can rather than requiring pre-action disclosure without any pleading at all. Such a course would indicate what is alleged without allowing dishonesty 'to spread its cloak over the means by which it can be detected and revealed'. Fourthly, I think that I should be tipping the balance unduly in First Gulf's favour if I were to order pre-action disclosure, in circumstances where FUNB themselves have what appear to be legitimate claims for disclosure, so that the parties will not be on an equal footing...

26. I am equally not persuaded that it is desirable that I should make an order for pre-action disclosure for the purpose of assisting the dispute to be resolved without proceedings or of saving costs, or that, if there is a prospect of achieving either of those results, so that the jurisdictional threshold is crossed, it is sufficiently enticing to justify making the order sought. The reality of the present case appears to me to be that there is very little prospect of it being disposed of without pleadings and standard disclosure being given by both sides in the ordinary way. There seems to me equally little prospect that the giving of the disclosure sought before an action is brought is likely to produce a significant saving in costs in comparison with the costs that would be involved if discovery was given after the proceedings were commenced. Any saving that might arise because pre-action disclosure might avoid the need to amend the proceedings subsequently appears to me to be of marginal significance in the context of a claim of this nature."

25. Let me now stand back from the authorities and consider the operation of CPR rule 31.16 in the context of TCC litigation. IT projects and construction projects typically generate extensive documentation. In many TCC cases, disclosure is a labour-intensive exercise and a major head of costs. Therefore, disclosure before the proper time is not something which should be lightly ordered. On the other hand, the court encourages the early and candid exchange of information in the hope that this will promote settlement before excessive costs are incurred. Alternatively, it is hoped that the parties may at least narrow the issues between them. This is part of the philosophy which underlies the Pre-action Protocol for Construction and Engineering Disputes. It should be noted that this is the only pre-action protocol which requires a meeting between the parties before they resort to litigation.

26. In any given case it must be a matter for close and critical analysis whether the early disclosure by one party of certain categories of documents really does bring the prospect of (1) disposing fairly of the anticipated proceedings; or (2) assisting the dispute to be resolved without proceedings; or (3) saving costs. The answer to this question must be heavily fact-sensitive. No rule of thumb can assist. This question is the jurisdictional threshold. If the answer is no, the application fails.

27. If the answer to the first question is yes, the next matter to consider is whether pre-action disclosure is desirable in order to achieve those of the specified purposes which are achievable. The third question to consider is whether the court should exercise its discretion in favour of making the order. As Rix LJ pointed out in *Black*, those two questions tend to merge into one another, but the judge must bear in mind each of the separate tests which he is required to perform.

28. The test of "desirable" and the exercise of discretion are particularly important in this context because of the relative ease with which the jurisdictional threshold can be crossed (see *Black* at paragraphs 82 and 83). In the TCC context, the judge may be assisted by having regard to any correspondence written pursuant to the Protocol. The judge should also have regard to the importance of limiting (a) pre-action costs and (b) the pre-action expenditure of resources (including management time) to a level which is reasonable and proportionate.

29. Christopher Clarke J observed in *First Gulf Bank* that to require pre-action disclosure is an order which, even if not exceptional, is unusual. I agree with that observation. Given the level of co-operation between opposing parties,

which is a normal feature of TCC litigation, I would not expect an order for pre-action disclosure to be appropriate in most cases which come before this court.

30. In addressing the issues in the present case, I must apply each of the tests set out in rule 31.16. I must also bear in mind the further illumination which has been given by the authorities mentioned above. This I shall now do in dealing with the various categories of documents sought by the applicant.

Part 5: Categories (a) to (e)

32. The documents in categories (a) to (e) which Birse seeks are defined as followed in Birse's application:

"(a) All of the respondent's records –

(1) concerning the progress or status of checks, tests and commissioning carried out on or prior to 10th August 2003 in relation to the respondent's works performed under its contract with HLC (Neath Port Talbot) Ltd (hereinafter referred to as the main contract);

(2) concerning the receipt and processing of waste at the Materials Energy Recovery Centre at Neath Port Talbot and the responsibility therefore prior to 10th August 2003.

(b) All correspondence (including letters, faxes, e-mails, instructions, notes, memos, minutes of meetings and telephone attendance notes) passing between –

(1) the respondent and HLC (Neath Port Talbot) Ltd (HLC NPT);

(2) the respondent and the engineer Mr Brimelow (and/or his representative) (the engineer);

(3) the respondent and HLC Waste Management Services Ltd (HLC WMS);

(4) the respondent and each of its subcontractors HLC Henley Burrowes Ltd, Nifes Energy Ltd, Waste Treatment Technologies BV and Horstman Recycling Technique GMBH (the subcontractors) between 1st December 2002 and 10th August 2003 inclusive;

(c) Such correspondence of the kind set out in (b) above as is or was in the respondent's control as defined in CPR 31.8 passing between –

(1) the engineer and HLC WMS or the subcontractors;

(2) The Environment Agency and any other party involved in the project or the operation of the plant.

(d) Such of the following documents as are or were in the respondent's control as defined in CPR 31.8…

(2) A copy of the contract between HLC NPT and HLC WMS referred to at paragraph 6.20 of the witness statement of Mr Danby dated 22nd June 2005.

(e) A copy of any written agreement or agreements between the respondent and HLC WMS."

33. In reading out this extract, I have omitted the last six lines of subparagraph (b) because these were deleted during the hearing. I have also omitted subparagraph (d)(1) because that document has already been handed over.

34. The first question to consider is whether HLC SA is likely to be a party to the proposed litigation (see rule 31.16(3)(a)). It is common ground that the answer to this question is yes. The second question to consider is whether the applicant is likely to be a party to those proceedings (see rule 31.16(3)(b)). It is common ground that the answer to this question is yes.

35. The third question is whether the documents sought fall within the ambit of standard disclosure (see rule 31.16(3)(c)). Mr David Sears QC for HLC SA contends that the application as presently framed is too wide and goes beyond standard disclosure. Miss Claire Packman for Birse accepted that this was the case and that some amendment was required in this regard. The amendment which emerged in the course of the hearing, and to which Mr Sears does not object, is as follows:

"The opening line of the draft order shall read as follows:

The respondent do make disclosure of the following documents (insofar as they fall within the test of standard disclosure set out in rule 31.6) by 4pm on… day of… 2006."

In addition, there shall be added at the end of the draft order the following passage:

"For the purposes of the standard disclosure test, the anticipated issue between the parties is whether on 10th August 2003 the premises were being used for the purposes of clause 29.2 of the main contract conditions."

36. I give leave for these amendments to be made to the draft order which Birse is asking the court to make. In the light of these amendments, the answer to the third question (which arises from rule 31.16(3)(c)) is yes.

37. I come now to the fourth question (which arises from rule 31.16(3)(d)). This is whether pre-action disclosure is "desirable in order to (1) dispose fairly of the anticipated proceedings; (2) assist the dispute to be resolved without proceedings; or (3) save costs".

38. Miss Packman submits that Birse satisfies this test. Birse was not on site at the relevant time. Birse does not have access to the basic information which ordinarily a contractor would have. The use to which the premises were being put is crucial to the proposed proceedings between Birse and HLC SA. HLC SA has a monopoly of

knowledge and documentation about these matters. Birse needs the documents in categories (a) to (e) in order to evaluate the strength of its case and in order to plead that case properly.

39. Mr Sears submits that Birse fails to surmount the hurdle of rule 31.16(3)(d). First, it is clear from the robustly worded witness statement of Mr Ash (a solicitor acting for Birse) that proceedings are inevitable. Birse has already made a firm evaluation of the strength of its case. Furthermore, Birse has all the information which it needs as a result of documents produced in the adjudication and other documents obtained through the endeavours of Birse's solicitors. The fact that Birse may need the documents to particularise part of its case is not a good ground for pre-action disclosure. Even if the subsequent disclosure of the documents will necessitate amendment of Birse's pleadings, that is not a good ground for pre-action disclosure (see *Black* at paragraph 83 and *First Gulf Bank* at paragraph 26).

40. These then are the arguments which I must evaluate. In approaching this matter, it is important to bear in mind a distinction which is highlighted in paragraph 12 of Mr Sears' skeleton argument. The crucial issue between the parties is not whether the MERC was being used. There is no dispute about that. The crucial issue is whether the MERC was being used for commissioning and testing purposes (as HLC SA contend) or for commercial or operational purposes (as Birse contends).

41. I have now spent several hours reading the documents which Birse has obtained. I will not extend this judgment by embarking upon a detailed analysis of those documents. Instead I shall set out the two conclusions which I have reached:

(1) The documents so far obtained by Birse only shed limited light on the crucial issue of the purpose for which the MERC was being used in August 2003.

(2) The documents identified in categories (a) to (e) are likely to shed very much more light on that issue.

42. It seems to me that if the documents identified in categories (a) to (e) are disclosed, there is a real possibility that the parties will resolve their present dispute without recourse to litigation. I accept Miss Packman's submissions in this regard. Both HLC SA and Birse are commercial entities. If they are both able to make an informed assessment of their case on the basis of the critical documents, there must be a serious possibility of compromise.

43. It also seems to me that pre-action disclosure of categories (a) to (e) will promote the fair disposal of the anticipated proceedings. It is not a level playing field if, at the outset of the litigation, one party is obliged to plead its case in ignorance of certain basic facts. If pre-action disclosure is not ordered, I anticipate that in due course Birse will need to make substantial amendments to its pleadings. Such amendments will be causative of delay and wasteful of costs. I therefore conclude that the jurisdictional threshold set out in rule 31.16(3)(d) has been passed in all three ways that are possible.

44. I now move on to consider the test of "desirable" and the exercise of the court's discretion. I consider these questions with the benefit of Court of Appeal's guidance given in ***Black*** and bearing in mind the reasoning of first instance judges in ***XL London Market Ltd, Briggs & Forrester Electrical Ltd* and *First Gulf Bank*.**

45. Paragraph 31 of Mr Justice Langley's judgment in *Excel London Market Ltd* seems to me to be in point. This is a case in which important information is held by the respondent and not otherwise available to the applicant. The present case is at the opposite end of the spectrum from *First Gulf Bank*. In that case the applicant had already obtained important information as a result of observing the related proceedings. Furthermore, in *Gulf Bank*, unlike the present case, an order for pre-action disclosure would have unfairly tipped the balance in the applicant's favour.

46. Two features of the present case seem to be particularly relevant to the "desirable" test and to the exercise of discretion. First, HLC SA was at the centre of events at the time when the fire occurred, whereas Birse was shut out from those events. Since Birse is a contractor who is said to have continuing obligations at the relevant time, this is an unusual situation. Secondly, the termination issue is one of particular importance to Birse. It determines the outcome of Birse's claim for repudiation. In addition, and more importantly, it determines whether or not Birse is presently able to pursue its substantial claim for variations, which are unrelated to the fire. On the basis of the adjudicator's decision, Birse is shut out from bringing that claim by clause 16.4 of the subcontract. When asked in argument, Mr Sears was unable to say how long it would be before the conditions of clause 16.4 would be satisfied. It may be a matter of months; it may be a matter of years. Mr Sears, on instructions, was unable to assist the court.

47. Finally, it is relevant to the exercise of the court's discretion that HLC SA, NPT and certain other companies dealing with the MERC during 2002 and 2003 appear to be related. Birse, on the other hand, has no connection with those companies. Birse is outside the loop.

48. Having considered all the circumstances of this case, I am quite satisfied that it is desirable and that it is a proper exercise of this court's discretion to make an order for pre-action disclosure of the documents in categories (a) to (e). All the various tests set out in rule 31.16(3) are satisfied.

Part 6: Categories (f) to (h)

49. The documents set out in categories (f) to (h) are principally relevant to any argument which HLC SA may advance seeking to justify its termination by a reference to clauses 12 or 13 of the subcontract. Mr Sears submits that any argument which HLC SA may advance in the litigation to the effect that it required fire reinstatement works

pursuant to clauses 12 or 13 would be fatally flawed. This is because HLC, in the termination letter dated 16th March 2004, relied only on clause 9.2.

50. In my view, this submission is well-founded. Birse is not entitled to pre-action disclosure of the documents in categories (f) to (h). If those documents somehow become relevant in the light of HLC SA's future pleadings, then Birse will obtain those documents at the proper time in the course of the action. In relation to categories (f) to (h), I do not consider that Birse has surmounted the tests set out in rule 31.16(3)(c) or rule 31.16(3)(d).

Part 7: Conclusion

51. For the reasons set out in parts 5 and 6 above, I will make an order for pre-action disclosure of the documents identified in categories (a) to (e) provided that the court's order includes the amendments indicated earlier in this judgment. I thank both counsel for their helpful skeleton arguments and oral submissions.

MISS CLAIRE PACKMAN (instructed by Osborne Clark) appeared on behalf of the applicant
MR DAVID SEARS QC (instructed by Fenwick Elliott) appeared on behalf of the respondent