JUDGMENT : His Honour Judge Richard Havery Q.C. : TCC. 28th October 2005.

1. The claimant, which I shall call Shinedean, is the owner of premises at number 113, Kirkdale Road, Sydenham. In order to develop those premises it contracted with an associated company, Xen Limited, to carry out the necessary work. In or about April 2002 Xen Limited contracted with the first defendant, which I shall call Alldown, a company specializing in demolition work, to carry out the demolition and necessary excavation work on the premises.

2. On 24th April 2002 Alldown excavated a hole adjacent to the neighbouring property, number 111, Kirkdale Road, which was owned by a Mr. Patel and his wife Mrs. Patel. On the evening of the same day the flank wall of that property began to collapse. As a result of emergency measures carried out to stabilize the site, Shinedean had to carry out works on its own premises and to alter the design of the development (essentially, changing from raft foundations to a steel frame with piling). The completion of the development project was in consequence delayed.

3. On 5th September 2001, Alldown entered into a policy of insurance for a period of one year with the second defendant, which I shall call Axa. That policy provided cover in relation to, among other things, public liability and contractors' all risks. On about 25th April 2002 Alldown, by its brokers, notified Axa of the partial collapse of the wall. On 2nd September 2002 Alldown went into creditors' voluntary liquidation. On 5th June 2003 Axa, through their loss adjusters, notified Alldown's brokers that they declined to grant an indemnity to Alldown under the policy in respect of the events of 24th April 2002 on the ground that Alldown had failed to provide Axa with information and assistance in accordance with the conditions of the policy.

4. In October 2003 Mr. and Mrs. Patel brought proceedings against Shinedean for damages, claiming the benefit of an easement of support. That action was settled on 14th June 2004 by a consent order under which Shinedean paid Mr. and Mrs. Patel £110,000 in full and final settlement including interest and costs.

5. In April 2004 Shinedean began these proceedings against Alldown. Shinedean claims (a) a contribution (of 100 per cent.) to the sums paid by Shinedean in settlement of the action brought by Mr. and Mrs. Patel, together with Shinedean's own costs of that action, and (b) damages in respect of Shinedean's own losses caused by breach of duty owed by Alldown to Shinedean. On 10th June 2004 Shinedean obtained a default judgment against Alldown for an amount to be decided by the court and costs. The case came back before the court on 7th March 2005 for an assessment of the amount to be decided by the court. At that point Axa was joined as second defendant on its own application made in order to protect its position as insurer of Alldown. The assessment was adjourned. The claim was repleaded to include, among other things, claims against Axa for declarations of entitlement to indemnity under the Third Parties (Rights against Insurers) Act 1930.

6. I have to decide three preliminary issues, as follows:
   (1) Whether Alldown was in breach of the claims co-operation conditions in the policy.
   (2) Whether compliance with the claims co-operation clause is a condition precedent to Axa's liability to indemnify Alldown under the policy.
   (3) Whether Axa is thereby entitled to decline to indemnify as a result of any such breaches by Alldown.

7. The relevant clauses of the policy appear in two sections of the policy: General Conditions and Public Liability. The General Conditions are expressed not to apply to the Public Liability section. In the General Conditions, the relevant clauses are as follows:
   3. Claims Conditions
   (1) In the event of any loss destruction or damage or event likely to give rise to a claim under this Policy the Insured shall
   a) notify the Company immediately ….
   d) deliver to the Company at the Insured's expense
   i) full information in writing of the property lost destroyed or damaged and of the amount of loss destruction or damage
   ii) details of any other insurances on any property hereby insured within 30 days after such loss destruction or damage or such further time as the Company may allow

iii) all such proofs and information relating to the claim as may be reasonably required ….

(2) No claim under this Policy shall be payable unless the terms of this condition have been complied with

12. Proceedings

…..The Insured shall render to the Company all necessary information and assistance to enable the Company to settle or resist any claim or to institute proceedings

15. Condition Precedent

It is a condition precedent to any liability on the part of the Company under this Policy that a) the terms hereof so far as they relate to anything to be done or complied with by the Insured are duly and faithfully observed and fulfilled by the Insured and by any other person who may be entitled to be indemnified under this Policy…..

In the Public Liability section the relevant clauses are as follows, under the heading Special Conditions:

1. Observance of Terms

It is a condition precedent to any liability on the part of the Company under this Section that the terms hereof so far as they relate to anything to be done or complied with by the Insured shall be duly and faithfully observed

4. Notification of Claims

In the event of any occurrence which may give rise to a claim under this Section the Insured shall immediately
a) give written notice with full particulars to the Company
b) forward to the Company upon receipt every letter claim writ summons or process …..

5. Claims Control …..

d) the Insured shall give all information and assistance the Company may require
The expression "the Company" means Axa.

8. The clauses upon which Axa relies are, in the General Conditions, clauses 3(1)(d)(iii), 3(2), 12 and 15; and in the Public Liability section, special conditions 1 and 5(d). Thus the second preliminary issue amounts to this: whether compliance on the part of the Insured with clauses 3(1)(d)(iii) and 12 is a condition precedent to liability on the part of Axa to provide indemnity under the General Conditions section; and whether compliance on the part of the Insured with special condition 5(d) is a condition precedent to liability on the part of Axa to provide indemnity under the Public Liability section. It is those questions that I shall first consider.

9. Mr. Jones submitted that a provision in a policy of insurance that fulfillment of a clause is a condition precedent to liability on the part of the insurer is not necessarily effective. He relied on the decision of the Court of Appeal in ***Re Bradley and Essex and Suffolk Accident Indemnity Society*** [1912] 1 K.B. 415. In that case there was a general provision that due observance and fulfillment of the conditions of the policy should be a condition precedent to any liability of the society under the policy. Cozens-Hardy M.R. considered (p.421) that some of the so-called conditions could not be conditions precedent. I accept Mr. Jones's submission so far as it goes.

10. Cozens-Hardy M.R. said (ib., at p.422) *"A policy of this nature, in case of ambiguity or doubt, ought to be construed against the office and in favour of the policy-holder, …"* In that case, the insured was a farmer in a small way of business who had insured himself against liability to pay workmen's compensation. In my judgment, Cozens-Hardy M.R's. remark applies equally to the present case. Farwell L.J. said at p.430 *"It is especially incumbent on insurance companies to make clear, both in their proposal forms and in their policies, the conditions which are precedent to their liability to pay, for such conditions have the same effect as forfeiture clauses, and may inflict loss and injury to the assured and those claiming under him out of all proportion to any damage that could possibly accrue to the company from non-observance or non-performance of the conditions. Accordingly, it has been established that the doctrine that policies are to be construed "**contra proferentes**" applies strongly against the company."*

That statement is of general application and applies here.

11. Mr. Jones submitted that the notification clauses in the policy were ambiguous. Under clause 3(1)(iii) of the General Conditions the insured was required to deliver the relevant proofs and information to the Company. But the following statement appeared on the first page of the policy*: "All communications should be addressed to your broker or agent or to the branch office shown in the Schedule."*

The Schedule stated that the insurance had been underwritten by Axa and arranged by Stuart Alexander Ltd. of 10, Philpot Lane, London EC3M 8AB. It was not clear, submitted Mr. Jones, whether putting the documents in the post was sufficient. The other clauses relied on by Axa did not expressly require delivery. Taking those clauses as a whole, they should be struck down as ambiguous for the purpose of supporting conditions precedent. I reject that argument. It is true that there is some ambiguity in the clauses in question, as submitted by Mr. Jones. But in my judgment the ambiguity is not of a kind to give rise to doubt whether the clauses are or are intended to be conditions precedent.

12. Mr. Jones further submitted that clauses 3(2) and 15 of the General Conditions and clause 1 of the Special Conditions, which provided that other clauses should be conditions precedent, were too wide in that not all the relevant other clauses could be conditions precedent. As an example, clause 6 of the General Conditions, which provided that the insured should take all reasonable precautions to prevent the loss destruction or damage, was in substantially the same wording as clause 4 of the policy the subject of *Bradley's* case ([1912] 1 K.B. 415), which seemed to Cozens-Hardy M.R. (p.421) not to be a condition precedent. I reject that submission, for the reason in particular that clause 4 in *Bradley's* case extended to general conduct of the insured, whereas clause 6 of the General Conditions in the instant case relates only to the subject-matter of the claim.

13. A further submission of Mr. Jones was that a difference between the effect of General Condition 3(2) on the one hand and the effects of General Condition 15 and Special Condition 1 on the other hand caused an ambiguity which should disentitle the insurer to rely on a so-called condition precedent. He submitted that the wording of clause 3(2) ("No claim…..shall be payable") did not suggest that a once only non-compliance permitted the insurer to decline forever. On the other hand, the effect of condition 15, because it spoke of a condition precedent to "liability" rather than to payment of the claim, would ensure that the insurer would never have a liability to pay if there had been a breach. A similar argument applied to Special Condition 1.

14. In my judgment, clauses 3(2) and 15 of the General Conditions and clause 1 of the Special Conditions are sufficiently clear. In my judgment, they all mean that the insurer shall not be liable to pay a claim unless the relevant conditions have been complied with in relation to that claim. I conclude that the clauses upon non-fulfilment of which Miss Chalmers relies are conditions precedent to liability on the part of Axa to indemnify Alldown. I repeat them here for clarity. Under the General Conditions: *"…..the Insured shall….deliver to the Company at the Insured's expense…..all such proofs and information relating to the claim as may be reasonably required (clause 3(1)(d)(iii);*

The Insured shall render to the Company all necessary information and assistance to enable the Company to settle or resist any claim or to institute proceedings (clause 12).

And under the Special Conditions: *"The Insured shall give all information and assistance the Company may require (clause 5(d))."*

I must nevertheless apply the principles set out in paragraph 10 above to the interpretation of those clauses. None of them expressly imposes a time limit.

15. The facts relevant to preliminary issue (1) are as follows. It is common ground that the information and documents required by Axa were made available to Axa in the form of an exhibit to a witness statement of Mr. Robert Clarke, a former director of Alldown, at the end of 2004 or the beginning of 2005. There is a dispute whether they were also furnished to Axa before then.

16. It is not in dispute that on about 25th April 2002 Alldown notified Axa of the damage to the building on number 111, Kirkdale. Axa appointed Cunningham Lindsey, loss adjusters, to investigate the circumstances of the damage. Axa quickly became aware of the likelihood of a claim against Alldown from the owners of the premises at number 111.

17. The person representing Cunningham Lindsey in relation to the claim was Mr. Ian Fox, a chartered loss adjuster. I am satisfied on the evidence that Mr. Clarke, then a director of Alldown, and Mr. Fox met on site (that is number 113) on 30th April 2002 to inspect the damage and the site. They repaired to a convenient café to discuss the matter. During the course of that discussion, Mr. Fox advised Mr. Clarke that he, Mr. Fox, would need to see all relevant documentation regarding the contract. He asked Mr.

Clarke to send him a copy of the contract health and safety plan, method statements, drawings of the work and any other relevant documentation. Mr. Clarke agreed to do so.

18. It is common ground that Mr. Clarke did not immediately send the documents to Mr. Fox, and that Mr. Fox thereafter made numerous requests of him to supply them. That conclusion is supported by the evidence of Mr. Fox and of Mr. Clarke. It is clear from the evidence of Mr. Fox, supported by the correspondence and his attendance notes, that he made numerous requests of Mr. Clarke for the documentation, both by letter and by telephone, from the time of the meeting on 30th April 2002 until 10th March 2003, both before and after 2nd September 2002, when Alldown went into liquidation. I accept evidence of Mr. Fox that he had a telephone conversation with Mr. Clarke on 13th May 2002 in order to discuss the matter further, since it was not clear to him who was the main contractor for the project. During the course of that conversation Mr. Clarke confirmed that there was no written contract, and said that he would send the other documents requested as soon as possible. I am satisfied on Mr. Fox's evidence and the documents from his file that on 5th June 2002 Mr. Fox received a letter from Mr. Clarke enclosing two letters from the solicitors acting for Mr. and Mrs. Patel, one addressed to the liquidator of Zen Limited (sic) and the other addressed to Mr. Clarke, both foreshadowing claims. Mr. Fox said he received none of the other relevant documents until he received some drawings following a telephone call he received from Mr. Clarke on 24th June 2003. Mr. Fox's file note records a message from Mr. Clarke that he had already sent the drawings to Mr. Fox "in January; no, two months ago". Mr. Fox's evidence about the telephone call was that Mr. Clarke said that he had sent the drawings and other documents to him in January and then on reflection advised that he had sent them about two months before the telephone call, namely April 2003. Mr. Fox confirmed to Mr. Clarke that the documents had not been received and Mr. Clarke agreed to send "another copy". A letter from Mr. Clarke to Mr. Fox of the same date says, with reference to the subject-matter of the claim, "Please find enclosed drawings for the above Site as previously sent". Apart from the drawings and the letters from Mr. and Mrs. Patel's solicitors, Mr. Fox said that he received none of the documents requested of Mr. Clarke, in spite of promises from Mr. Clarke.

19. Mr. Clarke said in evidence that he was absolutely certain that he sent all the documents in his file to Mr. Fox on at least two occasions, save only the site plans, which he sent only once because he did not retain a copy. He said he knew that Mr. Fox had asked for a set of drawings, but whether he sent them separately he did not recall. A copy of the documents in his file was exhibited as exhibit RC 2 to his witness statement. He said that some time after sending the documents, he received correspondence and telephone calls from Mr. Fox suggesting that Mr. Fox had not received any documents. On one occasion he told Mr. Fox that he had sent them, and would send them again. On Mr. Fox's file note of 24th June 2003 being put to him, he accepted that it was reasonable to suppose that the date of that occasion was 24th June 2003. Shinedean pleaded in its Reply that Mr. Clarke sent 14 documents, being most of the documents comprised in exhibit RC 2, by post to Mr. Fox in or about June 2002. Mr. Clarke said in evidence that he had definitely sent them by 28th August 2002. He also said that he did not have a good memory for dates, and that he was not a "writing person".

20. I heard evidence from Mr. Xenofon Ioannou, Managing Director of Shinedean. He said that he became aware that Mr. Fox was awaiting documentation from Alldown. He raised the matter with Mr. Clarke, who informed him that he had sent documentation to Mr. Fox on two occasions. He attended Mr. Clarke's office at a time which he said was some months after June 2002. He asked Mr. Clarke to let him have photocopies of everything that Mr. Clarke had sent to Mr. Fox. He was provided with copies of the documents at pages 1 to 28 of a bundle marked XI that was put to him in evidence. He then obtained a letter from Zencastle Contractors Ltd. to Mr. Patel dated 12th June 2002, a party structure notice dated 15th July 2002, plans by Mark Humby and Company Ltd., and drawing number 141. He put those documents, which he said were pages 29 to 34 of bundle XI, together with pages 1 to 28, in an envelope addressed to Mr. Fox, stamped and posted it. He made copies of everything he sent. He did not enclose a covering letter. That was in about September 2002. He telephoned Mr. Fox about a week to ten days later, and Mr. Fox told him that he had still not received the documents. In his witness statement, Mr. Ioannou wrote this: *"Whilst I cannot recall the precise detail of the conversation I was left with the impression, presumably from something that Mr. Fox had said to me, that when he received the documents he would move on to*

deal with the claim. I did not hear from Mr. Fox again so I presumed that the documents had arrived and the claim was proceeding."

21. Mr. John Hearsum, Mr. and Mrs. Patel's surveyor, made a witness statement which was put in evidence before me by consent. He attended a site meeting on 13th August 2003. He appended to his witness statement a note of that meeting. I take it that paragraphs 1 to 30 of that note were taken from his contemporary notes, since the note ends with a paragraph, paragraph 31, headed "Post Meeting note". He noted in paragraphs 27 and 29 that Mr. Ioannou stated that he had met one of the former directors of Alldown recently who had informed him that all necessary information (apparently only a plan) had now been provided to Ian Fox of Cunningham Lindsey. Mr. Ioannou was due to see Mr. Clarke later in the day and would endeavour to obtain copies of correspondence with Cunningham Lindsey and send it to Mr. Hearsum.

22. It was put to Mr. Ioannou in cross-examination that the claim had been declined before his first conversation with Mr. Fox. He did not accept that. In oral evidence in chief he said there was one telephone call after the events of September 2002. It was about eight or nine months afterwards, in 2003. It was when he heard that Shinedean's claim had been declined. He asked Mr. Fox what was going on. Mr. Fox said he had not received the documents yet. Mr. Ioannou assumed that Mr. Fox would telephone back if he did not receive them.

23. Mr. Clarke's secretary, Ms. Tracey Husnu, gave evidence before me. In her witness statement, she said that she remembered a Mr. Fox of Cunningham Lindsey who dealt with the claim and that letters were received about the matter. She could not recall details of the documents, but could recall one occasion when documents were sent to Mr. Fox. She had been informed by the claimant's solicitors that the documents were actually sent on two occasions, which she could not personally recall. But if she was given documents to send, collate, photocopy or otherwise deal with she would have done so. She recalled Mr. Ioannou attending Alldown's offices on a few occasions. She recalled him requesting photocopies after the incident, as well as bringing documents. She could not recall any more detail, except that she remembered one occasion when Mr. Clarke asked her for the folder with the documents relating to Kirkdale when Mr. Ioannou was present. She had been asked (she went on) whether she recollected documents being prepared for Mr. Ioannou in order that he could personally post them to Mr. Fox. She recalled nothing more than the fact that, as previously stated in her witness statement, she recalled Mr. Clarke asking her for the file on one occasion when Mr. Ioannou came in.

24. Bundle XI, comprising 34 pages, was identical with bundle RC 2. Pages 1 to 27 and 32 to 34 were the documents mentioned in paragraph 19 above as having been pleaded in the Reply. The letter to Mr. Patel dated 12th June 2002 was page 28, the party structure notice dated 15th July 2002 was page 30, the plan by Mark Humby and Company was page 29, and drawing number 141 was page 31.

25. I find Mr. Fox to have been a reliable witness, who had kept good records. I accept Ms. Husnu's evidence. Mr. Clarke did not keep contemporaneous notes. He wrote scarcely any letters. He did not remember dates. His evidence was confused. I found him not to be a credible witness. Mr. Ioannou's evidence was also confused. I find his errors over the precise documents and pagination in bundle XI to be insignificant. But the occasion when he said he sent the envelope to Mr. Fox seemed to turn into two separate occasions after Mr. Hearsum's note was put to him. He again produced no covering letter.

26. Mr. Jones submitted that the documents which Mr. Fox said he had not received might have been delivered to the premises of Cunningham Lindsey, where there were some forty employees, and then mislaid on all occasions. If they were all delivered, I would regard that as remotely improbable. On the totality of the evidence, I am satisfied that Cunningham Lindsey did not receive the relevant documents except the drawings and the two letters mentioned in paragraph 18 above, and that they were not sent.

27. Those are my findings of fact in relation to the first issue. Before considering whether Alldown was thereby in breach of the claims co-operation conditions of the policy, I shall consider the interpretation of those conditions.

28. Mr. Jones submitted that since no time limit was expressed in the co-operation clauses, and the relevant information and documents had eventually been provided, there was no breach of any condition

precedent. In my judgment, that does not follow. Even following, as I do, the contra proferentem rule, there must in my judgment be a term, implied in order to give business efficacy to the policy, that the insured will do the things required of it by way of notification and co-operation within a reasonable time. What is a reasonable time must depend on the facts in each case. In view of the rule of construction, what is a reasonable time must be interpreted generously in favour of the insured so far as it is reasonable to do so, rather than strictly, in favour of the insurer.

29. Mr. Jones made the following submission: *"Prejudice to the insurer is surely one of the tests for judging….reasonableness…..If a third party claim is being pursued vigorously, or the insured is brought into an existing case as an additional party with a looming trial date, perhaps the court would be persuaded to consider that a swifter response was required. Even then, a court would wish to know whether an insurer could obtain the information from elsewhere. But if a threatened claim is dormant then a reasonable time might be a great deal longer. Surely the purpose of the clause, if it is, as Axa contends, a condition precedent with an implied reasonable time limit, is to assist the insurer to protect his position as the indemnifier of the insured. It cannot be intended to operate punitively."*

I accept that submission. It does entail this, that an insurer may well be unable to tell whether a reasonable time has elapsed so as to enable him to close his books on a claim. That involves, in my judgment, a degree of prejudice, albeit small, to the insurer which is not to be ignored.

30. In considering the question of reasonableness in this case, I bear in mind that Axa, through Mr. Fox, made numerous requests for information that went unanswered. No excuse or reason has been offered for Alldown's failure to provide the information before 2nd September 2002, when Alldown went into liquidation. Mr. Jones submitted that thereafter the requests were made of the wrong person. They should have been made of the liquidator, since (as was not disputed) the continuance of the powers of the directors of Alldown was not sanctioned after the appointment of the liquidator. Thus those powers ceased, by reason of the provisions of section 103 of the Insolvency Act 1986. There was put in evidence by consent a witness statement of Mr. Alan Simon, the liquidator of Alldown. He said that despite numerous requests, Mr Clarke did not forward the necessary books and records of Alldown to him, though he did provide some incomplete information. It may be that Mr. Fox's requests made after 2nd September 2002 were not made to the right person. Certainly the liquidator was not in a position to furnish all necessary information and documents to Axa. Nevertheless, Alldown were undoubtedly to be blamed for the situation that had arisen. And the fact remains that the information and documents were not furnished.

31. I must now consider whether Axa has suffered prejudice by reason of the delay and non-co-operation. Miss Chalmers submitted that by reason of the failure to furnish the documents Axa from an early stage considered that it was prejudiced in that it was unable to take an early view as to liability and negotiate accordingly. If the information or assistance had been supplied as requested, Axa might have been able to resolve issues more easily or cheaply. It is not suggested, nor I think could it be suggested, that Axa has suffered prejudice in relation to the claim of Shinedean against Alldown in relation to Shinedean's own losses.

32. The order for the hearing of preliminary issues included two further preliminary issues: 4. Whether or not the settlement achieved between Shinedean and Mr. and Mrs. Patel was bona fide/reasonable, and 5. The degree of contribution/indemnity payable by Alldown in respect of the settlement and costs. It was unnecessary for me to decide those issues, and I was not asked to decide them. The reason was this, as given by Miss Chalmers. Shinedean had recently disclosed further documents relating to the Patel claim. Having considered those documents, Axa accepted that the settlement satisfied the test of bona fides set out in section 1(4) of the Civil Liability (Contribution) Act 1978. Axa having now had the opportunity to examine at least some documents relating to the claim of Mr. and Mrs. Patel, does not allege that Shinedean had any responsibility for the damage Mr. and Mrs. Patel suffered. Axa accepted that Shinedean was entitled in principle to an indemnity from Alldown in respect of the whole of its liability (£110,000) to Mr. and Mrs. Patel for damages and costs. Axa accepted that Shinedean was entitled to recover its reasonably incurred costs of the Patel action from Alldown. The reasonableness of the amount of those costs remains in issue.

33. In view of the matters mentioned in the preceding paragraph, any prejudice suffered by Axa by reason of the non-co-operation of Alldown over and above the prejudice mentioned in paragraph 29 above must be minuscule. I conclude that the documents ultimately coming to the knowledge of Axa by way of RC 2 at the end of 2004 or the beginning of 2005 were supplied within a reasonable time, and that the conditions precedent relied on by Axa were complied with. It follows that the answer to the third preliminary issue is No.

34. To sum up, my answers to the preliminary issues are these:

(1) Whether Alldown was in breach of the claims co-operation conditions in the policy.
Answer: No.

(2) Whether compliance with the claims co-operation clause is a condition precedent to Axa's liability to indemnify Alldown under the policy.
Answer: Yes.

(3) Whether Axa is thereby entitled to decline to indemnify as a result of any such breaches by Alldown.
Answer: No, since no such breaches have been found.

Mr. Nigel Jones Q.C. and Mr. David Lewis (instructed by Lawson George Solicitors) for the Claimant
Miss Suzanne Chalmers (instructed by Cartwrights Insurance Partners) for the Second Defendant