JUDGMENT : MR JUSTICE JACKSON: TCC. 23rd October 2006

1. This judgment is in five parts, namely: Part 1 – Introduction; Part 2 – The Facts; Part 3 – The Present Application; Part 4 – The Law; Part 5 – Decision.

Part 1 - Introduction

2. This is an application for disclosure against a non-party, made pursuant to section 34 of the Supreme Court Act 1981 and rule 31.17 of the Civil Procedure Rules 1998. Pell Frischmann Consultants Limited, to whom I shall refer as "Pell Frischmann", is the applicant for disclosure. AMEC Civil Engineering Limited, to whom I shall refer as "AMEC", is the respondent to Pell Frischmann's application. The Secretary of State for Transport, to whom I shall refer as "The Secretary of State", is not a party to this application, but is directly interested in the outcome.

3. The background to this application is that the Secretary of State is making claims against both Pell Frischmann and AMEC for alleged defects in a motorway viaduct. The claims are substantial, being quantified at approximately £37,000,000 plus interest.

4. The only other party which features in the present application is Weeks Technical Services Limited, which was formerly known as Contest Melbourne Weeks Limited. I shall refer to this company as "Weeks".

5. In the present proceedings, the Treasury Solicitor acts for the Secretary of State; Messrs Beale & Co act for Pell Frischmann; Messrs Wragge & Co act for AMEC.

6. In this judgment I shall refer to the Supreme Court Act 1981 as "The 1981 Act". I shall refer to the Civil Procedure Rules 1998 as amended as "CPR".

7. After these introductory remarks, it is now time to turn to the facts.

Part 2 – The Facts

8. Thelwall Viaduct is a massive structure, which carries the M6 motorway across the River Mersey and the Manchester Ship Canal. During the 1990s the Secretary of State engaged AMEC to carry out renovation works to Thelwall Viaduct as part of a scheme to widen the M6 motorway. The Secretary of State engaged Pell Frischmann to act as engineer in respect of the project. The renovation works involved the installation of roller bearings in or about 1996.

9. In June 2002, one of the roller bearings failed. The Highways Agency carried out investigations and decided to replace all the roller bearings. This work was carried out between September 2002 and December 2004.

10. On 18th December 2002, the Secretary of State commenced proceedings in the Technology and Construction Court against AMEC, Pell Frischmann and another firm of engineers who are no longer a party to the action. Those proceedings were stayed until 17th July 2003, when the Secretary of State served his Particulars of Claim. The Particulars of Claim alleged that the failure of the roller bearings was caused by breaches of contract and negligence on the part of AMEC and Pell Frischmann.

11. In July 2003, AMEC exercised its contractual right to require that the Secretary of State's claims against AMEC be referred to arbitration. Accordingly, the Secretary of State discontinued the court proceedings against AMEC and pursued that aspect of his claim by arbitration. Some of the procedural issues in that arbitration were dealt with by the Court of Appeal last year (see ***AMEC Civil Engineering Limited v Secretary of State for Transport*** [2005] EWCA Civ 291; [2005] 1 WLR 2339).

12. After AMEC's departure from the litigation, the remaining parties agreed a further period of stay to allow the exchange of information, the testing of samples, without prejudice of meetings and so forth. This procedure was intended to fulfill the aims and objectives of the Pre-action Protocol for Construction and Engineering Disputes. This was an extremely sensible procedure. It was referred to by the parties as "the protocol process".

13. During the protocol process Pell Frischmann served a helpful and detailed summary of its case, dated 28th May 2004. Both the Secretary of State and Pell Frischmann voluntarily gave extensive disclosure of relevant documents. Their respective experts held discussions and commissioned appropriate testing of the roller bearings.

14. On 5th May 2005, at a case management conference, I gave directions leading to an early trial of certain claims concerning the web panels on Thelwall Viaduct. However, the proceedings concerning the roller bearings were largely left in abeyance because of the valuable work which was being progressed by the parties and their experts.

15. In June 2005, Pell Frischmann issued Part 20 proceedings against Weeks. Weeks is a company providing materials consultancy services, which Pell Frischmann had engaged as sub-consultant in relation to Thelwall Viaduct.

16. In December 2005, the Secretary of State's claims concerning web panels were resolved by agreement between the parties.

17. In the meantime, the arbitration between the Secretary of State and AMEC concerning the roller bearings was being progressed. AMEC served a detailed defence in the arbitration. Although the stage of formal disclosure had not yet been reached in the arbitration, a number of documents were voluntarily disclosed by the Secretary of State and AMEC to each other.

18. In recent months the pace of events has quickened both in relation to the litigation and the arbitration. In relation to the dispute between the Secretary of State and Pell Frischmann, the protocol process is now drawing to a close.

Although the parties have not resolved their disputes by agreement, they have gained a fuller understanding of each other's cases and the expert investigations have been advanced. The Secretary of State has issued an application to amend his Particulars of Claim. This will be dealt with at a case management conference fixed for 9th November. At that case management conference, I shall have to give directions for the service of Pell Frischmann's defence and for the future conduct of the action.

19. Both the Secretary of State and Pell Frischmann became aware that AMEC had documents which would not only be disclosable in the arbitration but would also be needed in the litigation. On 29th June 2006 the Treasury Solicitor on behalf of the Secretary of State wrote as follows to Wragge & Co, who represent AMEC:

"As you are aware from previous correspondence, your client has much documentary evidence that will be relevant both to the Court Action and to the arbitration between our respective clients. This includes documentation that will prove of assistance to my client's case in the Court Action …

My client now requires that the following four categories of document be provided by AMEC for disclosure in the Court Action:

1. manufacturing data records for the roller bearings, including, specifically, records of heat treatment, roller and plate design and material certificates for all the steel used to manufacture the rollers and plates;

2. minutes from meetings recording how and why bearing material was chosen for the roller bearings;

3. tender documents for the roller bearings and FIP/AMEC sub-contract, including but not limited to drawings/schedules; design parameters; specifications; bills of quantities; conditions of contract; and method of measurement;

4. copies of all correspondence between AMEC and FIP relating to the Thelwall Viaduct renovation;

5. correspondence to/from any parties, pursuant to Clause 8B of the AMEC/SST contract.

Please respond to this letter, providing the above documentation, by 7th July 2006. Should your client again refuse to provide these documents by that date my client anticipates that it will make an application in the Court Action against your client for non-party disclosure under CPR 31.17."

20. Certain documents in the five categories set out in that letter were voluntarily provided by AMEC to the Secretary of State. The Treasury Solicitor passed on copies of those documents to Beale & Co, who represent Pell Frischmann. However, many other documents falling into those five categories were not disclosed at this stage by AMEC. There is nothing sinister in this omission. The explanation lies in the sheer volume of documentation generated by the Thelwall Viaduct project. Mr. Baylis, of Wragge & Co, explains in his witness statement that for some time his firm has been in possession of extensive documentation provided by AMEC. However, those documents were not reviewed whilst various jurisdictional challenges were being pursued, which might have given AMEC a complete defence to the Secretary of State's claims. Very recently, Wragge & Co have received from AMEC a further 56 packing cases full of documents relating to Thelwall Viaduct. Examination of these documents has begun, but will take some time.

21. Let me now return to the narrative. Beale & Co were concerned that the Treasury Solicitor's letter of 29th June 2006 had not elicited the documents requested from AMEC. On 4th September 2006, Beale & Co wrote to Wragge & Co requesting eight categories of documents held by AMEC. On 11th September 2006, Wragge & Co replied as follows:

"We are aware, of course, that a limited number of documents were provided by our client to a representative of the Highways Agency on a voluntary basis some time ago. In view of the fact that those documents were already in the Secretary of State's possession, our client saw no purpose in declining the request to allow them to be disclosed to your client. However, the further documents requested by the Treasury Solicitor in its letter of 29th June 2006 (and we are unsure of the circumstances in which correspondence between this firm and the Treasury Solicitor has been disclosed to you) have not been provided, for the very good reason that the Treasury Solicitor's request anticipated the process of disclosure in the arbitration, and was made at a time when it was neither convenient nor appropriate to require our client to undertake it. We would add that at the time that we declined to provide those documents voluntarily, it was our understanding that no order had been made relating to disclosure (in relation to the issue of the bearings) in the proceedings to which your client is a party.

Your letter now requests not only extensive correspondence, but also very many documents that have arisen in connection with the entirely private arbitration between our client and the Secretary of State for Transport, who, we would add, is not currently entitled to many of the documents to which you refer. You also assume, wrongly, that it would be an easy task to provide you with such documents by the end of next week. With respect, it is not for you to determine what our client's priorities in this matter should be."

22. Further correspondence ensued between solicitors, but this did not resolve the deadlock. Pell Frischmann was aggrieved by AMEC's refusal to hand over documents which Pell Frischmann required for the purposes of defending the Secretary of State's claims. Accordingly, on 12th October 2006, Pell Frischmann issued the present application.

Part 3 – The Present Application

23. By an application notice dated 12th October 2006, Pell Frischmann applied for an order that AMEC do disclose the following five categories of documents:

" 1. Manufacturing data records for the roller bearings and plates, including - but not limited to - records of heat treatment, roller and plate design and material certificates in respect of all the steel used to manufacture the rollers and plates.

2. Minutes of meetings and all other documentary records recording and/or evidencing how and why materials for the roller bearings and plates were chosen/selected.

3. Tender (and other contract) documents in respect of sub-contract between the Respondent (AMEC Civil Engineering Limited) and FIP Industriale S.p.A ("FIP") for the manufacture and supply of the roller bearings and plates, including - but not limited to – drawings/schedules; design parameters; specifications; bills of quantities; conditions of contract and method of measurement.

4. All correspondence between the Respondent (AMEC Civil Engineering Limited) and FIP relating to the Thelwall Viaduct renovation works.

5. All correspondence between the Respondent (AMEC Civil Engineering Limited) and any other party (including the Claimant and the Defendant) pursuant to and/or relating to Clause 8B of the main contract for the renovation works between the Claimant and the Respondent."

Since AMEC is not a party to the litigation between the Secretary of State and Pell Frischmann, this application for disclosure was made pursuant to section 34 of the 1981 Act and CPR rule 31.17. It should be noted that the five categories of documents identified in Pell Frischmann's application are substantially the same as the five categories requested in the Treasury Solicitor's letter dated 29th June 2006.

24. On 12th October 2006, Pell Frischmann served and filed in support of its application a written statement made by Ms Alexander, a solicitor employed by Beale & Co. In that statement, Ms Alexander explains that it is Pell Frischmann's case that the bearings have failed by reason of manufacturing defects for which Pell Frischmann cannot be held responsible. Ms Alexander expresses her belief that the documents sought from AMEC are likely to support Pell Frischmann's case on this point. She also expresses her belief that the documents may well support Pell Frischmann's case against Weeks.

25. Whilst Pell Frischmann was preparing and issuing its application for disclosure, significant events were taking place on the other side of the fence. Unknown to Pell Frischmann, the Secretary of State and AMEC had been in discussion about transferring the issues between them from arbitration to litigation.

26. On 16th October 2006, Wragge & Co wrote to Beale & Co expressing the view that Pell Frischmann's application for disclosure was unnecessary. Wragge & Co gave the following reasons for that view:

"During the course of recent weeks, following the service of pleadings in the arbitration, we have been in negotiation with the Treasury Solicitor over the possibility of streamlining the proceedings, and to that end we concluded an agreement with the Treasury Solicitor on Wednesday evening of last week whereby the arbitration is to be discontinued and jurisdiction conferred on the Court to determine the disputes which have formed the subject matter of the arbitration.

The agreed terms are currently being embodied in draft consent orders which are being passed between Counsel, and a term of the consent order in the proposed High Court proceedings is that there will be a joint application to the Court to have the action between our client and the Secretary of State for Transport consolidated with, or alternatively tried on the same occasion as, action number HT-02-485, and if and insofar as may be necessary, our client will be joined as Second Defendant to that action …

You will appreciate of course that disclosure in the consolidated proceedings will relieve your client of the burden of costs associated with the application pursuant to Part 31.17."

27. Pell Frischmann and Beale & Co gave rapid consideration to the revelations contained in Wragge & Co's letter. They decided to press on with their application (which was listed for hearing at 2.00 p.m. on Thursday, 19th October) unless AMEC gave certain undertakings relating to disclosure. Those undertakings were not forthcoming.

28. Events continued at a rapid pace. On 18th October 2006 the Secretary of State issued proceedings against AMEC in the Technology and Construction Court. The Secretary of State claimed damages quantified at approximately £37,000,000 for AMEC's alleged negligence and breach of contract in relation to renovation works at Thelwall Viaduct. On the same day, pursuant to paragraph 3.7 of the TCC guide, I classified the new action "HCJ" and assigned it to myself, so that both actions relating to Thelwall Viaduct could be managed by the same judge.

29. A further event, on 18th October, was that the Treasury Solicitor issued an application for a variety of procedural directions, including an order that the new action concerning Thelwall Viaduct be either consolidated or tried together with the existing action.

30. In relation to Pell Frischmann's application for disclosure, both AMEC and the Secretary of State served their evidence on 18th October. The evidence on behalf of AMEC comprised a witness statement of Simon Baylis, who is a partner in Wragge & Co. Mr Baylis helpfully summarises the history of the litigation and arbitration from AMEC's perspective. He describes the scale of AMEC's documentation, which his firm is in the process of reviewing. He then sets out AMEC's grounds of opposition to Pell Frischmann's application.

31. The evidence served on behalf of the Secretary of State comprises a witness statement of Roger Matthews, who is a solicitor employed in the Treasury Solicitor's department. Mr Matthews helpfully sets out the history of events from the Secretary of State's perspective. Mr Matthews adopts a neutral stance towards Pell Frischmann's application, since that application does not directly affect the Secretary of State.

32. After this rapid exchange of evidence on 18th October, the hearing of Pell Frischmann's application commenced at 2.00 p.m. on Thursday, 19th October. Mr James Cross Q.C. appears for Pell Frischmann. Mr Adam Constable appears for AMEC. Ms Jessica Stephens appears for the Secretary of State. I am grateful to all counsel for their considerable assistance. The oral argument lasted all Thursday afternoon. This court had other hearings on Friday. I therefore said that I would give judgment on Monday morning, 23rd October. This I now do.

Part 4 – The Law

33. Section 34(2) of the 1981 Act provides:
"On the application, in accordance with rules of court, of a party to any proceedings … the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings, and who appears to the court to be likely to have in possession, custody or power any documents which are relevant to an issue arising out of the said 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……"

34. The rules which Parliament envisaged when enacting section 34(2) are now to be found in Part 31 of the CPR. Rule 31.17 provides:
"(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.
(2) The application must be supported by evidence.
(3) The court may make an order under this rule only where-
(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
(b) disclosure is necessary in order to dispose fairly of the claim or to save costs."

35. The first conundrum which rule 31.17(3) presents to the reader is this: how can the litigant know whether documents which he has not seen are likely (a) to help or hinder his own case, or (b) adversely or beneficially to affect the case of his opponent? In many instances, the most that a litigant can say is that the documents will obviously be relevant, but he cannot say whom they will help.

36. The Court of Appeal has addressed this conundrum in ***Three Rivers District Council and others v Governor and Company of the Bank of England (No 4)*** [2002] EWCA Civ 1182; [2003] 1 WLR 210. This is one of many judgments arising from the ill-fated BCCI litigation. In this particular round, the claimants were seeking to obtain from HM Treasury documents generated by Lord Justice Bingham's enquiry into the Bank of England's supervision of BCCI. The claimants successfully obtained those documents pursuant to CPR rule 31.17.

37. In relation to the interpretation of rule 31.17(3)(a) Lord Justice Chadwick, delivering the judgment at the Court of Appeal, said this:

"29. Second, the threshold condition in rule 31.17(3)(a) is lowered by the qualification "likely to". It is not necessary that the documents of which disclosure is ordered will support the applicant's own case or that they will adversely affect the case of another party; it is enough that they are likely to do so. The explanation for that difference is also obvious; the rule-making body appreciated that an applicant cannot be expected to specify which documents under the control of another – which he may never have seen – will support his case or adversely affect that of another party, or to know whether he will wish to rely upon them. It is further appreciated that the person against whom disclosure is sought – being a stranger to the dispute - cannot be expected to decide for himself which of the documents under his control do support the applicant's case or adversely affect the case of one of the other parties to an action in which he is not a party. Nor can the court be expected to decide whether documents which it has not seen will support the applicant's case or adversely affect that of another party. The test has to be one of probability. The question, of course, is what degree of probability does the test require.

*30. The judge found assistance in the judgment of Rix LJ in **Black v Sumitomo Corporation** [2002] 1 WLR 1562. The question in that case was whether pre-action disclosure should be ordered pursuant to section 33(2) of the Supreme Court Act 1981 and CPR r 31.16. Rix LJ, with whose judgment Ward and May LJJ agreed, identified two questions: (i) whether section 33(2) of the 1981 Act required that it be likely that proceedings are issued, or only that the persons concerned are likely to be parties if subsequent proceedings are issued; and (ii) whether "likely" means "more probable than not", or "may well". He held, at page 1584, para 71, in answer to the first of those questions, that the requirement was no more than that the persons concerned were likely to be parties in proceedings if those proceedings were issued. He went on to say, at pages 1584 to 1585, para 72:*

*"As to the second question, it is not uncommon for 'likely' to mean something less than probable in its strict sense. It seems to me that if I am wrong about the first question, then it is plain that 'likely' must be given its more extended and open meaning (see Lord Denning MR in **Dunning v United Liverpool Hospitals' Board of Governors** [1973] 1 WLR 586), because otherwise one of the fundamental purposes of the statute will have been undermined. If, however, I am right about the first question, the second question is of less moment. Even so, however, I am inclined to answer it by saying 'likely' here means no more than 'may well'. Where the future has to*

be predicted, but on an application which is not merely pre-trial but pre-action, a high test requiring proof on the balance of probability will be both undesirable and unnecessary: undesirable, because it does not respond to the nature and timing of the application; and unnecessary, because the court has all the power it needs in the overall exercise of its discretion to balance the possible uncertainties of the situation against the specificity or otherwise of the disclosure requested. Clearly, the narrower the disclosure requested and the more determinative it may be of the dispute in issue between the parties to the application, the easier it is for the court to find the request well-founded, and vice versa."

He observed, at page 1585, para 73, that, apart from the two questions of principle which he had identified, the word "likely" itself presented difficulties: "Temptations to gloss the statutory language should be resisted. The jurisdictional threshold is not, I think, intended to be a high one."

*31 Mr Hollander submitted that the judge was wrong to place reliance on those observations. It is said that there is no real parallel between the provisions relating to pre-action discovery which were under consideration in **Black v Sumitomo Corporation** [2002] 1 WLR 1562 and the provisions relating to discovery against third parties which fall for consideration in the present case. We reject that submission. It seems to us that there is a close parallel between rules 16 and 17 in CPR Part 31; as there is between the statutory provisions to which those rules are respectively intended to give effect. In particular, it is plain that the word "likely" has a common root in the provisions of sections 31 and 32 of the Administration of Justice Act 1970; that that word is used in the same sense wherever it appears in sections 33(2) and 34(2) of the Supreme Court Act 1981; and that that word is used in the same sense in CPR r 31.16(3)(a) and (b). It would be remarkable if the rule-making body had intended the same word to be understood in a different sense in rule 31.17(3)(a).*

*32 In those circumstances, unless there were reasons which compelled a different conclusion, we would think it right to reject the submission that the word "likely", in the context of the threshold condition in rule 31.17(3)(a), means "more probable than not"; and to hold that the word has, in that context, the meaning "may well" which this court thought it should bear in rule 31.16(3)(a) and (b). We are not persuaded that there are reasons which compel a different conclusion. Indeed, it seems to us that the reasons which led this court to reach the conclusion which it did in **Black v Sumitomo Corporation** have equal force in the context of rule 31.17(3)(a). As Rix LJ pointed out, a high test requiring proof on the balance of probability would be both undesirable and unnecessary, for the reasons which he gave."*

38. In the light of Three Rivers, I shall construe the operative words in rule 31.16(3)(a) as meaning "the documents … may well support the case of the applicant or adversely affect the case of one of the other parties". For the purposes of rule 31.16(3)(a) it is sufficient if the documents are obviously relevant and are equally likely to help either side in the action.

39. Let me turn next to rule 31.17(3)(b). The Court of Appeal's decision in Three Rivers does not really help in relation to sub-paragraph (b). Indeed no authority has been cited by counsel in relation to this provision. Furthermore, no authority has been cited in relation to the question how the court should exercise its discretion under rule 31.17, once the threshold conditions have been met.

40. In relation to these questions, it should be noted that the wording of rule 31.17(3)(b) is quite similar to the wording of rule 31.16(3)(d). A cluster of case law has grown up around rule 31.16(3)(d). See in particular the Court of Appeal's decision in ***Black v Sumitomo Corporation*** [2001] EWCA Civ 1819; [2002] 1 WLR 1562; the decisions of the Commercial Court in ***XL London Market Limited v Zenith Syndicate Management Limited*** [2004] EWHC 1182 (Comm) and ***First Gulf v Wachovia Bank National Association*** [2005] EWHC 2827 (Comm); the decisions of this court in ***Briggs and Forrester Electrical Limited v Governors of Southfield School for Girls*** [2005] BLR 468 and ***Birse Construction Limited v HLC Enghenharia & Gestao de Projectos SA*** [2006] EWHC 1258 (TCC).

41. In the light of the Court of Appeal's judgment in ***Three Rivers*** at paragraph 31, the question arises whether that cluster of case law is relevant to the interpretation of rule 31.17(3)(b) and to the exercise of the court's discretion under rule 31.17(3). After some hesitation, I have concluded that this cluster of case law is not relevant to these matters. I reach this conclusion for three reasons:

1. The court, under rule 31.16, is considering the need for early disclosure. The documents in question are not likely to be withheld for ever (if the action proceeds). By contrast, the court, under rule 31.17, is considering whether the documents should be disclosed at all. This is a general consideration which militates in favour of ordering disclosure under rule 31.17. Where the test in rule 31.17(3)(a) is satisfied, disclosure may well be necessary in order for the court to dispose of the action fairly.

2. The parties to an application under rule 31.16 are already locked in a legal dispute. They both have an interest in the documents for that reason. By contrast, the parties to an application under rule 31.17 do not usually have a pre-existing dispute. The respondent to an application under rule 31.17 usually has an interest in the documents, which is quite different from the applicant's interest. In most applications under rule 31.17 the respondent has no involvement in the applicant's litigation. The respondent's concern may simply be to protect the confidentiality of his own documents. This is a general consideration which militates against ordering disclosure under rule 31.17.

*3. Upon analysis, it can be seen that the competing interests which the court is called upon to balance in an application under rule 31.17 are fundamentally different from the competing interests which the court is called upon to balance in an application under rule 31.16. See, for example, **Franks v The Home Office** [2003] EWCA Civ 655; [2003] 1 WLR 1952.*

42. For the above reasons, I have come to the conclusion that neither the Court of Appeal's decision in ***Black*** nor the cluster of first instance cases following ***Black*** can assist me in interpreting rule 31.17(3)(b) or in exercising the discretion conferred by rule 31.17(3).

43. Some guidance on these matters is to be gained from Zuckerman on Civil Procedure (Sweet and Maxwell 2006). Professor Zuckerman is Professor of Civil Procedure at Oxford, and an acknowledged expert in the field. He discusses the proper approach to applications under rule 31.17 at pages 574 to 578. At page 577, Professor Zuckerman writes as follows:

> *"14.106: The second jurisdictional condition, that disclosure is necessary in order to dispose fairly of the claim or to save costs, should give rise to fewer problems. In most cases it is likely to involve considerations such as whether the documents add significantly to what is already known, or whether the likely benefits of disclosure justify the expense. But in some cases the court may need to strike a balance between the applicant's need for access to the documents and some other competing interest, such as public interest immunity. On occasion the court may have to balance the applicant's need for particular documents against the respondent's legitimate interest in keeping them private. Privacy does not provide immunity from disclosure, but the court is entitled to consider whether it is necessary to infringe a person's privacy in order to enable a party to legal proceedings to prosecute his case. There may well be circumstances where the incursion into the non-party's privacy would be so great and the benefits of disclosure so small that the court would decline to order disclosure.*
>
> *14.107: Although the scope of documents that a non-party may be required to disclose under such an order is wider than the documents that a non-party may be required to produce in response to a witness summons under CPR 34.2, the court must take great care not to impose too heavy a burden on non-parties …*
>
> *14.108: The jurisdictional conditions of CPR 31.17(3) are necessary conditions, not sufficient conditions. An applicant that establishes the conditions will not necessarily succeed because the final decision will depend on the court's assessment of the competing interests of the party and the non-party. The court has to have regard not only to the interests of the party seeking disclosure but also the non-party's interest in protecting his privacy, confidentiality or other interests."*

I respectfully agree with this passage.

44. This concludes my review of the law. I must now apply the principles set out above to the present case.

Part 5 - Decision

45. The first question which I must consider is whether the five categories of documents set out in Pell Frischmann's application are likely to support the case of Pell Frischmann or adversely affect the cases of the Secretary of State or Weeks. For this purpose, I must interpret the word "likely" as meaning "may well" and not as connoting a better than even chance.

46. In relation to this question, I have carefully considered the witness statements served by all three parties, as well as the present state of the pleadings. It seems to me that all five categories of documents are relevant to the issues in the litigation. Those documents are likely to help or adversely affect the various parties, but I cannot predict who will benefit and who will suffer. It would not be surprising if it turns out that some of those documents help the Secretary of State, some help Pell Frischmann, and some help Weeks. In my view, the test set out in rule 31.17(3)(a), as amplified by the Court of Appeal in ***Three Rivers,*** is satisfied in the present case.

47. I turn next to the second jurisdictional test (namely, that set out in rule 31.17(3)(b)) and the question of discretion. Here, the guidance given by Professor Zuckerman is in point. If AMEC were continuing in its arbitration with the Secretary of State I would take the view that the second jurisdictional test was satisfied. I would furthermore take the view that the proper way to exercise my discretion under rule 31.17(3) was by ordering disclosure. However, that is not now the position. The seismic events of 18th October have completely changed the landscape.

48. The position now is that the arbitration is ended. The Secretary of State and AMEC are litigating in this court about the roller bearings of Thelwall Viaduct. It seems to me inevitable that this court will order either consolidation or trial together of (a) the Secretary of State's existing action against Pell Frischmann, and (b) the Secretary of State's new action against AMEC. In those circumstances, in the relatively near future Pell Frischmann will become entitled to standard disclosure as against AMEC. On the evidence before me, such disclosure is likely to take place in about February 2007. Standard disclosure, when it occurs, will no doubt embrace the five categories of documents set out in Pell Frischmann's present application. The present situation is far removed from the mischief against which section 34 of the 1981 Act and CPR rule 31.17 were enacted. The present situation is also far removed from the subject matter of section 33 of the 1981 Act and CPR rule 31.16, since the pre-action stage is now long past. In short, it seems to me that now, as a matter of principle, it is quite inappropriate to make an order against AMEC under any of these special provisions.

49. Mr. Cross, for Pell Frischmann, has developed an argument along the following lines. In the course of the protocol process, Pell Frischmann has given extensive disclosure which has enured to the benefit of both the Secretary of State and AMEC. AMEC, by contrast, has so far given much more limited disclosure in the course of the arbitration. The disclosure which Pell Frischmann now seeks is necessary to put the parties on an equal footing when AMEC enters the litigation. Furthermore, Pell Frischmann needs the documents requested promptly, in order to deal with the Secretary of State's application to amend on 9th November and in order to prepare its own defence. On top

of that, the specified documents are urgently required in order to make the collaborative work and investigations of the various experts more productive.

50. I am regrettably unmoved by any of these arguments. In my view, none of the considerations urged by Mr. Cross makes disclosure "necessary" within the meaning of rule 31.17(3)(b). Furthermore, when it comes to the exercise of the court's discretion under rule 31.17(3) the balance tilts firmly in favour of AMEC. If I make the order sought, AMEC's solicitors will have to devote a large amount of time and resources to trawling through vast quantities of documents in order to seek out five specific categories. This will involve a duplication of effort, since very soon AMEC will be embarking upon standard disclosure, which will involve a further trawl through the same vast mass of documents.

51. I quite accept that it would be advantageous both for Pell Frischmann and for the experts to have disclosure of the specified documents sooner rather than later. Nevertheless, in my view, this benefit to Pell Frischmann is decisively outweighed by the cost and inconvenience of AMEC giving disclosure twice over. In my judgment, Pell Frischmann is well able to deal with The Secretary of State's application to amend and the preparation of its own defence without the luxury of receiving disclosure from AMEC.

52. Let me now draw the threads together. For the reasons set out above, Pell Frischmann's application for disclosure was well-founded when it was issued. However, the events of 18th October have transformed the position. The whole disclosure process must now be managed in an orderly manner in the context of the emergent multi-party litigation. Pell Frischmann's application for disclosure under CPR rule 31.17 is now untenable and must be dismissed.

MS JESSICA STEPHENS (instructed by the Treasury Solicitor) appeared on behalf of the Secretary of State.
MR JAMES CROSS Q.C. (instructed by Beale & Co.) appeared on behalf of Pell Frischmann Consultants Limited.
MR ADAM CONSTABLE (instructed by Wragge & Co.) appeared on behalf of Amec Civil Engineering Limited.