JUDGEMENT : HIS HONOUR JUDGE COULSON QC: TCC. 20th July 2005

Introduction.

1. This is an application by Briggs & Forrester Electrical Limited, whom I shall call the Applicant, for pre-action disclosure pursuant to CPR 31.16. The original application sought 55 separate categories of documents but this has been reduced by the Applicant's solicitor's letter of 5 July 2005 to 32 categories.

2. The application arises in this way. In 2003 the buildings at Southfield School for Girls in Kettering were the subject of extensive electrical works. The Applicant was engaged to carry out that work. Because asbestos tiles had to be removed to allow the electrical works to be carried out, a specialist removal contractor, B&W Asbestos Removal Specialists Limited, who I shall call "B&W", were engaged to act as the Applicant's sub-contractors. The work was overseen by an architect, Peter Haddon & Partners.

3. There is no dispute on the documents that I have seen that this work of tile removal was badly carried out. As a result, the Respondents to this application (who are the prospective Claimants in any litigation, namely the governors of the school and the relevant education authority) allege that there was extensive asbestos contamination of the school buildings, which had to be evacuated in consequence. Thereafter extensive remedial works were carried out.

The Protocol Procedure

4. On 15 October 2004 the Respondents sent to the Architect, the Applicant and B&W a detailed letter of claim. This was sent in accordance with the Construction and Engineering pre-action protocol. The letter of claim, in a form similar to a pleading, set out a detailed claim for about £5 million damages arising from the asbestos contamination.

5. The Applicant responded in detail on 4 February 2005. The response included an admission of liability couched in these terms:

> *"6. Since the work done by B&W was not satisfactory, and caused some asbestos pollution and contamination to the school, it is inevitable that B&F will be held liable for breach of contract to the school. B&F had a contractual obligation to carry out their work in a good and workmanlike manner, and it is clear that they, through B&W, did not do so".*

6. The letter also complained of the difficulties in making an offer to the school and the Council due to their alleged failure *"... to quantify the losses claimed by reason of B&F's breaches of contract, as opposed to the losses brought about by the state of the building".*

7. On the same day, the Applicant's solicitors wrote a separate letter enclosing a document entitled "Pre-action disclosure required by Second Defendant from Claimant". This list was essentially the same as the list that was attached to the Applicant's original application for pre-action disclosure dated 12 April 2005, and it also forms the basis of the reduced list upon which the application was made before me.

8. The Respondents replied to the letter of response on 15 June. They dealt, amongst other things, with the suggestion made by the Applicant that the school was already the subject of contamination before their work commenced; and they also addressed the Applicant's second main point, namely that the remedial work related to the state of the building rather than the breaches of contract. In particular, at Paragraph 13 of that response, the Respondents said: *"It is not accepted that the school was contaminated by asbestos prior to the breaches of contract on the part of your client. Your letter contains no evidence to that effect. If you do have such evidence, then it should be disclosed, please. Failing that, we shall be forced to conclude that your remarks are pure speculation. Indeed it is apparent that much of your pre-action disclosure request is calculated to provide fuel for this speculation".*

9. The next stage in the Construction and Engineering protocol procedure would be a pre-action meeting. Indeed the Construction and Engineering protocol is the only one of all the CPR protocols which requires such a meeting. If the procedure outlined in the protocol and the subsequent meeting fail to bring about a resolution of the differences between the parties, then they are required by Paragraph 5.5 of the protocol to use their best endeavours to agree various matters. At sub-paragraph (ii) one of those matters is "the extent of disclosure of documents with a view to saving costs". That is, as far as I am aware, the only specific reference to disclosure in the Construction and Engineering protocol. In relation to this case I am told that, whilst of course, the letter of claim and the response letter stages have both been completed, there has as yet been no pre-action meeting.

Relevant principles

10. Before turning to the detail of the application, it is necessary to set out some of the relevant principles. I deal first with CPR 31.16. The relevant parts provide as follows:

> *"1. This rule applies when 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".

11. The principal authority dealing with this Rule is the decision of the Court of Appeal in ***Black & Others -v- Sumitomo Corporation*** [2002] 1 WLR 1562. In his Judgment, Rix LJ went through the rule and explained that an applicant had broadly to do two things: first, to demonstrate that each of the four elements of 31.16 (3) were in place; secondly, to persuade the Court that it was appropriate in all the circumstances for the Court to exercise its discretion in favour of granting pre-action disclosure.

12. The four requirements of Rule 31.16(3) in this case, therefore are: (a) that the Applicant was likely to be a party to subsequent proceedings; (b) that the Respondents were likely to be a party to subsequent proceedings; (c) that the documents sought would be disclosable in proceedings by way of standard disclosure, and (d) that pre-action disclosure was desirable.

13. As to the standard disclosure point at (c), Rix LJ said:

*"76: In general, however, it should in my judgment be remembered that the extent of standard disclosure cannot easily be discerned without clarity as to the issues which would arise once pleadings in the prospective litigation had been formulated. This Court touched on the question in **Bermuda International Securities -v- KPMG** [2001] Lloyd's Rep. PN 392 397, Paragraph 26, when Waller LJ there said that*

'The circumstances spelt out by the rules show that it will only be ordered where the Court could say that the documents asked for will be documents that will have to be produced at the standard disclosure stage. It follows from that that the Court must be clear what the issues in the litigation are likely to be, i.e. what case the claimant is likely to be making, and what defence is likely to be being run, so as to make sure the documents being asked for are ones which will adversely affect the case of one side or the other, or support the case of one side or the other.'

77: It also seems to me to follow that if there would be considerable doubt as to whether the disclosure stage would ever be reached, that is a matter which the Court can and should take into account as a matter of its discretion."

14. As to the question of the desirability of ordering pre-action disclosure at (d), Rix LJ said:

*"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,** 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 a 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."

15. Finally as to discretion, Rix LJ, at Paragraph 88 said: *"... discretion is not confined and will depend on all the facts of the case. Among the important considerations, however, as it seems to me, are: the nature of the injury or loss complained of; the clarity and identification of the issues raised by the complaint; the nature of the documents requested; the relevance of any protocol or pre-action inquiries; and the opportunity which the complainant has to make his case without pre-action disclosure."*

16. A number of other cases were cited to me, including the decision of Langley J in ***XL London Market -v- Zenith Syndicate Management Limited*** [2004] EWHC 1182 Comm; the decision of Lawrence Collins J in ***Meretz Investments -v- First Penthouse Limited*** [2003] EWHC 2324 (Chancery), and the decision of Morison J in ***Snowstar Shipping -v- Graig Shipping plc*** [2003] EWHC 1367 Comm. Save for the particular points noted at Paragraph 17 below, I regard those cases as examples of the particular application of the general principles outlined by Rix LJ in ***Black*** and it is therefore unnecessary for me to identify any particular parts of those Judgments in any detail.

17. Specific points from those authorities which may have some relevance to the issues before me are: (a) As to the need for precision in applications of this kind, Morison J in ***Snowstar*** said: *"The more diffuse the allegations and the wider the disclosure sought, the more sceptical the Court is entitled to be".*

(b) As to the reality that applications of this sort inevitably involve at least some speculation, Langley J in ***XL London Markets*** said: *"It has of course to be kept in mind, as Miss Blanchard submitted, that by definition this is a jurisdiction which typically will involve some element of speculation, and may not lend itself to precision. It is a powerful argument against an order that the applicant can well make a case without disclosure. It follows than an*

applicant will often, if not usually, be unsure of the specific nature of any case he may have and indeed one of the salutary objectives of the rule is to resolve claims without proceedings."

(c) Ms. Grange, who appeared on behalf of the Applicant, also referred me to Paragraphs 31 and 32 of the Judgment of Langley J in ***XL London Market***. I have borne in mind his comments both in relation to fairness and discretion, although I think that, as I have already indicated, they are further examples of a Judge applying the general principles to the particular factual matters in the case before him.

18. It will be noted that none of the authorities to which I have made reference deals with the situation where the application under CPR 31.16 is made during a period when the parties are actively complying with the requirements of a pre-action protocol. I have already referred to the general reference by Rix LJ to pre-action protocols, and their relevance to discretion, in the ***Black*** case. Rix LJ also referred to protocols in a general way in ***Bermuda International*** . In his Judgment in that case, Rix LJ said, by reference to the Engineering and Construction protocol. that under Paragraph 5.5(ii), "The question of disclosure is met with at a rather late stage in the relevant protocol". I have previously referred to Paragraph 5.5(ii). Unlike other protocols, the Engineering and Construction protocol does not provide for pre-action disclosure during the protocol period. Paragraph 5.5(ii) merely encourages parties who have utilised the protocol but not settled their differences to use their knowledge to try and agree the parameters of disclosure in any forthcoming litigation.

19. Both counsel agreed that the fact that there was ongoing protocol compliance in this case was a factor which I could take into account in considering the exercise of my discretion under Rule 31.16. I agree with that proposition. It seems to me to be entirely in accordance with Rix LJ's comment at Paragraph 88 of his Judgment in ***Black***. I therefore do that exercise at Paragraph 47 below.

The application generally

20. Ms. Grange told me that the documents that were sought fell into two broad categories. The first category comprised documents concerned with causation, which was relevant because the Applicant was going to argue that the school was polluted by asbestos prior to the commencement of the Applicant's work on site. In other words, the Applicant was going to run a positive case that some, perhaps a good deal, of the asbestos contamination about which the school and the council now complain was already in existence, and therefore nothing to do with the Applicant. The second category of documents, also said to be relevant to causation, comprised documents relating to the remedial work put in hand after the problems had been discovered. I was told that the Applicant was going to argue, amongst other things, that much of the work carried out related to the removal of pre-existing asbestos which therefore bore no relation to the breaches of contract on the part of the Applicant.

21. Whilst, as I have made clear, these two points feature in the Applicant's letter of response dated 4 February, and were again referred to in Ms. Grange's helpful skeleton argument, I was still a little surprised that the application was put in that way. My surprise stemmed from the fact that that is emphatically not how it is put in the statement made in support of the application by Nicola Ann Maher. There is no mention in that statement of the pre-existing contamination, nor is there a reference to the suggestion that the remedial work, on which the damages claim is based, bore no relation to the breaches of contract alleged. In my judgment the statement is very specific as to the reasons why, at that stage, the 55 categories of documents were said to be relevant and should be disclosed. At Paragraph 9, Ms. Maher states: *"Unfortunately, and despite repeated requests, the proposed Claimants' solicitors, Shoosmiths, have failed to disclose any documentation relevant to the claim, and as such it has remained impossible for the proposed Defendants to consider various issues, namely quantification of the claim, and liability".*

At the end of the statement, Ms. Maher makes plain the basis of the application, at Paragraphs 21 to 23. She says:

"21: It is the proposed Second Defendant's submission that without the requested documentation. it is impossible for the proposed Defendants to quantify the proposed Claimants' claim. If the proposed Defendants are unable to quantify the claim, it is also impossible to put forward a sensible offer of settlement, if so inclined, with a view to attempting resolution of the dispute and saving the costs of proceedings, possibly to arbitration or to trial.

22: The total sum claimed in respect of reinstatement and decontamination works is substantial. And in order for the proposed Defendants' solicitors and their experts to consider the validity of such claims, supporting documentary evidence to the work done, the reasons justifying the work and the cost of such work, are essential.

23: The proposed Defendants deny that this application represents a fishing expedition, as suggested by the proposed Claimants' solicitors. The documentation requested is simply that which is required to fully evaluate the proposed Claimants' claim, and justification for decisions made during the clean-up procedure. The proposed Defendants are simply attempting to be proactive in the disposal of this case by seeking documentation which they have a right to review at an early stage, rather than at a later stage when proceedings have been issued and costs have increased."

22. There can be little doubt that many of the categories of documents sought in the application are not, in truth, required for the reasons set out in that statement to which I have just referred (namely, to allow the Applicant to understand quantum) but for the other two reasons clearly and helpful outlined by Ms. Grange, concerned with aspects of causation. Ms. Grange realistically accepted that that was the case. Whilst I do not accept Mr. Hargreaves' submission that on that basis alone I should dismiss the application, the absence of the evidential material that I would have expected to find in the statement does create some difficulties for the Applicant. In

particular, as I put to Ms. Grange in the course of argument, it is difficult for me to conclude that some of the categories sought would be disclosable pursuant to standard disclosure - which is the point at CPR 31.16(3)(c) - when the reasons in support of such a contention are not set out in the evidence. Similarly, the absence of evidence does not assist me in concluding whether or not pre-action disclosure is desirable, which is Rule 31.16(3)(d).

23. No points arise under 31.16(3)(a) or (b). Both parties before me are likely to be parties to TCC proceedings. Accordingly, mindful of the general point that I have made in Paragraph 22, I now go on to consider each category of documents sought by reference to CPR rule 31.16(3)(c), namely whether on the material before me these categories would be disclosable by way of standard disclosure. I then go on, at Paragraphs 39 to 44, to consider the point at rule 31.16(3)(d), and then, at Paragraphs 45 to 57, to set out my conclusions as to the exercise of my discretion.

Standard Disclosure

24. Part 1 Category A is the Southfield School Full Asbestos Register. This is referred to in the letter of claim. Despite the Applicant's admission of liability, I consider on the balance of probabilities that this document would be disclosable by way of standard disclosure.

25. Part 1 Category B is described as "Southfield School's Maintenance and Capital Works Programmes since its construction in the 1960s, i.e. previous records of service alterations, installing IT cabling and other alterations, refurbishments and repairs involving the asbestos ceiling tiles, together with any documentation evidencing how the asbestos regulations were dealt with". I am in no doubt at all that that category is far too wide. On the material I have, I do not believe the Applicant would be entitled to such documents by way of standard disclosure. Ms. Grange's clever attempt to limit this category of documents to those just involving ceiling tiles is not, I think, as a matter of construction of this item, a fair reading. But even if she were right, I would still be of the view that the category was much too wide to be susceptible to standard disclosure.

26. Part 1 Category C is said to be "Documents evidencing the clearance testing regime adopted in respect of the operations dealt with by the previous items", and then various inclusive items are identified. Again, really for the same reasons as in Paragraph 25 above, I must conclude that this category is too wide for me to decide that it would be disclosable by way of standard disclosure. Obviously, in relation to both those categories, the remarks made in the cases which I have previously cited about the dangers inherent in casting one's pre-action disclosure net too wide are directly applicable.

27. Part 1 Categories D and E relate to documentation evidencing particular air testing from 1999. These categories are referred to in the letter of reply from the Respondents dated the 15th June 2005. On that basis I would conclude on the balance of probabilities that they would be disclosable by way of standard disclosure.

28. Part 1 Category F is the architect's appointment document. That is probably disclosable by way of standard disclosure, even though its relevance to the remaining issues between the Respondents on the one hand, and the Applicant on the other, is not entirely easy to discern.

29. Part 1 Category G is an alleged letter from somebody at the council to the school informing them of asbestos management. Ms. Grange in her submissions said that this was a letter that had been referred to at a meeting. There was no evidence about this letter or indeed that meeting. This is perhaps a small example of the difficulties created by what I see as the lack of evidence behind the Applicant's real reasons for their application. On that basis I cannot conclude that the letter exists, much less that it would be disclosable by way of standard disclosure.

30. Part 1 Categories H and I are said respectively to be "All correspondence between the school and Peter Haddon & Partners relating to the tender/quotation", and "All correspondence between the school and Northamptonshire County Council relating to the tender and the existence of asbestos at the school". It follows from what I have said previously that I regard those categories as being too widely drawn to allow me to conclude that they would be disclosable by way of standard disclosure. I should make the point that I have been told that the architects, Peter Haddon and Partners have been engaged by the school for a number of years, and therefore the potential scale of the documentation sought under these categories might be very large.

31. Part 2 Category A is the video footage taken by Ensafe, showing alleged areas of contamination. This is expressly referred to in the Ensafe report, attached to the letter of claim. It is therefore plainly disclosable by way of standard disclosure.

32. Part 2 Category B are the full laboratory test reports in support of the test samples relied on by Nsafe in their report of the 12th September 2003. That report was served with the letter of claim. Paragraph 3.6 of the report describes the information contained within the report as "The full details of the investigation sampling results". Ms. Grange says the Applicant would like to see the 'raw documentation', as she put it. But it is unclear why or how that goes to the issues between the parties. I am not at the moment persuaded that that material would be disclosable by way of standard disclosure.

33. Part 2 Category C is all correspondence between the school and Peter Haddon and Partners relating to the existence of asbestos tiles. And Category D is all correspondence between the school and Peter Haddon and Partners relating to the removal of the asbestos tiles. Ms. Grange confirmed to me that this was intended to relate to all the correspondence, both before and after the contract with the Applicant, which for the reasons that I have given might stretch back years. Again it follows from what I have said above that I consider that such categories

are too widely drawn, and therefore I am unable to conclude that they would be disclosable by way of standard disclosure.

34. Much of Part 3 is concerned with the documents relating to quantum. As such, many of the categories are plainly disclosable by way of standard disclosure. This would include the documents at Categories A, B, C, E, F, H and N. Category J, which is the method statement, and Category O, which is the specification, are in my judgment also disclosable by way of standard disclosure. Indeed, it seems to me that they would be documents that the Respondents would be relying on in any subsequent litigation. I accept Mr. Hargreaves' submission that Categories D, G and I are part of the almost traditional fishing expedition to see if the remedial works overran, and it has therefore not been demonstrated to me that those documents would be disclosable by way of standard disclosure.

35. Part 3 Category K is said to be "Documentation evidencing the cleaning works carried out, including identification of the results of any previous tests". I raised with Ms. Grange the question of what precisely was meant by the "cleaning works", since, for the reasons that I have already given, the documentation concerning the remedial works being carried out was plainly disclosable, and it was not clear what this category added. She was not really able to help. It seems to me that in the light of that uncertainty, the category as drawn is too wide, and it has again not been demonstrated what these documents are, or how they would be disclosable by way of standard disclosure.

36. Part 3 Categories L and M are concerned with documentation "Evidencing the extent of the ceiling construction" to Blocks A and B, and Ensafe's "Justification for their proposals to remove all non-asbestos ceilings and metal grids". In addition there is also sought Ensafe's proposals, and justification for those proposals as set out in the method statement. These categories may be disclosable by way of standard disclosure, but it is not possible for me to say on the material that I have that it has been demonstrated, even on the balance of probabilities, that they will be. I have already said that I think that the method statement is a document which should be disclosed, but I have to try and ensure that there is a limit to the extent of any pre-action disclosure process. It seems to me, on the material that I have, that Categories L and M go beyond that limit, and that it is not clear at all that they would be disclosable by way of standard disclosure.

37. Finally Part 3 Categories P and Q are described as two categories of documents evidencing (in one case) which socket outlets were cleaned and which tests were undertaken prior to carrying out such cleaning, and (in the other case) which cables were cleaned and what tests were undertaken prior to carrying out such cleaning. Ms. Grange said, realistically, that these were minor matters. It is difficult to see how and why these documents might be disclosable on standard disclosure. Again there may be some particular issue or point of evidence which makes these documents disclosable, but if so, that is not contained in the material before me. I therefore conclude, at this stage at any rate, that those documents would not be disclosable by way of standard disclosure.

38. In summary, therefore, the categories of documents which I have found on the material before me to be disclosable by way of standard disclosure are Part 1 Categories A, D. E, F; Part 2 Category A, and Part 3 Categories A, B, C, E, F, H, J, N and O. In general terms, I found that these categories would be disclosable by way of standard disclosure either because they are expressly referred to in the letter of claim, the letter of response and the letter of reply, which are the equivalent of the pleadings at the protocol stage; or because they go to the quantification of the claim which the Applicant has to meet. I have rejected the categories of documents which cannot be shown on the present material to be relevant to the issues, and in particular those categories of documents which are much too wide to permit me to conclude that such documents would be disclosable by way of standard disclosure.

Desirability

39. I now turn to consider the question as to whether it would be desirable to order pre-action disclosure of the documents identified in Paragraph 38. Ms. Grange urges me that I should allow such disclosure, because that would narrow the issues, cut down on expert evidence and accelerate the timetable that would hopefully lead to offers and settlement.

40. Mr. Hargreaves says that the pre-action disclosure of documents will make no difference because they would not ultimately assist the Applicant in demonstrating either of the causation points, which I have outlined above. He submits that even if the Applicant could show that a particular part of the school was not affected by their works, but was later the subject of remedial works, it would make no difference because of the clear evidence that the asbestos particles which escaped as a result of the Applicant's breaches of contract were trafficked round the school, obliterating their precise source. He also says that there has been an offer, so the suggestion that these documents have prevented an offer is plainly incorrect.

41. I do not accept Mr. Hargreaves' submission that I can or should dismiss the chance that, properly formulated, the Applicant's points might succeed. Neither do I think that I can speculate too far as to what might happen in any future litigation. On the other hand, I do accept his point that there does appear to have been an assumption on the part of the Applicant that if they got over the hurdle at r31.16(3)(c), they would in some way automatically clear the hurdle at r31.16(3)(d), because of the general references to the narrowing of issues and the like.

42. It is difficult, on the material which I have, to conclude that the documents at Part 1 Categories A, D, E and F, or Part 2 Category A, would of themselves make any or any real difference to the overall commercial position between the parties. Again, I am afraid that the lack of specific evidence on this point is a handicap for the

Applicant. Given that an offer has been made, and a detailed response has been put in to the letter of claim, I do not consider that the Applicant has satisfied me on Rule 31.16(d) in respect of those categories of documents. They may lead to a costs saving and the swift disposition of the issues. Equally, so it seems to me, they may make no difference at all.

43. The documents in Part 3, A, B, C, E, F, H, J, N and O are of a different kind. They are documents highly relevant to quantum, and I shall refer to them hereafter as "the quantum documents". Their disclosure plainly would satisfy both the grounds at r31.16(3)(d)(ii) and r31.16(3)(d)(iii). The application is therefore made out on the ground 31.16(3)(d) in respect of those quantum documents.

44. For the avoidance of doubt, I should say that if I was wrong and there were other categories of documents not set out in Paragraph 38 above, but which were disclosable by way of standard disclosure, I am entirely satisfied that the Applicant has not demonstrated that it would be desirable for them to be the subject of a pre-action disclosure application in any event. Just taking one example, I could not possibly conclude that the disclosure of all Southfield School's Maintenance and Capital Works Programmes since its construction in the 1960's would save costs or lead to an early settlement.

Discretion

45. It seems to me that there are a variety of general factors relevant to my discretion. In the Applicant's favour I accept the following: (a) This is a potentially large claim which the Applicant is striving to resolve before litigation is commenced; (b) The Applicant has taken a clearly proactive stance throughout the protocol stage; (c) The documents which the Applicant seeks are within the possession and control of the school and the council.

46. In favour of the Respondents, there are the following points: (a) A lot of the quantum documents have been either disclosed or offered for inspection, and (b) The costs incurred in the sort of wide pre-action disclosure exercise of the kind required by the Applicant, would be extensive.

47. As I have already indicated, I am also conscious of the ongoing protocol procedure. As I have said, that has not yet reached the pre-action meeting stage. There is nothing in the protocol that requires large-scale disclosure at any stage during the protocol. I accept the point made by Mr. Hargreaves, by reference to the introduction to the Pre-Action Protocols in the CPR, that the requirement there is of disclosure of "Key documents". In addition, I am aware that prospective claimants complain that compliance with the Engineering and Construction protocol can be an expensive exercise which 'front-loads' the costs to their detriment. There would be concern in the construction and the related insurance industry if it was thought that a prospective claimant embarking on the Engineering and Construction protocol procedure was routinely obliged to discharge the sort of onerous disclosure obligations contended for by the Applicant here.

48. Considering all the circumstances set out above, and with the exception of the quantum documents (paragraph 43 above), with which I deal separately below, I do not consider that it would be appropriate to exercise my discretion in favour of the Applicant in respect of any of the categories of documents sought. The categories are too wide and too peripheral to the real issues for me to conclude otherwise on the material that I have. For the avoidance of doubt, that finding applies to all the categories of documents sought, not just those which survived the application of rule 31.16(3)(c).

49. As to the quantum documents, which I have expressly excepted from that ruling, I am aware that the Respondents have offered many of these documents - although not, I think, all - for inspection. Some were inspected in January, and others were offered later. It is perhaps appropriate for me to set out as briefly as possible the relevant recent sequence.

50. On the 15th June the solicitors acting for the Respondents informed the Applicant's solicitors that they had received a significant quantity of documents relevant to quantum which were being reviewed. They go on to say: *"We suggest that the next stage would be for the quantity surveyors retained by our respective clients to meet for the purpose of auditing the claim, by which we mean that your client, whilst reserving its position with regard to arguments as to the proper scope of the claim, can satisfy itself that all of the costs that are being claimed by our client have actually been incurred in connection with the decontamination and the refurbishment of the school. It will therefore not be a function of the meeting between quantity surveyors for there to be a debate, for example, with regard to issues about the condition of the school prior to the contract with your client."*

51. The response to that was dated 24th June 2005. It said: *"In our view and that of our expert, such a meeting would not be of value to us unless we had already received your disclosure documentation. Indeed, to proceed with such a meeting on the basis that your own expert had access to all the documents but ours had not, would be inequitable in our view".*

52. On the 8th July the response to that from the solicitors acting for the Respondents referred to the inspection in January and accepted that the Applicant's solicitors were entitled to inspect the latest tranche of quantum documents. They reiterated the suggestion of a meeting between quantity surveyors, although they again said that that should be "Purely for the purpose of auditing the claim". The letter went on to offer copies of documents subject to receiving an undertaking as to the payment of the costs of photocopying, and what was called "a suitably-worded collateral purpose undertaking".

53. The correspondence on this topic ends on the 13th July, when the Applicant's solicitor wrote to say: "We now turn to the documents that you recently received and which we have not yet inspected. We are grateful to you for

your confirmation that you will provide us with access of the same, together with copies. However, before we can determine whether or not such disclosure satisfies our pre-action request, we require a List of Documents or other indication of the nature of the documents that you are prepared to disclose".

54. Mr. Hargreaves complains that the Applicant's approach was unco-operative and unduly formal with its reference to the provision of a List of Documents. There is some force in that criticism. On the other hand it was, at least with hindsight, unwise of the Respondents' solicitors to link the provision of such documents to the expert quantity surveyors' meeting and the so-called audit procedure.

55. In my judgment, what should have happened was that the Respondents, during the months since the letter of claim, should have produced, or have had produced on their behalf, a schedule, or possibly a series of schedules, identifying the full quantum claimed under each head of claim, and demonstrating clearly how each headline figure had been made up. The quantum in the letter of claim is just a collection of bald figures, many of which are estimates, and there is no further schedule or explanatory document which has been provided.

56. Accordingly, taking all those points into consideration, and in the absence of what I would regard as a helpful quantum schedule, I exercise my discretion in favour of the Applicant in respect of the quantum documents. Whilst I acknowledge that the offer by the Respondents' solicitors to provide documents may well be relevant to other matters, such as costs, it is in all the circumstances appropriate for me formally to require those documents to be produced pursuant to this application. I am also aware that this result has the effect, which I do not regard as unreasonable, of my having accepted the basis of the application as set out in the Applicant's own witness statement, and rejected the basis of the application that was put forward subsequently.

57. Accordingly, the application is dismissed, save in respect of the quantum documents at Part 3 Categories A, B, C, E, F, H, J, N and O. The application in respect of those documents is allowed. I will hear submissions as to the appropriate form of the order to be drawn up in consequence.

For the Applicant: MISS KATE GRANGE
For the Respondents: MR SIMON HARGREAVES