JUDGMENT : M BRIGGS QC: Chancery Division. 16th June 2006

1 This is an application for pre-action disclosure under CPR Pt 31(16). The background is as follows.

2 The Applicant, Mr Guy Hands, was, until April 2003, the majority shareholder in Rockingham Motor Speedway Ltd, which was formed to construct and then operate a motor racing complex at Corby in Northamptonshire and especially (but not only) a banked oval circuit suitable for staging events forming part of the FedEx Champ Car World Series organised by Championship Auto Racing Teams Inc, for which the acronym is CART. Those familiar with IndyCar racing will understand what that sort of event is like.

3 The Respondent to the application, Morrison Construction Services Ltd (which I will refer to as "Morrison") was part of a construction group. It was a minority shareholder in Rockingham; it was the main contractor employed by Rockingham in the design and construction of the speedway including, apart from the banked oval circuit, a grandstand, other facilities and, indeed, other circuits, pursuant to a **construction contract** with Rockingham, dated 14 August 2000.

4 Without needing to go into any detail, it is a feature of CART racing that the maximum speed of the cars is, because of the banks on the circuit, faster than the maximum speed of cars driven in the Formula One series. The cars only use slick tyres, again unlike Formula One and, therefore, can only be raced on dry track. As part of a much larger overall financial commitment to the project, Mr Hands paid, or invested, £7.5 million-odd, by way of subscription for rights issue shares in three instalments, in October and November 2000. Mr Hands claims that he made each of those three investments in reliance upon three written assurances by Morrison, the common feature of which was an assertion that Morrison knew of no reason, barring planning or weather problems, why the construction of the speedway should not be completed on time and on budget. It is convenient to read the first of those assurances to see those common features in context. It took the form of a fax to Mr Hands from a Mr McFadzean of Morrison, dated 9 October 2000, in the following terms:

> *"I refer to my Michael Fitzgerald's fax to shareholders of 7 October in which he advises that you are seeking certain assurances in respect of completion and budget for the Rockingham construction works. I am happy to confirm that with the exception of any planning issues, which are clearly outwith our control that we are not aware at present time of any issues which are likely to delay completion to time and budget. An obvious exception to this would be non-payment of Morrison's interim account for August, which is now overdue. However, provided payment is received within the next 24 hours then there will be no further implications of this late payment."*

5 Mr Hands claims that each of those assurances contained, by necessary implication, two further representations: first, that Morrison knew of no reason why the speedway would not be completed with reasonable care and skill and, secondly, that Morrison had reasonable grounds for that belief, having made reasonable enquiries.

6 Completion was to take place in time for the first ever British CART race, scheduled for 20 September to 22 September 2001, pursuant to a contract made between Rockingham and CART itself, dated 6 July 2000. It is not part of Mr Hands' case that the speedway was not completed on time and broadly to budget. His case is that it was not completed with reasonable care and skill, or fit for CART racing, which was one of its purposes, if not indeed its principal purpose, certainly a purpose central to the success of the Rockingham project and Mr Hands' investment in it. Put shortly, it is Mr Hands' case that the first British CART event in September 2001 was, to use the word in the draft Particulars of Claim, which I have been shown, wrecked by the presence of surface water on the track and that this was caused by defective design and/or defective construction and that the bad publicity attendant upon the first event ultimately caused the commercial failure of the Rockingham project, such that Mr Hands was obliged to dispose of his shareholding in Rockingham in 2003, for £1.

7 At the heart of his case is the necessary averment that the implied representations made by Morrison, in October and November 2000, were negligent, ie they were in breach of a duty of care owed by Morrison to him and that they were to the effect that Morrison had taken reasonable care, or made reasonable enquiries before making those assurances; to the effect that, if Morrison had taken reasonable care or made reasonable enquiries before making those assurances, Morrison would have known that the circuit, when completed as then planned, would not be fit for use as a CART circuit.

8 It is unnecessary for me to say much about the cause of the surface water problem (which problem there clearly was) on the speedway. This is because Mr Hands has pleaded a reasonably precise case about it in para 70 of the draft Particulars of Claim. In essence, he attributes it to defective design or to poor construction, pursuant to a design of the pavement structure devised and carried out on Morrison's behalf by a specialist racetrack firm, Colas Ltd, in circumstances where both the design and the commencement of the construction preceded the making of the written statements by Morrison upon which Mr Hands' claim is based. Mr Hands does not base this application for pre-action disclosure on a need for disclosure so as to enable him to plead, or focus, on that part of his case concerned with the precise cause of the surface water problem. There was a construction industry **adjudication** proceeding between Rockingham and Morrison about the surface water problem, which led to a decision by a Mr Alan Wood on 18 November 2003 which found against Morrison on reasonable care and skill.

9 That decision was, however, set aside by His Honour Judge Toulmin, on 5 April 2004, on the main ground that Morrison had been given insufficient time to respond to a late change of case by Rockingham's expert as to the cause of the surface water problem. The relevance of that **adjudication** process is that considerable material concerning the issues as to the cause and responsibility for the surface water problem came into Mr Hands'

possession, as a former majority shareholder in Rockingham, but the **adjudication** process was not about what Morrison knew, or ought to have known, in October or November 2000, when the written assurances were given.

10 I turn now to the present dispute: the opening shot was fired on 30 June 2005 in the form of a letter before action from Lovells, acting for Mr Hands, to the Managing Director of Morrison. The letter set out Mr Hands' claim in some detail, a little more detail than the summary which I have given, and it concluded as follows, in para 22:

"*22. We request a prompt acknowledgement of this letter followed by a full written response within 21 days.*

23. After receiving your response we suggest a meeting between the parties and their respective legal representatives.

24. We are not by this letter requesting that MCS provide us with copies of relevant documents in its possession, but we anticipate that it may be necessary to make such a request following receipt of a full written response to this letter and prior to the issue of any court proceedings. We hereby reserve all our client's rights in that regard."

11 This was acknowledge by Morrison itself in a letter from it's Legal Director, Anne Sheffield, dated 12 July 2005. The letter asserted that the CPR practice direction on protocols should apply to the claim. It asserted various failures by Mr Hands to comply with that practice direction. It promised a more detailed response in ten days and sought copies of all documents relied upon in the letter before action. And, finally, it asked what ADR proposals Mr Hands wished to make.

12 There was a short reply to that letter, on 19 July, which promised the documents sought shortly, reiterated Mr Hands' proposal for a meeting and stated that draft proceedings had already been prepared and sought a response in 21 days to the letter before action. That was followed up, on 28 July, by a letter enclosing copies of the 14 documents referred to by Lovells in the letter before action. The first substantive response to Mr Hands' claim from Morrison took the form of a letter from Eversheds, its solicitors, on 8 August. It sought further and better particulars of Mr Hands' position in relation to a number of critical issues so as to enable Morrison to respond, describing the letter before action as containing key deficiencies in relation to seven numbered items, of which I need to read (3) and (4), (3) was: "*Exactly what awareness is it alleged (if any) hat Morrison or Mr McFadzean had at the time of each of the three faxes referred to in October and November 2000?*"

And (4): "*What 'reasonable' enquiries should have been undertaken in circumstances where proposals to undertake the track design and construction had been received from a number of specialist subcontractors in the field, and Colas had been selected and appointed with the approval of RMSL. If you are suggesting that Colas was an inappropriate choice at the time you do not say so.*"

13 It made a number of points by way of defence in detail to the letter before action, in particular on duty of care, reliance, breach and causation. The letter concluded as follows: "*We look forward to receiving your confirmation that on reflection Mr Hands does not intend to pursue this matter further. If he does propose to do so, we invite you to clarify Mr Hands' case, and specifically to provide us with a copy of the draft proceedings to which you referred in your letter dated 19 July to Morrison. We will then take instructions in relation to your proposal of a meeting.*"

14 Lovells replied on 17 August. They enclosed a 30 page draft Particulars of Claim, stating it had been prepared by named leading and junior counsel. They made it clear that Mr Hands did, indeed, intend to pursue the matter further and the letter concluded: "*Clearly, however, your clients need some time to consider the draft Particulars of Claim before any meeting is arranged. We would have thought that they would have had ample time to do so by Friday, 9 September, at which date may we have your proposals for such a meeting.*"

15 On 7 September, Eversheds responded stating that the Particulars of Claim failed to deal with points made in its earlier letter of 8 August, in relation to the merits but expressed readiness to meet after Mr Hands had addressed those points. There was then further correspondence about a meeting and on 28 September, Eversheds wrote repeating criticisms of the Particulars of Claim. The letter contained the following:

"*Although you have provided draft Particulars of Claim setting out your clients case in general terms, we do not consider that these specifically and adequately address the points numbered 1 – 7 in our letter of 8 August 2005 or the issues raised in the remainder of our letter which illustrate these. To take only two examples and I am going to quote only the second:*

2. You have not explained exactly what awareness of issues in relation to the track you allege Morrison had at the time the assurances were given or what reasonable enquiries you allege should have been undertaken at that stage by Morrison (or presumably Peter Davis and Stepnell). Clearly the role and appointment of Colas as specialist subcontractor with the approval of RMSL is relevant in this context and, leaving aside other issues, the correspondence you refer to is substantially later.

We would ask you to respond point by point before we meet."

16 On 12 October, Lovells replied in detail. They proposed that the meeting should take place on 3 November and they asked whether it was Morrison's case that enquiries had been made before the written assurances had been given and, if so, sought details of those enquiries and copies of all documents said to constitute or evidence those enquiries.

17 On 21 November a meeting did take place, without prejudice, and unsurprisingly the court has no information about what occurred. On 2 December, Eversheds wrote to Lovells again. They reiterated many of the criticisms of Mr Hands' case, which had already been made in correspondence. The conclusion of the letter included the

following passage: *"The critical issues, however, which your client's claim needs to address before the question of damages can even arise are:*

The basis upon which the scope of the duty of care you allege can be sustained.

Your client does not sufficiently clarify what the defect was which was the cause of surface damp or when this would first have become apparent or how it could have been detected at the time of the relevant faxes. We would point out that we are now over four years after the events-in-question and yet you are unable to make out your case on this.

What reasonable enquiries your client says Morrison ought to have undertaken at the time of the relevant faxes and what you say they would have revealed."

18 On 9 December Lovells wrote to Eversheds seeking pre-action disclosure by reference to a schedule, which is in slightly wider form than that subsequently made the subject matter of this application. Lovells asserted that Mr Hands had a continued desire to reach a negotiated settlement and agreed that the issues in Eversheds' letter about causation, and whether Morrison should have known of the defect at the time of the assurances and what reasonable enquiries it should have made, were critical and it asserted a failure on Morrison's part to respond to requests for information.

19 The schedule, at para 1, requested:

"*1. Documents constituting evidence and containing or otherwise relating to:*

(a) any requests or enquiries made by Morrison, its servants or agents (including for the avoidance of doubt Mr John McFadzean) seeking information and/or advice for the purposes of preparation of each of the faxes of 9 October 2000, 14 November 2000 and 24 November 2000 and giving the assurances contained in those faxes; and

(b) any information and/or advice received by Morrison, its servants or agents (including for the avoidance of doubt, Mr John McFadzean) in response to any such request or enquiries."

There were then five further paragraphs which I do not, for the present purposes, need to read.

20 Eversheds replied on 6 January stating that Mr Hands had enough information with which to plead a particulars of claim should he wish to do so. At para 5 of that letter they said:

"In relation to the documents sought at (1)(a) and (b) of the schedule attached to the letter, that is the one I have just referred to we can confirm that our enquiries to date indicate that Morrison did not make any enquiries of third parties for the purpose of sending to Mr Hands the faxes of 9 October, 14 and 24 November 2000."

21 After a little further inconclusive correspondence, this application was issued on 15 March this year. It was supported by a witness statement from Mr Neil Fagan, a partner in Lovells. It was opposed by a witness statement from Mr Jonothan Sinclair(?), a partner in Eversheds and Mr Fagan replied. Both those gentlemen are evidently experienced litigation partners in their respective firms.

22 The schedule of documents sought is as follows, and for this purpose I am reading the schedule in a slightly amended form, the amendment having been submitted during the adjournment between yesterday and today, to meet possible jurisdictional difficulty. Firstly, the order sought:

"*1. The Respondent do within 28 days of the date of this Order carry out a reasonable search to locate all the documents in the categories listed in the Schedule below and do make and serve on the Applicants of a list specifying:*

(1) all the documents in the categories listed in the Schedule below which are now in Respondent's control;

(2) any such documents in respect of which the Respondent claims a right or duty held for inspection; and

(3) all documents in the categories listed in the schedule which were once but are no longer in the Respondent's control and what has happened to them."

Then this proviso was inserted by amendment: "*Save that, in relation to documents in the categories listed in paragraphs 2 to 6 of the Schedule, the provisions of this Order shall only apply insofar as such documents fall within the test of standard disclosure set out in CPR r 31.6 in relation to the issues raised in the draft Particulars of Claim exhibited at 'NJF1' (pages 1-30) at paragraph 69, (beginning with the words: 'it failed to make') 70, 70(1), 70(1)(b), 70(1)(c) and 70(2)*."

It sought within 42 days inspection by the Applicant of all documents disclosed, except for those in relation to which a right or duty to withhold was claimed, sought permission to apply to over-ride any withholding of inspection, acknowledged that Mr Hands would have to pay the costs of compliance but sought costs of the application from Morrison.

23 I turn now to the provisions of CPR 31.16 and the relevant law. The relevant parts (for present purposes) of CPR 31.16 read as follows, under the heading: "*Disclosure Before Proceedings Start*":

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

(2) The application must be supported by evidence.

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

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

(b) the Applicant is also likely to be a party to those proceedings;
(c) if proceedings had started the Respondent's duty by way of standard disclosure set out in rule 31.6 would extend to the documents or classes of documents of which the Applicant seeks disclosure; and
(d) disclosure before proceedings have started is desirable in order to: (i) dispose fairly of the anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs."

24 The task of the court in addressing an application made under this rule is set out authoritatively, and in detail, in two decisions of the Court of Appeal, the first being ***Bermuda International Securities Ltd v KPMG*** (2001) 1 Lloyd's Rep, Professional Negligence, 392 and ***Black v Sumitomo Corporation*** [2001] EWCA Civ 1819, [2003] 3 All ER 643, [2002] 1 WLR 1562. I was also referred as illustrations of the practical performance of that task by the court in particular cases to *Steamship Mutual v Baring Asset Management Ltd* 2004 EWHC 202 (Comm) and to ***XL London Market Ltd v Zenith*** [2004] EWHC 1182 (Comm) and during the course of the hearing, also, to **Birse Construction Ltd v HLC Engenharia E Gestäo De Projectos SA,** a decision of Jackson J sitting in the TCC, given on 2 May 2006.

25 For present purposes, I need do no more than summarise the principles which emerge from those cases, since there was no substantial dispute before me as to what they were.

26 Firstly, the Applicant must surmount the jurisdictional hurdles in Pt 31.16(3)(a) to (d). Secondly, the hurdles in (a) and (b) require no evaluation of the likelihood of proceedings. The hurdle in (c) is (on its face) a strict test but cases show that it may usually be surmounted by appropriate drafting, for instance, the inclusion of a limitation to standard disclosure only, or a precise formulation of the issue to which the documents must relate. Both of those drafting techniques have been included by amendment in the order which I am asked to make.

27 The hurdle at (d) expresses no standard in the language of the rule but Rix LJ, in the *Black* case, at para 81, held that the standard is that of a real prospect in principle. It is not, therefore, a steep hurdle requiring anything like a probability to be shown that one or more of the desirable objectives of the rule is going to be achieved.

28 Secondly, if the Applicant shows that there is jurisdiction the matter then, separately and distinctly, becomes a matter of the court's discretion and in that context I can do no better than read the following paragraphs of Rix LJ's judgment in *Black*, starting in para 81:

"*81. If there is such a real prospect, then the court should go on to consider the question of discretion, which has to be considered on all the facts and not merely in principle but in detail.*

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

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

And then moving to para 88: "*That 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.*"

29 Next, the court must consider the discretionary question in detail and that is likely to call for an examination of each of the categories of documents requested in any multiple requests, rather than just an all or nothing approach.

30 Next, the court must also stand back at some point and look at the matter in the round, in other words, not fail to see the wood for the trees. The question at that level may include the general question: does the request for pre-action disclosure further the over-riding objective in this case, or not.

31 The desideratum in r 31.16(3)(d)(1), that is the fair disposal of the proceedings, is addressed to the question whether early disclosure, rather than disclosure at the usual time, will add fairness. That may be achieved not merely to give an opportunity to plead an otherwise unpleadable case but where it enables the Statement of Case to be better focused so avoiding the cost, delay and disruption which may otherwise be caused by amendment after normal disclosure, for example, leading to further consequential amendments and a yet further round of disclosure.

32 Finally, the court must bear in mind that pre-action disclosure is a departure from the norm and that the norm may be assumed usually to be the fair time for disclosure, not least, because it involves mutuality and is inherently likely to produce a higher degree of co-operation, for example, in agreeing search techniques for searching electronic documents as recommended by CPR, Pt 31 Practice Direction para 2(a)(2).

33 Applying those principles to this case I deal first with jurisdiction. The requirements in (a) and (b) of 31.16(3) give rise to no difficulty. Plainly, the Applicant would be the Claimant if proceedings ensue and the Respondent would be the Defendant if proceedings ensue.

34 The third requirement, that the disclosure sought will come within standard disclosure if proceedings ensue, was, in my judgment, a problem on the construction of the schedule to the order as originally sought, but Mr Hands has been prepared to include the safeguards to which I have referred and they would, in my judgment, as a matter of jurisdiction, keep any order made subject to those safeguards within standard disclosure if proceedings were to ensue.

35 The fourth jurisdictional hurdle is, in my judgment, satisfied in the limited sense that there is a real prospect that some pre-action disclosure, rather than necessarily the whole of that requested, may satisfy one or more of the desiderata in that part of the rule.

36 At present (and for jurisdictional purposes) it seems to me that the fair disposal of the proceedings is the least unlikely of those desiderata to be satisfied, in principle. As will appear below, I have real reservations about either a costs saving or the avoidance of litigation. Rather than repeat them, I will set out my reasons for those reservations when considering how to exercise my discretion.

37 I therefore come now to the question of discretion. I am happy to adopt the list of important considerations given by Rix LJ in para 88 of his judgment in ***Black*** as, but only as, a framework for the expression of my reasons, not losing sight of the need to consider all relevant factors and stand back and look at the matter in the round.

38 The first of those was the nature of injury or loss complained of: as recognised in ***Black***, at para 83. The recent extension of this jurisdiction beyond personal injury cases means that there is a spectrum of cases in which the extent to which pre-action disclosure is likely to be appropriate will vary. A personal injury case in which medical records are sought being at the top of the spectrum and a speculative commercial action, with broad disclosure sought, being at the bottom.

39 Construction cases, by that I mean construction of structures rather than documents, are frequently found to be awash with documents. In the ***Birse*** case, Jackson J said this at para 25:

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

I will return to the relevance of protocols in due course.

40 This is only not a construction case in the strict sense because Mr Hands is a shareholder of the employer, suing in respect of a loss franked by Rockingham's loss but with his own separate cause of action based upon the written assurances made in the year 2000. It is plainly awash with documents. Mr Barnes QC (who appeared for Morrison) said that Mr Hands' case was also speculative in the sense of being a try-on. I am not prepared so to conclude and both counsel and I have attempted (with a reasonable degree of success) to prevent this application turning into a trial on the merits.

41 It is a case in which Mr Hands has a series of serious issues on which he must succeed, including, first, whether the written assurances (if set in their proper context) carried with them the implications alleged; secondly, whether the speedway was in fact unfit for its purpose; thirdly, whether Morrison's actual ignorance of the surface dampness problem in 2000, which Mr Hands does not challenge in the presently drafted Particulars of Claim, was negligent; and, fourth, whether the defect caused the commercial failure of the Rockingham project in the relevant legal sense. Morrison argues that it was always doomed for other commercial reasons. The consequence is not that the case is speculative, in the sense of being a try-on, but that the major issues, (1) and (4) in the above list, will not, in my judgment, be addressed, at all, by the pre-action disclosure sought. I bear in mind, however, that issues (2) and (3) were treated by both parties in the pre-action correspondence as critical.

42 It follows that I have real doubt, not least because of the imminence of the expiry of the limitation period and Morrison's disinclination to grant an extension of time, that the pre-action disclosure sought is at all likely to lead to this dispute being settled without recourse to litigation. Nor is the pre-action disclosure sought likely to contain material so helpful to Morrison that Mr Hands will just walk away. If Morrison had such material, such as, for example, correspondence showing that it made reasonable enquiries in the year 2000, it would, in my judgment, probably have produced it by now. On the contrary Morrison has stated (by its solicitors) that, as presently informed and subject to detailed search, it made no such enquiries.

43 The fact that the case (at least at Morrison's end) is awash with documents is relevant because of the burden which the reasonable search called for by the pre-action disclosure sought will place, both on its solicitors, its in-house legal team, and its own non-legal staff, and because of the time which that research will be likely to take. I will come back to that issue in more detail in due course.

44 The next general consideration of importance is the clarity and identity of the issues raised by the Claimant. This is a case in which, in sharp contrast with *Black*, before this application Mr Hands has had prepared and delivered to Morrison as detailed a draft points of claim as, in my judgment, could reasonably have been expected. Morrison has gone a considerable way (short of serving a draft defence) to identify the key contentious issues. It is a case in which the question whether any particular document is relevant, in the sense meant by the standard disclosure obligation, should be readily capable of being addressed. In that sense, this is a factor which favours pre-action disclosure, but the corollary is that this is not a case which cannot be launched without pre-action disclosure.

45 I turn next to the nature of the documents requested. I remind myself of the following passage in ***Black,*** again from Rix LJ's judgment, at para 95: "*In my judgment, the more focused the complaint and the more limited the disclosure sought in that connection, the easier it is for the court to exercise its discretion in favour of pre-action disclosure, even where the complaint might seem somewhat speculative or the request might be argued to constitute a mere fishing exercise. In appropriate circumstances, where the jurisdictional thresholds have been crossed, the court might be entitled to take the view that transparency was what the interests of justice and proportionality most required. The more diffuse the allegations, however, and the wider the disclosure sought, the more sceptical the court is entitled to be about the merit of the exercise.*"

46 I have yet to read the categories of documents sought, which I should now read as follows, firstly:

"*1. Documents constituting, evidencing, containing or otherwise relating to:*

(a) Any requests or enquiries made by the Morrison, its servants or agents (including for the avoidance of doubt Mr John McFadzean) seeking information and/or advice for the purposes of preparation of each of the faxes of 9 October and 24 November 2000 and giving the assurances contained in those faxes; and

(b) Any information and/or advice received by Morrison, its servants or agents (including for the avoidance of doubt Mr John McFadzean) in response to any such requests or enquiries.

(2) Correspondence or other communications between Morrison and Colas relating to the design and/or construction of the pavement structure of the Indianapolis-style banked oval racing circuit for RMSL in the period between 1 January 2000 and 22 September 2001.

(3) Internal memoranda (and drafts thereof) and emails relating to the design and/or construction of the pavement structure of the Indianapolis-style banked oval racing circuit between 1 January 2000 and 22 September 2001.

(4) Any draft design of the pavement structure of the Indianapolis-style banked oval racing circuit prepared by or for Morrison.

(5) Technical reports prepared to the cause and extent of surface water on the banked oval racing circuit.

(6) Documents prepared for or otherwise arising out of the ***adjudication*** *between Morrison and Colas including any decisions in that* ***adjudication.***"

I have summarised those paragraphs where they would otherwise be repetitive.

47 Those categories are, in my judgment, sensibly focused on the issues identified as critical in the parties' correspondence, all the more so in the light of the amendment to the order in the proposed form which I have also read. The problem is not so much that what is sought is too wide but that treating what is sought as if it were needles and pins the haystack is huge, contains a very large proportion of electronic documents and is not archived in a way which, by contrast for example of the audit files in the *Bermuda* case, will make all of them easily found by a search. As Mr Barnes said, reducing the amount of documents sought from two needles to one needle makes it no easier to find in the haystack.

48 The magnitude of the difficulties which would face Morrison if an order (as requested) were to be made is set out by Mr Sinclair, in paras 35 to 54 of his witness statement. There is really no substitute for reading them in full, but since if this matter goes further they will be readily available, I will summarise them at risk of less than total accuracy as follows.

49 Mr Sinclair says, having clearly given the matter considerable thought, that there are about 550 files of hard copy documents to be searched, about a quarter of which are held by his firm or Morrison's in-house legal department and the remainder of which are in an archive warehouse. He estimates that the hard copy search exercise would cost in the region of £100,000. As to electronic files, he says that there are 1,855 gigabytes. That is (I am told) 1.855 terabytes of material, on the ten potentially relevant servers. That equates (he says) with 850,000 lever arch files. Uploading these documents on to a database for search and carrying out a preliminary key word selection process would (he says) take in the region of 50 days and cost in the region of £90,000, even before the start of legal review for relevance. Of course, he concedes that only pins, or perhaps a box of pins, would emerge from that electronic haystack. It is easy to say that this is just an exaggeration designed to intimidate (and "terabyte" might be thought to be an appropriate word for that purpose). Indeed, Mr McQuater so submitted.

50 But, in my judgment, he did not convincingly explain (with any detail) why Mr Sinclair's analysis was wrong. He did say that the apparently formidable ambit of the search task could, of course, be narrowed by co-operative discussion. But, while no doubt true, that assertion has not been matched by any attempt to narrow the width of the disclosure sought, or the extent of the search to be made, by or on behalf of Mr Hands, since receipt of Mr Sinclair's witness statement in mid-May.

51 Mr Fagan, with his own no doubt very considerable experience of these matters, accepted in his witness statement in reply, that compliance with the order sought might not be completed by October, that is, by the time of the expiry of the relevant limitation period. In my judgment, an affidavit (but equally witness statement) of a solicitor with appropriate experience charged with the task of making disclosure should not be lightly rejected. There is long-standing authority in this division that the utmost respect is to be given to information given to the court in that way by such a person.

52 Further, in my judgment, any order which called for anything like a search of the magnitude described by Mr Sinclair faces the most serious costs and fairness obstacles, which would only be likely to be overcome if the desirability of pre-action disclosure were very strong indeed; indeed, if it was something amounting to a necessity, rather than a desirability. I would add however that it is not a complete answer for Mr Hands to say that he will pay the cost. The court must look at the cost of the litigation as a whole. Furthermore, the making of burdensome disclosure creates burdens going beyond mere cost and burdens extending to persons other than just lawyers. Yet, further, where disclosure has to be given quickly, recent authority and, in particular, authority arising in the TXU administration litigation, suggests that where that burden is discharged in part by non-lawyers within the client, working under pressure, they may not be able to recover costs for it, at all.

53 Furthermore, quite apart from cost, delay and duplication of effort are inherently wasteful. And yet further (as Mr Barnes submitted) this case could, if it had been launched in December 2005 on the basis of the existing draft Particulars of Claim, be now at (or approaching) standard disclosure in the usual course.

54 But, against that it is fair to say that the cost of doing the uploading of the electronic documents into a database, if done now, would probably not have to be repeated. There would have to be a differently worded key word selection process and, of course, the hard copy documents would, on the face of it, have to be reviewed again if pre-action disclosure was followed by disclosure in the usual course.

55 I turn now to the relevance of protocols and pre-action enquiries. It is acknowledged on both sides that in this case the pre-action protocol practice direction, for use in cases with no bespoke approved protocol, applies. It is appropriate to read into this judgment the following paragraphs. Under the heading *"Pre-action behaviour in other cases":*

"4.1 In cases not covered by any approved protocol, the court will expect the parties, in accordance with the overriding objective in the matters referred to in CPR 1.1(2)(a), (b) and (c), to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings.

4.2 Parties to a potential dispute should follow a reasonable procedure, suitable to their particular circumstances, which is intended to avoid litigation. The procedure should not be regarded as a prelude to inevitable litigation, it should normally include:

(a) the Claimant writing to give details of the claim;

(b) the Defendant acknowledging the claim letter promptly;

(c) the Defendant giving within reasonable time a detailed written response; and

(d) the parties conducting in genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings."

56 Among the things to be included in the Claimant's letter under para 4.3 is to be included a need to "Identify and ask for copies of any essential documents, not in his possession, which the Claimant wishes to see."

57 And in 4.6, among other things which the Defendant's response should contain are "Copies of documents asked for by the Claimant or an explanation why they are not enclosed."

58 And, in para 4.7 it is stated: *"The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation and, if so, endeavour to agree which form to adopt. And I am leaving out a sentence. The court to take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the court must have regard to such conduct when determining costs."*

59 This would, however, have been a paradigm case for the application of the construction and engineering protocol, were it not for the reason which I have already explained. In essence, that protocol requires (as Jackson J observed) "*A pre-action meeting*". And, para 5.5 continues: *"If the parties are unable to agree on a means of resolving the dispute otherwise than by litigation, they should use their best endeavours to agree. And then there are a number of matters, the second of which is: The extent of disclosure of documents with a view to saving costs."*

60 That paragraph does not in terms explain whether the disclosure contemplated is pre-action disclosure or disclosure at the ordinary time. In the *Bermuda* case Rix LJ at para 39 appears to have thought that it did, at least, include a reference to pre-action disclosure. I have already read para 25 of Jackson's J judgment in ***Birse*** which takes the matter no further than to show that the likely weight of documents in a construction case should

give pause for serious thought before ordering pre-action disclosure which the learned Judge in that case then went on to order.

61 Mr McQuater categorised Morrison's attitude to the pre-action process as destructive, contrary to the agreed protocol and amounting to a simultaneous complaint about the lack of particularity on key issues, while refusing to provide any documents in relation to those issues.

62 Mr Barnes disputed that, saying that on the key issue Morrison believed it had made no relevant enquiries and hence had no documents and that issues as to the cause of the surface damp problem were sufficiently covered by documents emerging from the Rockingham **adjudication** process of which Mr Hands already had copies.

63 In my judgment, there is some force in Mr McQuater's criticisms, but this is not a great weight in the exercise of the court's discretion now. It is not a discretion which exists to punish non-compliance with protocols and it is one which must have regard to the present effect and utility of the making of an order for pre-action disclosure, rather than be overly focused on the history which has led up to that application.

64 I turn now to the issue as to the Complainant's opportunity to make his case without recourse to pre-action disclosure. It is not suggested in this case that Mr Hands cannot make out a case without pre-action disclosure. He seeks such disclosure, not to make a case but so that he can either (a) drop his complaint if the documents are hurtful to it; or (b) get back to meaningful negotiations; or (c) more precisely focus his case and, in any event, (d) save costs and delay later.

65 Mr Barnes accepts that the case passes the basic merits test, ie that it is not a fanciful case, and Mr McQuater submitted that that concession by Mr Barnes was one on the basis of which he, his client, and the court, could assume that it was a case that would in due course reach the stage of standard disclosure eventually, ie that it was not one about to be made the subject of a strike-out or summary judgment application. I agree that that is a fair inference to be drawn but it is also to be noted that there are issues unaffected by the pre-action disclosure and one which, in my judgment, could be made the subject of an early preliminary issue with only limited disclosure required, namely, as to the meaning of the assurances.

66 In the result, the absence of the need for pre-action disclosure to make a case means that the reasons in this case for such disclosure are not to be found, as it were, in the highest bracket. But the test is one of desirability and not necessity. As for other matters affecting discretion, Mr Barnes submitted that it was unfair that Morrison should have to give pre-action disclosure while Mr Hands had in his possession all Rockingham's documents relating to the **adjudication** between Rockingham and Morrison, while Morrison only hoped to obtain those by other means. I reject this as a significant factor.

67 Morrisons have already been given all the disclosure which it has so far sought from Mr Hands. There is, in my judgment, no reason to suppose that further request for disclosure from Mr Hands would have met with a refusal or, if made now, would meet with a refusal. In any event, those **adjudication** documents may not go to the heart of the question whether there was a negligent failure to make enquiry in the year 2000 since, as I have already stated, the **adjudication** process was based upon the **construction contract** and whether, as a matter of contract, it had been broken, rather than based upon the assurances.

68 I stand back to look at the matter in the round. I am in the end not impressed by the prospect that, upon receiving this pre-action disclosure sought, Mr Hands might decide to walk away from this dispute without issuing proceedings. Secondly, I consider it to be (on balance) unlikely that litigation will be avoided altogether by a settlement after pre-action disclosure but before the commencement of litigation by the issuing of a claim form, mainly because of the imminence of the limitation period. But an early settlement, that is after pre-action disclosure after issue but perhaps after a stay following issue, if negotiations are then a serious prospect, cannot be regarded as impossible. It is an unquantifiable possibility.

69 The difficulty is likely to be, in my judgment, that the first and fourth issues, which I have listed, that is the meaning of the assurances and the question whether the damp problem really caused the economic failure of the project, will not be addressed by the pre-action disclosure sought. Accordingly, the prospect that pre-action disclosure might lead to the avoidance of litigation altogether is not, in my judgment, a very weighty factor to be put into the balance.

70 There is, however, a real prospect that pre-action disclosure may enable Mr Hands to focus his case on one or two critical issues, which may well save time, cost and trouble later. I recall that it is common ground between the parties, on the correspondence, that the two issues (to which I have referred) are critical. But, in my judgment, the order, as sought, will probably cause cost and delay at least as great, if not, indeed, much greater than any time or cost likely to be saved by a refined pleading because of what Mr Barnes has described as “the needle in a haystack” problem. I would, therefore, not be disposed, as a matter of discretion, to make the order sought but I am required to look at the matter in detail and consider whether some lesser order would be desirable.

71 I invited the parties, during the course of submissions, to make any arguments which they wished to make in the context of a possible order for the same categories of documents but limited by a restricted search condition to those hard documents already with Eversheds or with Morrison's in-house legal team. In other words, to the 175 files referred to in para 40 of Mr Sinclair's witness statement. I should add that category 6, on its face, appears also to be capable of extending to documents still held by another law firm, Messrs Lee Crowder, who were instructed by Morrison on its **adjudication** with Kolas.

72 Mr McQuater did not suggest that that limitation upon the ambit on the order sought would make the pre-action disclosure process of insufficient value to justify the expense, which, of course, would fall on his client. Conversely, Mr Barnes accepted, after taking instructions, that the burden would be (as he put it) manageable but still substantial. In my judgment, this much more limited order would offer a real prospect of achieving the objective of more focused pleadings, it might assist more fruitful negotiations and it should not take so long as to cause serious delay. Furthermore, it should not involve Morrison's own non-legal staff in too much of a burden and, to the extent that the work is done by its in-house lawyers or by its solicitors, that will be subject to an order for costs which Mr Hands would have to pay.

73 On balance, therefore (and it is a fairly narrow balance) I do consider, as a matter of discretion, that an order for pre-action disclosure should be provided in this more limited form, and although I will hear submissions on the precise form of the order, I indicate now that, looking at the revised draft submitted by Mr McQuater, I will hear submissions on the timing, in para 1. I am not disposed to make the order sought in para 1(3). I am disposed to impose a search limitation of the type which I have described and I will hear argument on whether it should or should not extend to documents held by Lee Crowder. I am disposed to extend the second condition already included by amendment, and currently limited to paras 2 to 4, so that it also extends to paras 5 and 6 of the categories sought. I am not at present persuaded, but I will hear argument, that para 3 of the proposed order is necessary. It seems to me that that is something which (if it arises) falls within the ability of an Applicant to ask for, but I would not wish to encourage it.

E McQuater QC and H Knox for the Applicant/Claimant instructed by Lovells;
M Barnes QC for the Defendant/Respondent instructed by Eversheds