

**IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION**Royal Courts of Justice
Strand
London

Neutral Citation Number: [2024] EWHC 3280 (KB)

Before MASTER DAGNALL**IN THE MATTER OF****(1) RHEA TARANEE NAUER-STATHAM
(2) CHRISTOPHER DAVID ORCHARD** (Claimants)

- v -

DIRECT LINE GROUP PLC (Defendant)**MR A BARNS-GRAHAM** appeared on behalf of the Claimants
MR J BROWN appeared on behalf of the Defendant**JUDGMENT
11 NOVEMBER 2024
(APPROVED JUDGMENT)**

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MASTER DAGNALL:

1. This is my judgment on the Applicants (whom I will call “the Claimants”) application notice dated 13 June 2024, now confined by way of previous developments to seeking disclosure of a report, which I will call “the Cedric report”, by Cedric International UK, who I will call “Cedric”, to the Respondent whom I will term “the Defendant”, dated 27 January 2023, and which relates to a meeting between the Claimants and Cedric which took place on 6 January 2023.

2. The application is being made on a pre-action basis under CPR 31.16:

“31.16

(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started¹.

(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.

(4) An order under this rule must –

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require him, when making disclosure, to specify any of those documents –

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

(5) Such an order may –

(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and

(b) specify the time and place for disclosure and inspection.”

3. The essential facts are not in issue. First, that the Claimants are the owners of a residential property in which they were formerly living with their four children, 16 Eastern Road, N22 7BD.

4. Secondly, that the Claimants had insured their property and its contents with the Defendant under a standard residential insurance policy.

5. Thirdly, that the property sustained substantial water damage on 22 October 2022, that the relevant escape of water was an insured peril and that the Claimants are entitled in principle to payments for the damage and its consequences.

6. Fourthly, the Claimants have sought to claim under the policy for the damage to the property and that has been the subject of various inspections by the Claimants’ loss adjusters and experts including an entity known as White Knight.

7. Fifthly, that the Defendant does not feel that all the necessary inspections have been carried out and as of 2023 and 2024 and, until very recently, wanted it to be White Knight who would carry out a further inspection.

8. Sixthly, that the Claimants assert and have asserted that they needed to move out of the property and to be rehoused pending remedial works being carried out on the property, which works have not yet taken place; and in due course, asserted to the Defendant that it was appropriate that they be rehoused in a property in Vallance Road and that they asked to be and have asked for the Defendant to agree to fund rental payments in relation to that property (“Vallance Road”) in Vallance Road as part of the compensation under the insurance policy.

9. The Defendant has at least intimated that it was not told or was not sufficiently told that Vallance Road was owned by relatives of the Claimants or that the rental was excessive, and that, in consequence, the Claimants so misled the Defendant that the Defendant may be able to repudiate liability for that element of the claim.

10. The Claimants dispute all that and say that the Defendant was informed properly as to and sufficiently as to the ownership of Vallance Road and also that its rental was and is a proper and appropriate one.

11. Seventhly, the Defendant has asked Claimants a set of questions with regards to Vallance Road and its letting which, at least until very recently, the Claimant has not answered.

12. Eighthly, that the Claimants complained to the Financial Ombudsman with regards to the Defendant’s delay in progressing their claim and the Financial Ombudsman has upheld that complaint at least to some extent.

13. The Claimants have contended, at least at one point, that the Financial Ombudsman has actually ordered and directed the Defendant to disclose the Cedric report. That may or may not be right; but I do not determine that particular question since Mr Barns-Graham for the Claimants has not sought to rely on that aspect before me as he accepts that there is a real dispute as to whether a particular relevant email was sent from the Financial Ombudsman to the Defendant.

14. In any event, it seems to me that whether the Financial Ombudsman has required that disclosure is a matter for the Financial Ombudsman rather than for me sitting in the King’s Bench Division in the High Court.

15. It remains open for the Claimants to pursue that aspect with the Financial Ombudsman. I make clear that, as far as I am concerned, I should say nothing with regards to that process, including as to whether, if the Claimants successfully pursue such a complaint and application to the Financial Ombudsman, that would extend to the Financial Ombudsman being able to grant any remedy or compensation in relation to the costs that the Claimants

have incurred or any that they may be ordered to pay in relation to this application or this litigation generally.

16. Ninthly, that there was a meeting on 6 January 2023 between the Claimants and Cedric acting as loss adjusters instructed by the Defendant. That meeting was recorded and the Claimants have a transcript of it.

17. It included discussions with regard to the state of the property and the Defendant's desire for there to be a further inspection and the Defendant's concerns and enquiries with regards to Vallance Road.

18. The Claimants say that they answered all of the Defendant's queries fully. That, though, is, at least potentially, in dispute.

19. Tenthly, that Cedric reported to the Defendant by a report dated 27 January 2023. The Defendant contends that the dominant purpose of the report was to provide advice and assistance with regards to then contemplated litigation, and so that the report is subject to legal professional privilege. The Claimants say that the report did not have such a dominant purpose and therefore, the privilege contention is wrong and ill-founded.

20. Eleventhly, that the Defendant thereafter, by various letters and communications including an email of 23 June 2023 and a letter from solicitors of 30 June 2023, sought to have Claimants (1) agree for there to be a further inspection of the property by White Knight and (2) have the Claimant answer a set of questions with regards to Vallance Road.

21. Twelfthly, that the Claimants responded to such requests effectively by first seeking disclosure of both the Cedric report and a number of other reports relating to the property (and which other reports have eventually been disclosed). Secondly, by refusing to answer the questions relating to Vallance Road, instead contending that they have already been fully answered including at the meeting on 6 January 2023, but not stating what those answers actually had been. Thirdly, by contending that a further inspection by White Knight was simply unnecessary, especially as the Defendant already had a number of reports which had been commissioned by it in relation to the property. Fourthly, to threaten the institution of proceedings, including by emails of 7 August 2023 and 4 October 2023 in which it was said that such a claim was in its final stage of preparation.

22. The Claimants then eventually issued their application notice of 13 June 2024 seeking disclosure of the Cedric report and other documents, being principally other reports. That was supported by a witness statement contained in the application notice, and, after the Defendant had responded by a witness statement of Jessica Taylor of 19 July 2024 saying the application was misconceived and the Cedric report was privileged, by a witness statement of

the First Claimant of 19 August 2024, and which was responded to by a further witness statement from Jessica Taylor on 28 August 2024.

23. As I have said, the Defendant has, following the issue of the application notice, disclosed a number of other reports, but not the Cedric report. The witness statements indicate that the real reason for such non-disclosure is that legal professional privilege is claimed in relation to the Cedric report; but it is said that, in any event, this is not a case which either requires or deserves such pre-action disclosure.

24. I have taken into account all of the witness evidence and the submissions, written and oral, which I have received from counsel, Mr Barns-Graham for the Claimants and Mr Brown for the Defendant.

25. I heard the matter initially on 24 September 2024 when I adjourned with directions, including because the Claimant sent a letter of claim on 19 September 2024 to the Defendant to which the Defendant's side said that they would respond, and I thought such a response might clarify material matters.

26. The Defendant's side, in fact, produced a letter of response which maintains their refusal to accept liability for the alternative accommodation claim and for the Vallance Road rental, and which again required the Claimants to answer the questions which the Defendants had posed regarding Vallance Road and its letting.

27. The Claimants have confirmed that they have a transcript of the 6 January 2023 meeting and have sent a letter to the Defendants referring to elements of that transcript as (they say) answering the Defendant's questions.

28. The parties also seem to be agreed that there should now be a further inspection of the property by a new expert instructed by the Defendant, not being White Knight.

29. Before me, Mr Barns-Graham has referred me first to the White Book notes with regards to CPR 31.16, in particular at section 31.16.4 and the classic statements cited at the end of the first full paragraph as to the application of CPR 31.16 as summarised in *Carillion v KPMG* [2020] EWHC 1416 at paragraph 66:

“66. The relevant legal principles are conveniently summarised by Blair J. in paragraph 17 of *Assetco*. CPR 31.16 provides that the court may make an order for pre-action disclosure only if certain conditions are satisfied:

i) The respondent and applicant must both be likely to be parties to subsequent proceedings. It is not however necessary to show in addition that the initiation of such proceedings is itself likely: *Black v Sumitomo Corp* [2002] 1 WLR 1562 at [71 – 72], Rix LJ, which is the leading case on the rule.

- ii) The documents sought must fall within the scope of the standard disclosure which the respondent would have to give in the anticipated proceedings. It follows that at the time of the application, the issues must be sufficiently clear to enable this requirement to be properly addressed.
- iii) Disclosure before proceedings have started must be desirable (i) to dispose fairly of the anticipated proceedings, (ii) to assist the dispute to be resolved without proceedings, or (iii) to save costs: CPR 31.16 (3) (d).
- iv) In considering whether to make an order, among the important considerations are the nature of the 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 (*Black v Sumitomo Corp* at [88]).
- v) The anticipated claim must have a real prospect of success.
- vi) In the commercial context, a pre-action disclosure order, even if not exceptional, is unusual.”

30. He has further referred me to the leading case of *Black v Sumitomo* [2002] 1 WLR 1762 in particular at paragraphs 70 to 98 all of which I have borne in mind. In particular, I have noted the following paragraphs:

“CPR 31.16(3)(a) and (b): “likely to be a party”.

70.. The application has to be made by “a person ... likely to be a party to subsequent proceedings” against “a person ... likely to be a party to the proceedings” (section 33(2)) and those requirements are reflected (in reverse order) in CPR 31.16(3)(a) and (b). There is no longer any statutory requirement that “a claim ... is likely to be made”...

CPR 31.16(3)(d): “desirable”

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

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 sub-rule as a whole. In *Bermuda v. KPMG* Waller LJ contemplated (at para 26) that sub-rule (d) may involve a two-stage process. I think that is correct. In my judgment, for jurisdictional purposes the court is only permitted to consider the granting of pre-action disclosure where there is a real prospect in principle of such an order being fair to the parties if litigation is

commenced, or of assisting the parties to avoid litigation, or of saving costs in any event. If there is such a real prospect, then the court should go on to consider the question of discretion, which has to be considered on all the facts and not merely in principle but in detail.

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

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

Discretion

.... 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...

...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.

...97.. In the present circumstances, the expressed determination of Mr Black to commence proceedings, and the avenues open to him to obtain documentation or (as it seems) information from other sources, militate against him.

98.. In this connection, as this case demonstrates, there is considerable danger of a request for pre-action disclosure leading to what must be expensive satellite litigation in connection with proceedings which have not yet been initiated.”

31. Mr Barns-Graham submitted to me as follows. Firstly, that the jurisdictional matters set out in CPR 31.16 were satisfied in relation to this application as firstly, the Claimants and the Defendant were likely to be parties to subsequent proceedings thus satisfying CPR 31.16(3)(a) and (b). He reminded me that in paragraph 70 of the *Black* decision, it was said that only a limited burden existed on the Applicant to show that proceedings were likely.

32. Secondly, that the Cedric report would fall within standard disclosure in such proceedings, thus satisfying the jurisdictional requirement in CPR31.16(3)(c) and especially so as it would reveal as to what had occurred and what was being said by each side at the meeting on 6 January 2023.

33. Thirdly, that it was desirable within CPR 31.16(3)(ii) for there to be disclosure as it would assist the dispute to be resolved without proceedings. Before me, he stated that he was not relying on subrule 31.16(3)(i), that the disclosure would be desirable to dispose fairly of the anticipated proceedings, or subrule (iii) that the disclosure would be desirable to save costs.

34. He submitted that it would assist to resolve the dispute without proceedings for the following reasons. He asserted that the negotiation and pre-action process had stalled because the Claimants no longer trusted it. They could not see why any further investigative report was required and in particular, one from White Knight whom they did not trust. They did not see why they needed to answer the Defendant’s questions with regards to Vallance Road and the Vallance Road letting especially where all those questions had already been answered in the meeting attended by Cedric on 6 January 2023 of which both sides have a transcript. Further, the Claimants could not understand how what had appeared to be a friendly meeting with Cedric could have resulted in the Defendant taking its particular

stances and effectively asserting or at least asserting some intention or at least preparedness to accuse them of dishonesty.

35. In such circumstances, if the Cedric report was disclosed, the Claimants would be able to understand why the Defendants were taking the stances that they were taking, and which would, hopefully, firstly give the Claimants confidence to re-engage in the process and, secondly, avoid the possibility that there had been some form of miscommunication.

36. Fourthly, that if the Defendant does wish to contend that the Cedric report is privileged, that would require its dominant purpose having been for the purposes of contemplating litigation and in his submission, that is clearly not the case.

37. Before me Mr Brown submitted: firstly, that the reasons given by the Claimants for it being desirable for the report to be disclosed simply did not fall within the legislative policy underlying the rule, in particular as described in *Black* and subsequent cases.

38. Secondly, that the Claimants already perfectly well know what their case is, and they can bring it without any difficulty where this report would add nothing to their case, which report is not in any way concerned with the substantive questions as to what has actually happened in the past.

39. Thirdly, that if the Claimants want the Defendant to carry on the pre-action protocol process without instituting legal proceedings, all the Claimants still have to do is to answer the Defendant's questions, and previously to have allowed White Knight to enter the property which the Claimants are not occupying and describe as uninhabitable. He submitted that the Claimants would have no difficulties with either requirement particularly in relation to (a) answering questions because the Claimants say (i) they have already answered them and in any event, (ii) the answers are effectively sitting on the transcript and (b) access, as the Claimants would have no difficulty in affording access because they are not even living at the relevant property.

40. Fourthly, this is not an appropriate situation to deal with any dispute regarding legal professional privilege in the Cedric report. Mr Brown stated that CPR 31.16 itself in subrule (4)(b) identified that it was only if a CPR31.16 pre-action disclosure order had first been made that it would then be, at that stage, for the disclosing party when it provided its list of relevant documents to then claim privilege, and it would only be that point that that dispute could then be argued out.

41. Mr Barns-Graham responded to say that it might be appropriate for the court to look at the Cedric report in order to consider whether privilege might attach to it; and also, that there is an attractive alternative that the Defendant could at least provide those parts of the Cedric

report in relation to which the Defendant did not assert privilege. Mr Brown answered that the Defendant simply claimed privilege over the entirety of the report, that such a division was not consistent with the way in which the law of privilege operates, and, in any event, the court should simply not order pre-action disclosure irrespective of whether the Cedric report was or was not privileged.

42. As I said, I adjourned on 24 September 2024 in part due to a lack of time and in part because the Defendant had said it was going to respond to the Claimant's letter of claim. The eventual response did, in fact, maintain that the Defendant wished to have the answers to its various questions regarding Vallance Road; and stated that in the absence of the Defendant being satisfied by appropriate answers, the Defendant at least reserved its position as to whether it would resist the claim for alternative accommodation expenses as being dishonest.

43. I do note that the Claimants and the Defendant do seem to have agreed that there should be a new investigation and report by an entity other than White Knight. I do also note that the Claimants referred the Defendant to what the Claimants said were the relevant sections of the transcript of the January 2023 meeting which the Claimants said contained answers to the Defendant's various questions. It is not entirely clear to me whether the Claimants say that what is stated in the relevant letters amounts to the Claimant's sole and entire answer to each of the questions or whether the Claimants are simply referring to elements of the meeting in which they say some form of answer was given. It seems to me that it might be desirable, but only might be desirable, if the Claimants were to clarify that.

44. I have considered all of the submissions and material before me; and it seems to me clear that I should refuse the applications for disclosure of the Cedric report for the following reasons.

45. I look first at the question of jurisdiction. It does seem to me that the Claimants and Defendant, the Applicant and Respondents are persons who would be parties to what is likely litigation. The question is whether the litigation is "likely", and the case law makes it clear that that is not a high test or burden to satisfy. In view of what the Defendant have raised with regards to Vallance Road and what they seek to wish to maintain, and the fact that they are not making any payments out to the Claimants, it seems to me that litigation is, in fact, distinctly likely between these parties.

46. Secondly, it does seem to me that the jurisdictional requirement as to the Cedric report falling within standard disclosure is satisfied whether the report is privileged or not. The question of privilege does not make any difference to whether or not the report would fall within the standard disclosure. The standard disclosure process involves the disclosure of

relevant documents, at least by way of listing them, although privilege may be asserted as to a reason why inspection should not take place – see CPR31.10(4)(a). The report clearly will contain reference to the subject matter of the dispute and discussions and conversations between the parties relating to that subject matter. It is the report of loss adjustors to their client insurer's solicitors with regards to matters that the loss adjustors, and it seems to me also the insurer, being the Defendant, regard as being relevant and of potential assistance to them, and which they would wish to rely upon; and therefore, it does seem to me that it would fall within standard disclosure as defined by CPR31.6, at least in principle.

47. I do have some doubts as to whether the third jurisdictional requirement in CPR31.16(3) is satisfied. As I said, it has not been suggested to me that the disclosure of the Cedric report is desirable to dispose fairly of the dispute or to save costs. Such might be the case if it had the effect of assuaging the Claimant's concerns with regards to the pre-action process, albeit it does seem to me that it is rather speculative as to whether it could do so, but that is not the basis on which the application is pursued.

48. I am dubious as to whether disclosure of the report is desirable to assist the dispute to be resolved with proceedings. In paragraph 81 of *Black*, it is made clear that there must be a real prospect that it would result in that particular outcome. As to this: firstly, it seems to me that whether disclosure of the Cedric report would assist in resolving the dispute without litigation is pure speculation.

49. The Claimants say that if they saw the report, they would or at least might be comforted and regain confidence in the pre-action process. It note that even they say that have considerable doubts about that; but in any event, it seems to me to be speculative and would depend very much as to what were the contents of the report. For example, if the report indicates that Cedric regard the Claimants as being untrustworthy and/or dishonest, I cannot at first sight see as to how that could assist in resolving the dispute.

50. The Claimants also say that if they saw the report, they would be in a position where they would be able to correct any misapprehensions. Whether there is even a misapprehension seems to me to be purely speculative; but, in any event, the Defendant seems to have something of a fixed view, at least if the Claimants are not prepared to answer the questions which have been put to them. Therefore, what is stalling the process appears to be the Claimants absence of preparedness to provide such answers, at least in a form or format acceptable to the Defendants; and it is only once they have been provided that it will become clear as to whether the Defendants are prepared to accept those answers as satisfactorily resolving their concerns. It seems to me that the Cedric report has little to do

with that, and that it is pure speculation to consider that (i) it does and (ii) seeing it would enable the Claimants to both put themselves in a mental state to progress the matter and be, in fact, in a better position to do so.

51. In any event, even if the jurisdictional requirement is satisfied as to disclosure being desirable to assist the dispute being resolved without proceedings, it does not seem to me that I should order the disclosure as a matter of discretion. I have applied the principles set out in *Black* and the other cases.

52. As to this: firstly, I note that jurisdiction and disclosure are different parts of the analytical process which the court applies to CPR 31.16 in any particular case - see, for example, paragraph 83 of *Black*.

53. Secondly, I note that the satisfaction of the jurisdictional requirement itself may inform the exercise of the discretion, particularly by way of representing the underlying policy or part of the underlying policy of CPR 31.16 - see paragraphs 81 to 84 of *Black*.

54. Thirdly, I note that pre-action disclosure is, in principle, exceptional. It is something which requires particular justification- see, for example, paragraph 85 of *Black* and also, subparagraph 66(6) of *Carillion*.

55. In this case, I bear in mind particularly the following. Firstly, the Claimants are perfectly able to make their claim and can bring the litigation without seeing the Cedric report; and the Claimants have, in fact, threatened to do so and to issue a claim form at various points over the history. It also seems to me obvious that the Claimants can bring such a claim. They have their own reports. They know effectively precisely what happened. They know everything that they need to know about the resultant damage and their loss and the remedies that they seek. Thus, the Cedric report is not a document which will assist them in any way in formulating their claim beyond what they already have.

56. Secondly, if the Claimants want the negotiation process to continue, they know and have known precisely what they need to do. With regards to the question of further investigation, they knew that all they had to do was to agree to allow an investigator entity into the property of which they were and are not themselves presently the occupiers. With regards to the Vallance Road aspect, they knew that all they needed to do was to answer the questions posed by the Defendant.

57. Thirdly, it seems to me that those matters which the Claimants needed to do in order to carry on the pre-action protocol process were, or at least should have been, simply uncontroversial as far as they were concerned if they wanted the pre-action process to be continued.

58. As far as access was concerned, as I have said, they did not live at the property. What they were particularly wishing to do was to raise queries about the identity of the further investigator, and what they needed to do was to put that matter to the Defendant and see whether it would be prepared to have a different investigator as indeed it has actually agreed.

59. As far as the questions were concerned, all the Claimants had to do was to answer the questions. Indeed, the Claimants said on numerous occasions that they had already answered the questions, in particular at the January 2023 meeting, thus the Claimants simply had no problem or difficulty in answering the questions at all. All they had to do was to repeat what they had already said. They were not disputing that they should have to answer the questions at all, rather their own position was and is that they had already articulated the answers in which case all they had to do was to repeat what they contend they had already said orally in writing. In fact they assert that they have now done this by supplying or by identifying the relevant sections in the transcript of the January 2023 meeting in which they contend that they actually gave those answers (although it might well assist if they wrote out or cut and pasted what they say are actually the answers to each question respectively). The pre-action process could then continue with the Defendant either being or not being prepared to take it further.

60. In all those circumstances, it does not seem to me that the provision of the Cedric report to the Claimants would at first sight be particularly relevant or important to the Claimants taking steps to have the Defendant continue with the process.

61. I also do not think that the policy of CPR 31.16 is such that it would be a proper exercise of what is an exceptional discretion for the court to order such a disclosure on the basis maintained here by the Claimants i.e. that they wish, or they would say need, to have the document disclosed by the Defendant in order for them to have the confidence to be prepared to continue with the pre-action process, even though they are and were in a perfectly good position both to be able to bring proceedings and to progress the negotiation process.

62. For the court to be prepared to exercise the CPR31.16 jurisdiction in those circumstances, it seems to me would be a recipe for the satellite litigation which was deprecated in *Black* in paragraph 98 of that judgment.

63. It also seems to me that it would very much widen the scope of CPR 31.16. That scope, it seems to me, is primarily concerned with putting a party in a position where they can bring a claim or negotiate a settlement on an informed basis as to what actually happened in relation to the subject matter of the substantive dispute i.e. the events which gave rise to the substantive claim.

64. This situation seems to me to be a wholly different one, much more an attempt by the Claimants to learn what is the thinking of the Defendant about the dispute and where the Defendant has already set out precisely what they say they want to know from the Claimant and why. I do not see that as being within the policy or true policy of CPR 31.16 at all or as being any particular reason as to why I should exercise this exceptional jurisdiction.

65. I also do not see this disclosure as being appropriate where it is said by the Claimants that it would enable the Claimants to possibly clear up some misapprehension on the part of the Defendant. First, that, it seems to me, as I have said above, to be speculative as to whether there is any misapprehension at all. Secondly, the Defendants have already provided their own solution of saying what they want to know are the answers to a set of questions, and which answers the Claimants seem perfectly prepared for the Defendants to learn because the Claimants say they have already communicated them and the answers are said to be sitting within the transcript.

66. If there is a misapprehension, then in those circumstances, all the Claimants have to do is to again answer the questions or if they are right about the transcript, identify the relevant passages in the transcript and say, "Here is the answer." It does not seem to me that disclosure of the Cedric report is likely to take matters any further, at least without the Defendant being prepared to accept those answers (and which is a matter for it and not the Claimants).

67. Again, I do not see this type of point as really being within the policy of CPR 31.16 at all, but in any event, there is a much simpler solution which was always fully available to the Claimants and which has been set out before them i.e. to (re)answer the questions in writing.

68. I therefore do not see it is appropriate to exercise the discretion, even assuming, as I do for these purposes, the jurisdictional requirements are satisfied. That is all notwithstanding that the application is, at least as it now is before me, very tightly focused down to one known identified document. That is a factor generally in favour of applications of this nature being granted but the court still needs to have looked at all the circumstances to decide whether the exceptional jurisdiction should be exercised, and in my judgment this is not such a case for the reasons which I have just given.

69. In those circumstances, I am simply going to dismiss the application, at least as it now stands.

70. I add that I have considered the privilege issues but it just seems to me that, where I am dismissing the application, I should simply not determine with them. Nevertheless, it may be of value to the parties to consider the following set of initial and provisional thoughts.

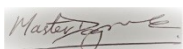
71. First, it seems to me that there is substantial force in Mr Brown's submissions that privilege is not something which would generally be considered at this stage, that is to say at the stage of considering whether or not to make a CPR 31.16 order. If it was the case that privilege obviously and clearly existed, that might be a reason for refusing to make a CPR31.16 order on the basis that it was pointless. However, if that is not the case, it seems to me there is substantial force in Mr Brown's submission that CPR31.16(4)(b)(ii) makes it clear that the court first decides to make the disclosure order, and only after then is a privilege claim asserted following the disclosing party having decided that they wish to assert privilege, and only then will the court deal with a dispute as to whether or not such privilege is made out.

72. Secondly, it does not seem to me at all obvious that this report is not privileged. It was made following a particular meeting where the then circumstances and the mere fact of the meeting in such circumstances seem to me to suggest that matters were potentially, at least at the level of some form of dispute between the parties. On the other hand, it may, of course, be that even if there was some sort of dispute, it was not sufficient to render the dominant purpose of the report, advice or assistance, with regards to actual then contemplated litigation. However, it does not seem to me that I am in any position to resolve any of that.

73. Thirdly, it further seems to me that there is substantial force in Mr Brown's submission that if the report is made in order to give advice or assistance in relation to reasonably contemplated litigation or for the purposes of such reasonably contemplated litigation that it is unlikely that one could describe any one or more element(s) of the report as not being privileged. Generally, such a report would be read as a whole and privilege would attach to it generally.

74. Again, though, I do not decide that point. I do note that in at least one email, there was some reference from the Defendant's side as to certain matters having been stated within the Cedric report. If that is the case, then it may be that it can be split into privileged and non-privileged elements. Alternatively, it may be that privilege has been waived in some way or other by way of a partial disclosure. However, I have not heard any detailed submissions on such points and it does not seem to me, in the light of my general conclusion that I should not be making a CPR31.16 order, that it is appropriate in this hearing to go any further into that.

75. For all of those reasons, so far as the Cedric report is concerned, I am dismissing the application.



31.12.2024
