(Claim No.) Pre-action)

[2014] EWHC 4254 ADMLTY

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMIRALTY COURT

The Admiralty Registrar, Jervis Kay Q.C.

B E T W E E N:

MARINE SERVICES (GRIMSBY) LIMITED

Applicant/Proposed Claimant

- and -

ASSOCIATED BRITISH PORTS

Respondent/Proposed Defendant

Hearing date: 28th October 2014

For the Claimant - Mr. Jason Robinson instructed by Myton Law Limited

For the Defendant – Mr Tom Whitehead instructed by Hill Dickinson LLP

JUDGMENT

(Handed down 15th December 2014)

Introduction

1. By an Application Notice dated 31st July 2014 the prospective Claimant ("the Applicant") seeks an order for pre-action disclosure in relation to a number of documents set out in the witness statement of Mr. Scott Yates of Myton Law, the Applicant's solicitors, and in the draft order supplied with the Application Notice.

The Factual Background

2. The prospective action concerns a collision which took place in the Royal Dock at Grimsby on 5th December 2013 between an accommodation barge named "Formby" and two of the Applicant's vessels, "Wil Venture" and "Scapa Pilot" as a result of which both of the latter were considered to be constructive total losses. The total loss is calculated to be about £162,156.00. The Royal Dock is owned by the Respondent. Apparently the collision occurred because the "Formby" which was lying moored in the Defendant's dock broke loose from her moorings and thereafter drifted onto the Applicant's vessels.

3. The Applicant has expressed the opinion that the Respondent is liable for this loss in (i) its capacity as designated port/harbour authority and/or (ii) by virtue of having assumed ownership and/or control of the "Formby", in particular when it exercised its right of distraint and sale over the vessel and/or when it re-moored her at a different berth around 18 months prior to the collision. The Applicant is also of the view that the Respondent failed in its duties to ensure the "Formby's" moorings were properly fixed, checked and maintained and/or that she was negligently re-moored, and/or failed to ensure the Applicant (as a user of the dock) was able to utilise and navigate the dock without danger to its property.

4. At present the Respondent has denied any breach of duty and has denied it owed any duty to the Applicant. The Respondent suggests that the owners of the "Formby" are the correct defendant in this proposed action. The parties' positions have been set out in the pre-action correspondence to date, by letters dated the 30th April 2014 and 16th July 2014. Since that correspondence, the Respondent has provided 6 pages of partially redacted emails, with attachments, relating to the Respondent's exercise of its right of distraint over the vessel and arrangements to move and re-moor the "Formby".

5. The limited disclosure provided to date apparently represents a small portion of the documents requested by the Applicant in its 'letter before claim' dated 30th April 2014 and the Claimant has submitted that the Respondent's disclosure, and its response to the 'letter before claim' (dated 16th July 2014), raise further issues which also form part of

this application for pre-action disclosure. In these circumstances the Applicant has requested that the court order that there should be further pre-action disclosure.

The case for the Applicant

6. For the Applicant, Mr. Jason Robinson has submitted that the relevant provisions are set out in CPR Part 31.16 and that the evidence set out in the witness statement of Mr Scott Yates, shows that the jurisdictional pre-conditions set out in CPR r.31.16 are satisfied because: (a) It appears to be common ground that if proceedings are issued in this case, the Respondent is *likely* to be a party to those proceedings (CPR r.31.16(3)(a)); (b) It is obvious that the Applicant will, of course, be a party to any such proceedings (CPR r.31.16(3)(b)); (c) The Respondent to this application does not dispute that had proceedings started, the duty of disclosure would extend to the documents or classes of documents of which the Applicant seeks disclosure in this application (CPR r.31.16(3)(c)); and (d) For the reasons set out in the witness statement of Mr. Yates, pre-action disclosure in this case would be desirable to dispose fairly of the anticipated proceedings, and/or assist the dispute to be resolved without proceedings, and/or save costs (CPR r.31.16(3)(d)). (e) The only area of dispute between the parties appears to whether one or more of the conditions in CPR r.31.16(3)(d) is satisfied. (f) The Applicant need only satisfy one of the grounds in CPR r.31.16(3)(d) to satisfy the jurisdictional threshold referred to above.

7. With respect to CPR Part 31.16(3)(d) Mr. Jason Robinson has submitted:
    a. That the likely issues to for determination if proceedings are issued, are:
        i. whether or not the Respondent exercised sufficient control over and responsibility for the "Formby" so that they owed a duty of care in negligence to other harbour users, or with respect to the operation or mooring, or re-mooring, of the "Formby";
        ii. if not, whether the Respondent owed a duty of care in negligence to the Applicant for some other reason;
        iii. whether the Respondent breached that duty; and
        iv. whether any such breach was causative of the loss in this case.

b. That the Applicant obviously has one or more causes of actions against another party arising from the collision of the "Formby" with its two vessels and that the other party is likely to be the Respondent or the owner of the "Formby".

c. That this application cannot be termed a 'fishing exercise' because the Applicant is requesting that it be provided with documents that will assist it to determine whether the claim ought best to be brought against the Respondent or the owner of the vessel.

d. That the classes of disclosure requested are relevant to:

    i. *Ownership, responsibility and/or control of the "Formby"*. Paragraph 3 of the draft order, and paragraphs 1, 2, 10 and 11 of the Schedule to the draft order, all concern substantially the same issue, i.e. whether the 'owner' of the "Formby" had effectively disowned the vessel at the material times and, in any event, who exercised responsibility and/or control over the vessel at all material times. As to which:

        1. *Paragraph 1 (and paragraph 3 of the draft order):* the request, which relates to "*correspondence between the Respondent and the owner of the "Formby" regarding the unpaid dock dues and the exercise of its power of distraint and sale*" clearly satisfies one or more of the jurisdictional pre-conditions in CPR r.31.16(3)(d). The correspondence between the Respondent and owner of the "Formby" regarding unpaid dock dues and the Respondent's exercise of its power of distraint goes to when, and why, the Respondent began to exercise effective control and/or responsibility of the vessel. This informs whether the Applicant's claim ought properly to be brought against the Respondent, bearing in mind the Respondent's stated position that the owner of the vessel is the proper defendant. There is a real prospect that the information requested may dispose fairly of the proceedings, and/or assist the dispute to be resolved without proceedings and/or save costs.

        2. The Respondent has to date provided 6 partially redacted pages of emails, with attachments, which address its provision of notice of distraint to the owner of the "Formby" and details correspondence

regarding re-mooring of the vessel. However, the information requested at paragraph 1 is still required because:

a. the disclosure to date does not address whether, and if so what, attempts have been made by the Respondent to sell the vessel at any time. This goes to whether or not they exercise a sufficient degree of control over the vessel to make them the proper party to the claim founded on the tort of negligence.

b. the most recent correspondence provided by the Respondent dates from 29th March 2012, i.e. 20 months before the collision. Therefore, despite the information provided to date, the Respondent remains justifiably unclear as to the degree of control, if any, exercised by the Respondent at any time during the 20 month period before the collision.

3. Paragraph 2 (*"All internal correspondence or documentation relating to the exercise of the Respondent's powers of distraint and sale in relation to the "Formby" and the steps taken to re-moor her"*): the documents requested go to whether or not the Respondent is the correct defendant and significant costs can be saved at this early stage if the Respondent produces the documents requested and the Applicant can then safely conclude that an alternative defendant ought to be pursued. Further information regarding the steps taken to re-moor the "Formby" may also avoid the need for proceedings given that the manner in which the vessel was re-moored will be a central issue in the case if proceedings are issued. It will not be difficult, or particularly costly, to provide the information sought as it is reasonable to assume the information requested in Schedule 1 is in the possession or control of the Respondent or its legal representatives.

4. Paragraphs 10 & 11: (*These are any documents upon which the Respondent relies in support of its claim that "the owner has not abandoned the vessel and even after the incident on 5 December*

2013 has continued to exert proprietary rights over the vessel. The owner does not agree to the intended sale of the vessel by ABP and reserves their position" and *"All correspondence between the Respondent or its legal or other representatives and the owners, insurers, legal or other representatives of the "Mekhanik Makarin" . . . . in relation to the damage caused to the "Formby" in Grimsby Royal Dock in or around June 2014"*). These requests go to whether or not the Respondent, as opposed to the owner of the "Formby", exercised effective control over, or responsibility for, the vessel and there is clearly a real prospect that provision of this information may dispose fairly of the anticipated proceedings, and/or assist the dispute to be resolved without proceedings and/or save costs.

5. One or more of the pre-conditions at CPR r.31.6(3)(d) are satisfied regarding paragraphs 1, 2, 10 and 11 of the Schedule to the draft order, and therefore the only question for the court regarding these paragraphs is whether it ought to exercise its discretion to make the order requested.

ii. *The Collision and the Respondent's conduct.* The remaining paragraphs 3-9 of the Schedule relate to the Respondent's conduct and/or involvement before and after the collision. There is a real prospect that the disclosure requested therein may dispose fairly of anticipated proceedings, assist to resolve that dispute without proceedings and/or save costs. In particular:

1. <u>*Paragraph 3:*</u> (This relates to the request for "*Any internal memorandum warning of the weather and/or giving guidance in relation to dock security on or around 5 December 2013 including any forecasts or warnings that it received, circulated or issued*"). Mr. Robinson has submitted that if, upon provision of this information, it becomes clear that the Respondent took all steps it could reasonably be expected to have taken to avoid the collision, proceedings in this case may be avoided. The nature of the

information and its timing would be a central issue if this case proceeds.

2. Paragraph 4: (This relates to the request for "*Any record or report in relation to the weather on or around 5 December 2013. Specifically, the document on which the Respondent seeks to rely in support of its contention that "conditions experienced at the port exceeded the gale force conditions forecast with gusts experienced up to 67 mph" as appears in Page 2 of its letter dated 16 July 2014*"). It is said that this application relates to a specific allegation made by the Respondent of which the Applicant is entitled to request documentary evidence in the interests of saving costs and assisting the dispute to be resolved without proceedings. If the Respondent is in a position to categorically state the conditions experienced at port, including the exact wind speed, it is presumably not too onerous a request that the evidential basis for the allegation be provided. Disclosure will allow the Applicant to ascertain the truth of the allegation and, if true, ascertain whether the Respondent is a proper party to this claim in light of the steps it took, if any, to safely secure the mooring of the "Formby".
3. Paragraphs 5 & 6: (This relates to the requests for: (i) *"Any specific Risk Assessment undertaken by the Respondent or its agent(s) in relation to the weather that was forecast on or around 5 December 2013"* and (ii) *"Risk Assessments and procedures governing the mooring of vessels within the dock")*. Mr. Robinson submits that the same point is made for paragraphs 5 and 6. It is obvious that the Applicant has a claim arising out of the collision between the "Formby" and its two vessels, having sight of a Risk Assessment (if it exists) will allow the Applicant to ensure the Respondent is a proper party to this claim by reference to the information contained therein and the Respondent's reaction, if any, to take steps to ensure the "Formby" was properly moored. If the document exists, it is presumably not too onerous or costly an obligation on the Respondent to provide it.

4. Paragraph 7: (This relates to the request for *"Any directions issued by the relevant Harbour and/or Dock Master in relation to the "Formby" pursuant to Section 52 of the Harbours, Docks and Piers Clauses Act 1847"*). Mr. Robinson has submitted that section 52 of the Harbour Docks and Piers Clauses Act 1847 provides harbour masters with powers to give directions regarding, *inter alia*, the position, mooring, unmooring, placing and removing of a vessel and that whether any directions were issued pursuant to this section, and if so the content of those directions, will allow the Applicant to ensure it does not bring its claim against the wrong defendant, thereby saving costs and assisting in an early resolution of the dispute without proceedings.
5. Paragraphs 8 & 9: (This relates to the requests for (i) *"Any incident reports in relation to the incident* and (ii) "*any witness statement or other investigation documentation obtained in relation to the incident"*). Mr. Robinson has submitted that the documents requested here would obviously assist in determining exactly how the "Formby" became loose and go to the degree of causative fault, if any, for which the Respondent may or may not be responsible.

e. **The exercise of discretion.** In this respect Mr. Robinson has submitted:
   i. The jurisdictional pre-conditions of CPR r.31.16(3)(d) are satisfied in this case as there is a real prospect that the disclosure requested may satisfy one or more of the sub-paragraphs therein. The only issue that remains for the court is whether it ought to exercise its discretion to order the disclosure requested.
   ii. This application ought to be granted in the interests of (i) saving costs that may be unnecessarily incurred if this case proceeds in circumstances where the Respondent is not a proper party, (ii) narrowing the issues between the parties at an early stage, or alternatively assisting in resolving this dispute without the need for proceedings to be issued, and (iii) in light

of the court's concern to save expense where practicable according to the overriding objective.

iii. The documents requested are likely to be in the Respondent's control and possession, are readily obtainable and capable of being disclosed. It has not been explained why provision of the requested documents would be costly and it is to be noted that if the documents disclose evidence which indicates the Respondent is not the proper party to be sued, there is an obvious cost benefit for both parties in ensuring the claim is not issued against the Respondent. On the other hand, if the documents do not support the Respondent's position, there will be no 'waste' of costs because the documents requested are documents which would form part of standard disclosure in due course once proceedings are issued.

f. **The scope of the application.** With respect to this aspect Mr. Robinson has submitted:

i. Whether or not the scope of disclosure requested in this application is too wide is entirely a matter for the judge and depends on all the circumstances of the case. Lord Justice Underhill summarised the relevant principles at paragraph 10 of his judgment in *Smith v Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585, which paraphrase Rix LJ's judgment in *Black v Sumitomo Corporation* [2001] EWCA Civ 1819, and in particular paragraph 10(7) as follows:

"*... It is worth noting that [Rix LJ] does not regard the fact that a claim might be characterised as "somewhat speculative" as necessarily fatal to an order for disclosure. Rather, it is a factor going into the discretionary balance. He says, 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.""

ii. That granting the disclosure sought by this application strikes an appropriate balance between the interests of the Respondent and the legitimate interests of the Applicant in seeking information which has a real prospect of saving costs and resolving this dispute without the need for proceedings.

iii. In any event, if the court is of the view that the scope of disclosure sought by this application is too wide, it is entitled to and ought to grant part of the application as it sees fit.

The case for the Respondent

8. Mr. Tom Whitehead has submitted:

a. that the application is subject to CPR Part 31.16(3) which provides:

"The court may make an order under this rule only where – (a) the respondent is likely to be a party to those proceedings; (b) the application is also likely to be a party to subsequent 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 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."

b. On this application, Rules 31.16(a) and (b) are met. The issue is whether Rules 31.16(c) and (d) are satisfied.

c. It is plain on the authorities that (d) is not satisfied: pre-action disclosure is not "desirable" in this case. It is a type of application which is not encouraged by the *Admiralty and Commercial Courts Guide.*

d. An order for pre-action disclosure should be made only in "exceptional" circumstances. It is an order which is made where the facts are unusual and "out of the ordinary run".

e. The burden of proof is upon the applicant to show that the disclosure must be "strictly necessary" in order to make a case against the respondent to the application.

f. There is nothing about the circumstances of the Applicant's intimated claim which is exceptional. The claim is not unusual. There is nothing to take the case outside the norm.

g. Therefore the question of whether 31.16(3)(c) is satisfied is academic however, in the alternative and if necessary, the Respondent submits that the requested disclosure is not relevant or otherwise within rule 31.6.

9. By way of support for the above submissions Mr. Whitehead has relied upon the following:

   a. That an order for pre-action disclosure should only be made in exceptional circumstances is supported by:

      i. *Phoenix Natural Gas Ltd v British Gas Trading Ltd* [2004] EWHC 451 (Comm) in which Cooke J. said:

> *"[1] … There is, so far as CPR 31.16(3)(d) is concerned, a two stage process. There is a jurisdictional requirement that at least one of the three matters set out in that subparagraph should be desirable and, secondly, once the jurisdictional requirement is satisfied, the court has a discretion to exercise in deciding whether or not pre-action disclosure is appropriate.*
>
> *[2] The jurisdictional requirements, it is fair to say, set a relatively low threshold but the general position is that pre-action disclosure is not to be given simply because those threshold requirements have been reached. Leaving aside obvious examples such as medical records or their equivalent as provided for in various protocols in the rules in particular kinds of dispute, by and large the concept of disclosure being ordered at something other than the normal time is presented as requiring something to justify departure from the norm at any rate where the parties at the pre-action stage have been acting reasonably and is therefore only to be given in exceptional cases …"*

ii. *Trouw UK Limited v Mitsui & Co (UK) Plc* [2007] UKCLR 921 at [23], in which Tomlinson J. (as he then was) said that pre-action disclosure was not to be regarded "*... as something which was generally available in the ordinary run of cases*" and that there needed to be "*...some feature of the case which took it out of the ordinary run in order to render it appropriate to exercise this jurisdiction.*"

iii. The approach was followed in *Pineway Limited v London Mining Company Limited* [2010] EWHC 1143 (Comm) in which David Steel J said at paragraph 52:

> "*It must be that in almost every dispute a case could be made out that pre-action disclosure would be useful in achieving a settlement or otherwise saving costs. It follows in my judgment that in order to obtain pre-action disclosure, circumstances must be outside "the usual run" to allow the hurdle to be surmounted: Trouw UK...*"

b. That an order for pre-action disclosure should only be made where it is necessary for the applicant to be able to make a claim against the respondent is supported by:

i. *Steamship Mutual v Baring Asset Management Ltd* [2004] 2 CLC 628; *First Gulf Bank v Wachovia Bank National Association* [2005] EWHC 2827 (Comm) at [24].

ii. *Snowstar Shipping Co Ltd v Graig Shipping Plc* [2003] EWHC 1367 (Comm), in which Morison J said:

> [2] "*...The approach to the issues I have to determine is set out in Rix LJ's judgment in Black v Sumitomo Corporation .... I summarise them thus:*
>
> *(1) There is no longer a requirement that the Court should be satisfied that a claim is likely to be made; merely that the persons against whom the application are made are likely to be parties in such proceedings if issued.*
>
> *(2) The court will act with particular care and caution when an allegation of fraud is made or hinted at: "... it cannot be right that an allegation of fraud should assist the potential claimant to obtain*

pre-action disclosure unless his allegations carry both some specificity and some conviction and his request for disclosure is appropriately formulated" and it will obviously be easier for a respondent to resist any pre-action disclosure if he has acted reasonably in exchanging information and documents relevant to the claim.

(3) The purpose of the rule is not just for the assistance of a prospective claimant to improve his prospective pleading but also of those who need disclosure as a vital step in deciding whether to litigate at all or as a vital ingredient of the pleading. It is relevant in the context of conditions (a) and (b) to take account of a number of matters including these:

(a) whether the injury or wrong in respect of which compensation is claimed is clear and

(b) called for an examination of the documents in question and

(c) the disclosure requested was narrowly focussed and

(d) bore directly on the injury complained of and responsibility for it and

(e) the documents would be decisive on the conduct or even the existence of the litigation

(4) There is a clear distinction between a personal injury action on the one hand and speculative commercial actions [where the disclosure sought is broad or ill defined]. The more diffuse the allegations and the wider the disclosure sought the more sceptical the court is entitled to be.

(5) In order that the court can determine whether condition (c) has been fulfilled, there needs to be clarity as to the issues, which would arise once pleadings in the prospective litigation had been formulated. ..."

iii. Morison J.'s further statement at paragraph 35: "... *I regard the ambit of the disclosure sought as wide and woolly. Mr Eder suggested that if there were flaws in the application notice then they could be dealt with after this*

judgment. I do not regard that as satisfactory. It is, I think, important, if not essential, that every application for pre-action disclosure should be crafted with great care, so that it is properly limited to what is strictly necessary. In this case, as Ms Andrews submitted, the order asks for something which the court could not order [confirmation of the date of undated documents] and is fishing for disclosure of documents which will either be privileged or subject to considerable commercial sensitivity ...."

iv. And by David Steel J. in *Pineway Ltd v London Mining* where he said at paragraph 49: "*...all documents within a class or category must be subject to standard disclosure. This emphasises in my judgment the need for a highly focussed application which clearly does not encompass categories of documents which will simply prove to be relevant, if at all, as part of the background (let alone of course documents which merely lead to a train of enquiry)*"

v. The commentary to rule 31.16 in the *White Book* (Vol.1) at pp.991-995.

vi. The *Admiralty and Commercial Courts Guide* which makes clear that: parties are not required, or generally expected, to engage in elaborate or expensive pre-action procedures, and restraint is encouraged.

c. That an order for pre-action disclosure should only be made where it is desirable is supported by:

i. The decision of the Court of Appeal in *Black v Sumitomo* [2002] 1 WLR 1562. That was a case about pre-action disclosure in the context of heavy prospective litigation in the Commercial Court concerning a possible claim for unlawful conspiracy to manipulate markets and/or breach of articles 81/82 of the EC Treaty. At first instance the judge, Michael Brindle Q.C. sitting as a deputy high court judge, had ordered that there should be 9 categories of pre-action disclosure against the prospective defendants. The conclusion summarised in the headnote states: "*Consideration of whether disclosure is "desirable", pursuant to paragraph (3)(d), involves a two-stage process. 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."

ii. The judgment of Rix L.J. at paragraphs 79-88 provides the relevant principles:

> *"[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").*
>
> *[80] Three considerations are mentioned in paragraph (3)(d): disposing fairly of the anticipated proceedings; assisting the dispute to be resolved without proceedings; and saving costs. The first of this trio obviously contemplates the disposal of proceedings once they have been commenced—in that context the phrase "dispose fairly" is a familiar one (see e g RSC Ord 24, r 8); the second as clearly contemplates the possibility of avoiding the initiation of litigation altogether; the third is neutral between both of these possibilities.*
>
> *[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 Ltd v KPMG [2001] Lloyd's Rep PN 392, 397, para 26 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 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.*

[84] In the present case, I think with respect that the judge fell into this error. Thus he dealt with paragraph (3)(d) in a single paragraph in which he decided that disclosure relating to the China deal and generally was desirable and should be made. He

said that his reasoning or much of it was already dealt with under the heading of the "likelihood of proceedings". There, however, he had in turn applied the wrong test; and even though in doing so he had considered matters which properly belonged to the question of discretion, by dealing with them for the different purpose of asking himself whether proceedings were likely, he was led into thinking that having decided that proceedings were likely, therefore pre-action disclosure should be made. That is demonstrated by his very next paragraph (headed "Discretion") where he simply says that "It is clear from what I have said above that an order should be made..."

[85] In effect, the judge never stood back, having dealt with the jurisdictional thresholds, and asked himself whether this was a case where his discretion should be exercised in favour of disclosure. It cannot be right to think that, wherever proceedings are likely between the parties to such an application and there is a real prospect of one of the purposes under paragraph (3)(d) being met, an order for disclosure should be made of documents which would in due course fall within standard disclosure. Otherwise an order for pre-action disclosure should be made in almost every dispute of any seriousness, irrespective of its context and detail. Whereas outside obvious examples such as medical records or their equivalent (as indicated by pre-action protocols) in certain other kinds of disputes, by and large the concept of disclosure being ordered at other than the normal time is presented as something differing from the normal, at any rate where the parties at the pre-action stage have been acting reasonably.

[86] It is to be observed that because of the way in which he proceeded, the judge decided the question of discretion even before considering the breadth of the discovery requested or the allegation of oppression . . . .

[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".

d. On the wider principles Mr. Whitehead also relied upon the following extract from the judgment of Rix LJ where he commented upon CPR 31.16(3)(c):

"[76] ... 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 Ltd v KPMG [2001] Lloyd's Rep PN 392, 397, para 26 when Waller LJ there said that:

> *"The circumstances spelt out by the rule show that it will 'only' be ordered where the court can 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 . . . .*

[94] I come next to the nature of the documents requested. Mr Black's request for disclosure went extremely wide. It was not confined to documents, such as medical reports, or the maintenance reports of an item of equipment, or some other category of internal reports, which could be said at one and the same time to be reasonably narrowly focussed and to relate directly to a loss or injury plainly sustained. It was not confined, as in Bermuda International Securities Ltd v KPMG [2001] Lloyd's Rep PN 392, to documents which were directly related to professional work alleged to have been negligently performed by a

prospective defendant for a prospective claimant. It was not confined to documents which a protocol had identified as the sort of material one party should be disclosing at an early stage to another. … In my judgment, however, such disclosure was very wide indeed. I am sceptical that the disclosure of daily trading statements throughout the period fell within standard disclosure in any event: they seem to me to be in effect "train of inquiry" or at any rate merely background documents. It would in any event be difficult to assess this question without a pleaded statement of case. Or, to put the matter another way: if such documents were to fall within standard disclosure, that fact would itself indicate the width of the allegations made.

[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.…

[98] … 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."

Consideration

10. I have set out the cases put forward by each counsel in some detail because they were clearly and coherently expressed and because rehearsing them has assisted me to understand the principles involved.

11. There is a two tier process which must be performed where there is an application of this nature. I do not think that this approach is disputed but it is clearly supported by the authorities cited above. The first part of the process involves the Applicant in surmounting the jurisdictional requirements which are set out in CPR Part 31.16(3). It has been said that there is a low threshold. It is obvious that the requirement under (b) is satisfied because the Applicant was the injured party and is considering claiming against one or both of two possible defendants. The Respondent will also be a party if the Applicant makes a claim. At the very least the Applicant is considering the matter so that it appears that the proviso in (a) is satisfied.

12. The next question is whether, on the assumption that proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the requests and documents of which the applicant seeks disclosure in accordance with proviso (c).

13. In my view paragraph 3 of the draft order includes matters which may not be included within "disclosure". As such these are items which do not fall within proviso (c). In addition the requests include documents which are confidential and/or privileged or are likely to be. This is demonstrated by Mr. Haddon's first witness statement at paragraphs 18 and 19. In my view that is not material which should be the subject of an order for pre-action disclosure and inspection. Further it is obvious that it involves a post-incident event. In my view that is irrelevant to what happened on 5th December 2013 or to who is legally responsible for the alleged damage to the Applicant. This includes the requests referred to in paragraphs 8, 9, 10 and 11 of the Schedule 1 attached to the draft order.

14. In addition there is the issue of whether proviso (d) is satisfied. Is disclosure before the proceedings have started desirable in order to – (i) dispose fairly of the anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs.

15. For the avoidance of doubt it is clear that the documents referred to in paragraphs 8, 9, 10 and 11 of the Schedule are not necessary or desirable to dispose of the anticipated

proceedings insofar as they are either irrelevant or privileged or possibly privileged. In any of these events they are clearly not, in my view, documents which should ever be subject to pre-issue disclosure.

16. This leaves the documents referred to in paragraphs 1-7 inclusive of the Schedule. What is being said by the Applicant is that these are documents which would be relevant to establishing: (i) whether the Respondent had taken on the mantle and responsibility of the owners of the colliding vessel and (ii) if so, whether the Respondents had acted negligently in performing in that capacity. To that extent it is probable that the documents would be those which would be disclosable once the proceedings had commenced and it therefore appears that they fall within proviso (c) of CPR Part 31.16.

17. However the question still remains as to whether proviso (d) is satisfied. This approach accords with the two stage process referred to in *Bermuda International Securities.* On this aspect I can see nothing about the request for documents which renders it fair that they should be disclosed at this stage of the proceedings because, in my view, the Applicant is capable of pleading its case against the Respondent with respect to the responsibility issue and it has no need of the proposed documents to enable it to do so. The next question is whether such disclosure would assist the parties to avoid litigation. The difficulty I have with this concept is that it is nearly always open to a party to say that if he is provided with disclosure he will be assisted in deciding whether to prosecute the claim or not. However in the normal case it is for the Claimant to set out his claim and disclosure thereafter follows from the issues which are identified. It is not normally considered to be fair to require the prospective defendant to provide documents or information to assist that process. It is this which gives rise to the question of whether there is something special or extraordinary about the case which renders pre-action disclosure desirable. If one considers the test proposed by Morison J. in *Snowstar Shipping Co. Ltd v Graig Shipping Company* (supra) I do not think that the Applicant has established that the disclosure requested is a step necessary to decide whether to litigate at all or that it is necessary to provide a vital ingredient of the pleading. Further, outwith the question of whether the Applicant would decide whether or not to commence proceedings, I very much doubt whether it can be said that early disclosure will give rise

to any, or any significant, saving in costs. On the contrary disclosure usually follows once the issues have been formulated and is restricted to those issues. If the present request is wider than those issues then unnecessary expense will be incurred by the Respondent however, if the issues presently put forward are an accurate assessment of those which will arise on the pleadings, it is difficult to see how pre-action disclosure will lead to any saving in costs.

18. With respect to whether the Applicant might be put in a better position to decide whether to commence proceedings I do not find that it has made out its case. The issue of whether the Respondent might be liable will depend upon its powers and obligations as a harbour authority. These powers and duties may be established as a matter of statute and law but I do not think that they will be materially influenced by the documents which have been requested by the Applicant. Furthermore to the extent that it appears to be considered that there are matters which might be influenced by the weather forecasts and what the Respondent knew about them I take the view that these requests are in the nature of a fishing expedition. The Applicant is capable of establishing both what actual weather conditions were experienced at the relevant time and what forecasts were available. What the Respondent should have done in those circumstances is a burden which lies upon the Applicant and it would, in my view, be wrong to take a step which has the effect of reversing that burden.

19. In my judgment, for the reasons set out above, the Applicant has failed to establish that the jurisdictional threshold has been reached but even if it had it would still be necessary to consider whether the court should exercise its discretion to make an order for pre-action disclosure. In my view it should not because:
    a. This is not an unusual case nor one which can be considered to be "out of the ordinary run of cases" or exceptional as considered in *Phoenix Natural Gas Ltd v British Gas Trading Ltd, Trouw UK Limited v Mitsui & Co. (UK)* and *Pineway Limited v. London Mining Company Limited* (supra).
    b. The disclosure is not necessary, and is certainly not "vital", to enable the Applicant to bring the claim. For the reasons given by Mr. Whitehead in his submissions the Applicant does not need further disclosure to enable it to decide whether to commence proceedings. The known facts are that the Respondent tried

to exercise its power to sell the "Formby", that the Respondent caused the "Formby" to be moved within the port of Grimsby, that bad weather conditions were forecast before the 5th December 2013 and that bad weather conditions were experienced. On the basis of those known facts the Applicant has contended that Respondent is responsible but the Applicant has not identified what, if any, disclosure, other than that already provided, is necessary to enable the Applicant to bring its claim.

c. Further, in my view, it is improbable that the disclosure requested will enable the dispute to be resolved at this stage of the proceedings.

d. The Schedule to the draft order applied for itself demonstrates that the application is too wide and is unfocussed. As already stated parts of the application are outside what is permissible and other parts are unnecessary. The most obvious example is the request related to the vessel "Mekhanik Makarin" which has no discernible relevance to the prospective claim regarding the "Formby" but, in addition, I agree with Mr. Whitehead that the requests made with regard to the correspondence related to unpaid dock dues, the documents related to the statutory power of distraint and sale, the weather forecasts and dock security are too wide. In short the requests are outside what is permissible.

e. Furthermore the application is of a type which is discouraged by the Admiralty and Commercial Court Guide.

Conclusion

20. For the reasons set out above I have come to the conclusion that the application should be dismissed.

Dated this 15th December 2014