

**Judgment 8/2005**

**Norman Piette Limited v. Hochtief  
Construction (UK) Limited – Royal Court  
(Civil Action file 875) – 26 January, 2005**

---

**Actions in tort and quasi-contract – plaintiff’s application for specific discovery – application granted.**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 26<sup>th</sup> day of January, 2005 before Alan Robin Winston Hancox Esquire, EGH, CBE, Lieutenant Bailiff; sitting alone

In the matter of:

NORMAN PIETTE LIMITED

(Plaintiff/Applicant)

and

HOCHTIEF CONSTRUCTION (UK) LIMITED

(Defendant/Respondent)

Whereas on 11<sup>th</sup> January, 2003, the Lieutenant Bailiff considered an application for specific discovery by the Plaintiff in the terms attached hereto and heard thereon Advocates P. Richardson and J. P. Greenfield, Counsel for the Plaintiff and Defendant respectively.

The Lieutenant Bailiff this day gave judgment in the terms attached hereto and GRANTED the said application as prayed and reserved the question of costs.

S. M. D. ROSS  
Her Majesty’s Deputy Greffier

Approved Text

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:

NORMAN PIETTE LIMITED

Plaintiff/Applicant

And

HOCHTIEF CONSTRUCTION (UK) LIMITED

Defendant/Respondent

**Judgment on Plaintiff's Application for Specific Discovery.**

1. This action arises from the construction of the new Airport in Guernsey whereby the Defendant Company (Hochtief) were the main contractors for the erection of the new terminal building and the necessary works appurtenant thereto. The Plaintiffs are well-known suppliers of materials to the building industry in the Bailiwick. They supplied goods and building materials to an English Company named Concept Developments (Wiltshire) Ltd (Concept), who were sub-contractors to Hochtief for the purpose of constructing ground and other ancillary works in connexion with the project.

2. The Plaintiffs say that between July and November in the year 2002 they supplied goods and materials to Concept for the purposes of the project to the total value of £309,499.35. Of this Concept have only paid £116,301.77, leaving £193,197.58 outstanding which they unfortunately have not paid. Some of the items concerned were incorporated into the fabric of the Airport building and are thus not capable of being returned *in specie* to the Plaintiffs. Other items are said to have remained on the site and Hochtief have refused to return them.

3. Advocate Richardson, appearing for the Plaintiff Company stated that his clients have not sued Concept. Instead they have had recourse to mounting these proceedings against Hochtief, who are a substantial international construction company. They claim that as, under their contract with Concept, which contained that which is known as a ROMALPA Clause (so named after the case of Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd [1976] 2 AER 552) the title to and/or the property in the goods and materials thus supplied had not passed to Concept, Hochtief are guilty of converting the Plaintiffs' goods and materials to their own use, either by incorporating them into the building or by failing to return them.

4. The other head of the Plaintiffs' claim is that, because Hochtief have re-ceived payment for the project under their contract with the States of Guernsey, which payment would necessarily include monies for the items supplied to Concept by them, Hochtief has been unjustly enriched to the tune of £193,147.58. Thus one head of the claim sounds in tort and the other in that which is often regarded as part of the law of quasi-contract. In view of requests 2 and 3 in the Plaintiffs' Application for Specific Discovery, coupled with the Interim payment Application and the Interim Valuation Certificate, appearing at TABS 8 and 9 of the Plaintiffs' bundle, each of which refer to materials on site, it is important at this stage to identify the legal bases for their alleged causes of action, which are pleaded alternatively.

5. The learned authors of Chitty on Contracts, 28<sup>th</sup> Edition, Volume 1 devote a complete section of Chapter 30 to the principle of unjust enrichment. At the commencement of this Chapter,

which is entitled ‘Restitution’, at paragraph 30-001 they quote from the Speech of Lord Wright in Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32. The *dictum* is at page 61:

“It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.”

6. The facts in Fibrosa were that the respondents, a company based in Leeds, agreed in July of 1939 to supply certain specialised textile machinery to the appellants in Gdynia in Poland with delivery three to four months hence. The price was £4,800 of which one-third was payable on order, and of this the appellants paid £1,000 on account on 18<sup>th</sup> July. On the outbreak of war on 3<sup>rd</sup> September the contract became frustrated and the appellants sought to recover their £1,000 which was refused. Overruling Chandler v. Webster [1904] 1KB 493, and the other ‘coronation’ cases, the House of Lords held the appellants were entitled to restitution of the £1,000.

7. Another example is Refuge Assurance Co v. Kettlewell [1909] AC 243, where the plaintiff, who held a policy of assurance on her brother’s life, wished to discontinue paying the premiums but was persuaded to continue to do so by one Cowling, the Company’s agent, who promised that if she did she would receive free insurance after five years. This was false but was said without the company’s knowledge. The Court of Appeal held that as the Company, though innocent, had benefited during the five years by the amount of the premiums which continued to be paid, the plaintiff could recover the sums so paid.

8. The Fibrosa case differed from the instant one in that the parties had been in a contractual relationship, and the decision turned on a total failure of the consideration whereas here, as Mr. Richardson conceded, privity of contract did not exist between them. However, it seems to be clear from the text in Chitty that the right to recover on the ground of unjust enrichment, notwithstanding that the party who received the benefit may not have intended to enrich itself (see Lord Wright again at page 61 in the Fibrosa case (*supra*)) does not necessarily depend on the existence, or prior existence, of contractual relationship between the parties. It depends on the principle that one party is obliged, *ex aequo et bono*, to make restitution (Lord Wright at page 62 of the Report).

9. While the examples given at paragraph 1-074 of The Law of Restitution by Goff and Jones (at TAB 2 of the Defendant’s Bundle of Authorities) might appear to militate against this view, the general discussion of the topic of unjust enrichment at paragraphs 1-012 to 1-015 indicates that this area of the law has received wide judicial recognition. For example in Craven-Ellis v. Canons Ltd [1936] 2 KB 403 in which a managing director had performed services for a company without having obtained the qualification shares necessary under the Articles of Association. Even though the claim under the void contract for his remuneration failed he was held entitled to recover on a *quantum meruit quasi ex contractu*, (per Greer L.J. at page 412). The foregoing may well open up an area of legal argument later on in this case, but, for the purposes of the present application for specific discovery, I am satisfied that there is an arguable case on the Plaintiff’s behalf on the ground of unjust enrichment.

10. In the foregoing paragraphs I have not attempted to deal with legal issues that might arise in respect of the goods and materials said in paragraph 11.1 of the Cause to have been incorporated into the Airport buildings or other structures appurtenant thereto, and thus possibly losing their identity, or whether the maxim *quicquid plantatur solo solo cedit* might apply. In the Romalpa case (*supra*) the retention of title clause was not dissimilar from that in the contract between the Plaintiffs and Concept, and the Court of Appeal held that the sub-purchasers from the defendants (who had become insolvent and were in receivership) of the aluminium foil concerned

were liable to account to the plaintiff sellers for the unmixed foil that they had received in priority to the creditors.

11. A different result was reached in Borden (UK) Ltd v. Scottish Timber Products and another [1979] 3 AER 961 where the unpaid sellers were held not entitled to trace resin they had sold to the defendants since it had been made into chipboard and was no longer identifiable as resin. Similarly, in Hendy Lennox Ltd v. Grahame Puttick Ltd [1984] 2 AER 152 Staughton J. held that the property in two of the three diesel engines sold to the defendants and subsequently incorporated into generator sets had passed to the defendants, and then to their customers. Only in respect of the third where the proprietary title had not passed were the plaintiffs held entitled to recover the proceeds of sale from the sub-purchaser. That case, however, depended very much on the fact that at the relevant time the credit period had not expired and it could not be said that the two engines had not been paid for under the terms of the retention clause.

12. Reverting to the position in the instant case, the scenario (this is central to the argument of Advocate Greenfield representing Hochtief) is set against the back- ground of three distinct contracts, namely:

- (1) The contract between the States of Guernsey and Hochtief.
- (2) The contract between Hochtief and Concept.
- (3) The contract between the Plaintiffs and Concept of 19<sup>th</sup> July, 2002, which the Plaintiffs referred to as a Supply Contract, but which Hochtief insist is a Crejdit Application Form with a limit of £10,000, which Mr. Greenfield submitted had been greatly exceeded.

13. Mr. Greenfield said that there was nothing sinister in his clients' reluctance to disclose the first three documents listed in the Plaintiff's' Application for Specific Discovery, which is now before me for determination: if there had been he would not so readily have conceded those sought at numbers 4 to 7. There were genuine commercial reasons why Hochtief, an internationally known company with a world-wide reputation, did not wish the Plaintiffs to have a kind of roving commission to investigate documents prepared by them for the Airport project, which included the risk of disclosure to all and sundry involved in the building industry in Guernsey.

14. Mr. Greenfield contended that the burden rested on the Plaintiffs to show why they should have discovery of the disputed items. There was no legitimate reason why documents prepared at one level of the structure of contracts involved in the project should be transposed to another level. What the Plaintiffs were trying to do, Mr. Greenfield continued, was to 'drill upwards' to ascertain the details of matters relevant to the main contract between the States and Hochtief, under the guise of drilling down through the documents already discovered at TABs 8 and 9 to obtain the supporting vouchers.

15. Furthermore, Mr. Greenfield said, it was not enough to cite Mr. Mansell's report and swear, as Mr. Richardson does in his Affidavit of the 24<sup>th</sup> September, 2004, that the documents sought in the letter of 18<sup>th</sup> June were essential to complete his report. The so-called provisional report had not been exhibited, and the mere fact that Mr. Mansell was said to require the documents could not *per se* render them discoverable. In effect, Mr. Greenfield said, this was a fishing expedition mounted by the Plaintiffs in the hope that 'something helpful to their case' in the documentation relevant to a different layer of the contractual background 'would turn up'.

16. Mr. Richardson's riposte to this suggestion was that the allegation that Mr. Mansell needed the documents sought in the letter of request of 18<sup>th</sup> June by Collas Day appeared in his Affidavit of 24<sup>th</sup> September, 2004. Paragraph 8 of that Affidavit exhibited the correspondence passing between the Advocates in June and July of that year, culminating in a letter from Carey Olsen's of 20<sup>th</sup> July, which said that the writer would endeavour to have the 'documents you requested by the end of this month'. No suggestion there, Mr. Richardson said, of any reason why

the documents requested by Collas Day should not be discovered. Why, he said, if there was any objection could there not have been an affidavit responding to his paragraph 8?

17. I am in full agreement with Mr. Greenfield that it is not enough for the Plaintiffs to say that Mr. Mansell needed the disputed documents in order to finalise his report, and, of course the letter from Mr. Mansell, if there was such a letter, or, maybe, the transcript of a recorded telephone call, was not exhibited to Mr. Richardson's Affidavit. However the fact remains that there was, indisputably, no response to that Affidavit by the time this Application came for Directions in November, or even by the date of hearing, some 3½ months later.

18. Mr. Richardson then referred generally to Order 24 Rule 2 of the 1999 Rules of the Supreme Court and in particular to the note in the Commentary at paragraph 24/2/11. As I have observed before the phrase '...Relating to any matter in question between them in the proceedings...' is common to both jurisdictions, in that it forms the concluding words to Order 24 Rule 2(1) R.S.C. and to paragraph (a) of Rule 39(1), which is the relevant provision for discovery in the 1989 Guernsey Rules. Mr. Richardson analysed paragraphs 4 to 10 of the Niances in the Defences, and submitted that the way in which the Defence is pleaded, namely the partial denial in paragraph 4, coupled with the denial in Paragraph 10, the non-admissions in the intervening paragraphs, and putting the Plaintiff to strict proof of the matters alleged in paragraphs 7 to 9 of the Cause, showed that whether the items supplied to Concept remained Norman Piette's property, and, indeed, whether they had supplied any goods or materials to Concept, and, finally, whether Hochtief owed any duty to the Plaintiffs, were all 'matters in question between the parties to the action'.

19. Accordingly Mr. Richardson submitted that that the present Application fell within the principles laid down by Brett L.J. in the early case of Compagnie Financiere du Pacifique v. Peruvian Guano Co [1882] 11 QBD 55, which is still good law. These were recently authoritatively endorsed by Sir Thomas Bingham M.R. in Taylor v. Anderton [Police Complaints Authority Intervening] [1995] 1 WLR 447. They also appear at paragraph 4.08 of the work on Disclosure by Matthews & Malek, which indicates that the brackets within which documents are regarded as relevant are wide, and that in considering the application for disclosure the Courts should adopt a policy of inclusion rather than exclusion.

20. I now come to the passage in the judgment of Brett L.J., which Sir Thomas Bingham described, at page 459E as "the classical exposition of the meaning of the phrase 'Documents..... relating to matters in question in the action' ". Having posed the question Brett L.J. said at page 63:

"I think it obvious from the use of these terms that the documents to be produced are not confined to those which would be evidence either to prove or to disprove any matter in question in the action: and the practice with regard to insurance cases shows, that the court never thought that the person making the affidavit would satisfy the duty imposed on him by merely setting out such documents, as would be evidence to support or defeat any issue in the cause. The doctrine `seems to me to go father than that and to go as far as the principle which I am about to lay down. It seems to me that every document relates to the matters in question in the action, which would not only be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which must — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words `either directly or indirectly,' because as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document *which may fairly lead him to a train of enquiry* which may have either of these two consequences" [My italics]

21. Mr. Greenfield also referred to Taylor v. Anderton, and the context of the defendant's submission in that case—that under Rule 13 of Order 24 an order for production and inspection of the disputed reports was not shown to be necessary for disposing fairly of the cause or matter or for saving costs. At page 460, Sir Thomas Bingham, citing R v. Chief Constable of West Midlands Police Ex parte Wiley [1995] 1 AC 274, described this as the first issue which arose for consideration. In the West Midlands case Lord Woolf had said that the restriction, which also appears in Rule 8 in connexion with discovery, meant that there are many situations where the court can avoid making an order on the ground that the documents concerned are not necessary for either of those purposes, 'although it cannot be said that they are not relevant.'

22. Mr. Greenfield also drew to the Court's attention Rule 8 of the Royal Court Discovery of Documents Rules 1998, which, he said, were a direct copy of the latter part of Rule 8 of Order 24. That Rule only applies to applications for discovery under Rules 1 and 2 of the 1998 Rules. Both those Rules only in personal injury cases, the first when a claim in respect of personal injuries or death is contemplated, and the second when such a claim is actually made. Those Rules therefore have no relevance to the instant case.

23. Nevertheless, although that requirement does not appear in so many words in the Guernsey Rules, I am satisfied that Mr. Greenfield is right in saying that it is a basic principle that the Royal Court, equally, should be satisfied that discovery, as well as production and inspection, of any documents sought is necessary either (1) for disposing fairly of the Cause or (2) for saving costs. It should not make an order under Rule 39 without addressing that issue. He submitted that the Plaintiffs' Application failed on both those counts in relation to the three disputed documents.

24. It has to be observed that the issues regarding discovery and production in Taylor v. Anderton arose under very different circumstances. In the first place the question was as to whether the Judge at first instance had been right to reject the plaintiff's application for a jury trial in an action against the former Chief Constable of Greater Manchester Police for misfeasance in office, malicious prosecution and conspiracy under section 69 of the Supreme Court Act 1981. The action, which was commenced by writ in March, 1991, had resulted from the plaintiff's acquittal after a trial, which spread over 2¼ years in the Manchester Crown Court in January, 1990, on charges of fraud and dishonesty in relation to his business affairs.

25. In that case, in the course of the discovery process, the plaintiffs had listed some 4,500 documents and the defendant's list contained 6,700 documents. The pleadings alone occupied four substantial ring binders, and 2,900 pages of transcript of the criminal trial had been ordered. The further and better particulars on both sides had totalled over 540 pages. Procedural experts at the local Bar may be encouraged by this. Moreover the allegations and counter allegations of fact made pursuant to an order of Owen J. ran to 462 pages. In those circumstances Sir Thomas Bingham held that the judge's decision to hold that the trial would require prolonged examination of books and accounts was entirely right, and that the *prima facie* right to a jury trial under the section was displaced.

26. Bingham M.R then turned to the issue of whether discovery should be ordered of certain reports dealing with police conduct after the plaintiff's acquittal. This, in turn, impacted on important issues of public interest immunity from production. He commented on the fact that the plaintiff, instead of pleading merely the unsuccessful prosecution and particulars of malice directly related to it, had based his case on the course of police conduct since 1985 and of a far-reaching plot to destroy the plaintiff and the former Deputy Chief Constable. Thus the plaintiff could hardly complain that the defendant deployed a heavily documented case (which included the disclosure of three police related reports of inquiries into matters arising out of the prosecution of the plaintiff) to rebut it.

27. The defendant (in Taylor v. Anderton) disclosed the three reports but resisted inspection of them, (a) on the ground of their belonging to a class of documents covered by public

interest immunity, and (b) that, under Rule 13, they were not necessary (i) for disposing fairly of the action or (ii) for saving costs. The Judge had rejected the claim to immunity. In giving leave to the defendant and the intervener to appeal against that decision, and remitting the issue to the Judge for reconsideration the Master of the Rolls said, as regards (a), that the House of Lords in R v. Chief Constable of West Midlands Police Ex parte Wiley had ruled that public interest immunity does not attach to a class comprising statements obtained for the purposes of an investigation under the Police and Criminal Investigations Act 1984 (which these statements were) but left open the question of whether class immunity attached to the reports themselves. Accordingly, that issue was still open for decision.

28. As regards (b)(i) he enunciated this test, at page 462 C —D:

“The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment, is the test.”

Turning to (b)(ii) Bingham M.R. said that the Court had not inspected the reports, and since this issue had not been argued before Owen J. it was appropriate to include this in the matters to be reconsidered by the Judge, who was more versed in the minutiae of that exceptionally complicated case.

29. In two recent cases the question of whether documents sought to be disclosed would lead legitimately to a train of enquiry as propounded by Brett L.J. arose, namely Smith v. Islands Insurance Royal Court [2001] 11<sup>th</sup> May and in O Co v. M Co [1996] 2 Lloyd's Reports 347 (cited in the former). Smith v. Islands Insurance was an action on a policy of insurance issued by the Defendant company to the Plaintiff in respect of interruption of his business in consequence of the loss of or damage to the premises or property thereby insured due to a burglary in April 1994. The property insured included the Plaintiff's computer discs and data base recorded thereon.

30. The Defendant insurers repudiated liability on the grounds, *inter alia*, of misrepresentation and a breach of the insured's duty to disclose all material facts under the first condition of the Policy. This was because the plaintiff had previously brought proceedings against the owner of the premises adjoining those occupied by the plaintiff, for the escape of water into his premises some time before the burglary. He also sued his landlord for alleged breach of covenant by him to keep the building in which his premises were situated wind and watertight. This had resulted in damage to the contents, which included the plaintiff's computer discs and the information stored therein. There was no indication in the earlier Cause that the data lost was similar to that lost in the burglary, but at least one of the entities of which particulars of loss were given in the earlier Cause was identical to that given in the response to interrogatories administered in the second case.

31. It was obviously reasonable for the insurers to have disclosure and inspection of the documents produced in the earlier case so as to enable them, and their legal advisers, to see whether the data lost in the earlier case matched, or differed from, that said to have been lost in the later case. I therefore found that the documents in the earlier case were relevant to the issues pleaded by the defendant, in particular as to whether the insured had taken reasonable precautions to prevent loss or damage to his property as required by the policy. Their non-disclosure would have inhibited the defendant in pursuing its case. Accordingly I held that the documents sought in the defendant's application for discovery in the second case would yield information which might enable the defendant to pursue a legitimate train of enquiry which might well advance its case.

32. The plaintiffs in O Co v. M.Co (*supra*) had sued for the loss of their cargo

while it was being carried on the defendants' ship which had occurred due to an explosion on board. The defendants relied on exclusion of liability under the Hague—Visby Rules, which exclusion was itself excluded if the cargo owners proved the loss was 'due to actual fault or privity of the carrier'. The seaworthiness of the vessel, by reason of the alleged lack of due diligence by the shipowners, was also in issue. The explosion was alleged to have happened due to the escape of crude oil from one hold into another, which, in turn, was said to be caused by corrosion of the intervening bulkhead, due to lack of maintenance.

33. The plaintiffs applied for specific discovery of eighty-three classes of documents, unconnected with the area where the explosion occurred, on the grounds that these would lead to a chain of enquiry, in that they might throw light on the shipowner's general management of the vessel, or on the rate of corrosion in other parts of the vessel, or that they might contain material relevant to whether fire occurred without the shipowner's fault or privity, and other suggested lines of enquiry. Of the classes of documents sought, Colman J. allowed only one item. His judgment includes this passage:

" In a case such as this, where there has been explosion and fire on board the defendant's vessel but the cause is uncertain .....one would normally expect to find a spectrum of differing materiality ranging from documents which were central to pleaded issues.....to documents relating to features of the ship, such as the main engines and their maintenance, not hitherto suggested as being pertinent to the explosion.....Within that spectrum it may be said of the documents towards one extreme that although they do not relate directly to any part of the vessel hitherto under suspicion as having been material to the loss, they may, on investigation, reveal, or at least suggest by inference unanticipated deficiencies in the owners' conduct on the basis of which their defence could be attacked or their reliance on limitation challenged.

Although at the end of the spectrum of potential evidential significance it may be said that such documents fall within the letter of Brett L.J.'s formulation of relevance for discovery purposes inasmuch as such classes of documents might, if disclosed fairly lead the plaintiffs to a train of enquiry which might have the consequence' [my emphasis]' that the plaintiffs were enabled to advance their own case or damage the the shipowners' defence, that is not what the formulation means or how it ought to be applied. The principle' was never intended to justify demands for disclosure at the far end of the spectrum of materiality which on the face of it were unrelated to the pleaded case of the plaintiff or defendant and which were required for purely speculative investigation. The excessively wide application of Brett L.J.'s formulation of relevance has probably contributed more to the increase of the costs of English civil and commercial litigation in recent years than any other factor other than the development of the photocopying machine. That formulation must not, in my judgment be understood as justifying discovery demands which would involve parties to civil litigation being required to turn out the contents of their filing systems as if under criminal investigation merely on the off-chance that something might show up from which some relatively weak inference prejudicial to the case of the disclosing party might be drawn."

The facts alleged in the instant case do not bear any real similarity either to Taylor v. Anderton, to Smith v. Islands Insurance or to O Co v. M.Co. It is, in my view, more straightforward than a train of enquiry case. I therefore proceed to consider the three disputed documents *seriatim*.

34. The first request in the Application dated 27<sup>th</sup> September, 2004, is for ' a complete copy of the contract exchanged between the Defendant and the States of Guernsey dated 20<sup>th</sup> June, 2002'. I bear well in mind Mr. Greenfield's point that this document relates to a different level of the contractual structure involved in the Airport project. Clearly there was no privity between the States and the Plaintiffs but, nonetheless, the Contract is disclosed as Item 3 in Schedule 1 in the Defendant's list of documents furnished on the 17<sup>th</sup> May, 2004, under the heading

“B. Documents re arrangements between the States of Guernsey and the Defendant.”

On 14<sup>th</sup> June, according to Mr. Richardson, inspection of the Part I documents, presumably including Item 3, took place, followed by the provision of copies of those documents under cover of the letter of 17<sup>th</sup> June from the Defendant’s Advocates.

35. In the letter annexing the lists of the Defendant’s documents there follows paragraph 2, which states, in common form, that the Defendant objects to the documents enumerated in Part 2 of Schedule 1 of the List. The contract in question was not listed in Part 2, but in Part 1. Not a word was said there, or in the letter of 17<sup>th</sup> June, regarding any objection to those portions of the Contract which are missing. Parts of the Contract (presumably those included in the copies sent with the letter of 17<sup>th</sup> June) appear in TAB 7 of Collas Day’s bundle.

36. I confess I have had some difficulty in following the pages forming Divider 7. Parts appear to be in sequence and others not. As far as I can see the pages that are there comprise the commencement, eleven recitals (the Contents say there are seven) Clauses 1.3 to 40.5.1 followed by the signatories and the Common Seal of Hochtief, followed by four pages of Contents. There are then twelve more pages in which, as I indicated during Mr. Richardson’s submissions, there are breaks in the pagination. In particular, following the Contents,—between pages 4 and 23; 24 and 33; and 69 to the end, before a page which appears to be a divider to an annexure to the Contract entitled ‘Appendix T: Warranties’.

37. On the assumption that some of the pages are missing from the material forming Divider 7, why cannot the Plaintiffs, and for that matter, the Court see the missing pages? Obviously, before any order for discovery can be effective it is necessary to ascertain which parts *are* missing. In my opinion, the Plaintiffs’ sub- mission that, if a substantial part of the Contract has been divulged, freely and without any order, in a part of the Schedule of Documents which the Defendant does not object to disclosing, and if no valid reason for withholding the remainder has been advanced, the whole of the Contract should be disclosed and inspection permitted, is unanswerable.

38. There is another reason why I should accede to the Plaintiffs’ request as regards the first document included in their Application. A substantial part of it has been exposed to the Court’s scrutiny. It is impossible to forecast what view the Jurats will form of it at the trial. But one thing is certain. If the Court only sees a part of a document, without being allowed to see the whole, there is a risk that it will have a distorted view of that part of the factual evidence, unless the portions that are not revealed are edited, or expurgated, for legal reasons, for example, perhaps, parts of a confession in a criminal trial. On that count also I consider the Plaintiff’s should have discovery and inspection of the full Contract.

39. I turn to parts 2 and 3 of the Application, which seek, in each case, a full breakdown of the documents appearing at TABs 8 and 9 respectively, and their sup- porting documents. The first of these is entitled ‘Bill Summary’, dated 31<sup>st</sup> May, 2003, and was enclosed with the Defendant’s Project Manager’s letter of 9<sup>th</sup> June to Davis Langdon & Everest who, I understand, would pass it on, either directly or through another intermediary, for payment to the Employer, meaning the States of Guernsey. It is clear from the list under the heading ‘General Summary’ that it summarises thirteen Bills which have been raised by Hochtief with the amounts due in the far column. These total £1,849,908.94, after allowing for retention monies and amounts previously certified for payment. At the foot is the item ‘Add materials on site.’

40. Reverting to the Cause, the Plaintiffs allege in paragraph 9 that the goods and materials for which Concept had not paid are listed in Schedule 1 to the Cause. The next but one paragraph, number 11, then divides these into goods and materials incorporated into the works, and those not yet so incorporated, but remaining on site. The Bill at TAB 8, as I have observed, mentions materials on site. It is a reasonable supposition that the Substructure and Superstructure Items charged for in Bills 4 and 5 might well include materials supplied by the Plaintiffs to Concept.

41. Applying Bingham M.R.'s test which I have set out at paragraph [26] above, it seems to me that the Plaintiffs would suffer a litigious disadvantage by not seeing the details requested and the supporting documents and vouchers. Until they do they cannot tell whether any, and if so, which, of the items set out in Schedule I to the Cause they allege were converted by Hochtief to its own use, and which fall into one or other of the classes of goods and materials allegedly converted, described in sub-paragraphs 1 or 2 of paragraph 11 of the Cause. This may be a material distinction in view of the principles to which I have alluded in paragraphs [10] and [11] hereof. It follows, in my judgment, that the disclosure sought in paragraph 2 of the Application is necessary for disposing fairly of the Cause under head (b)(i) in paragraph [25] hereof.

42. I take a similar view in respect of paragraph 3. Very probably, since the number of the interim valuation, number 11, matches the number in the Application letter enclosing the Bill Summary, the former was in response to the latter. Thus, of the amount applied for, £813,216 was certified by the Valuers. Item A of this document states:

“Value of work executed and of *materials and goods on site.*”

Once again, in my judgment, the Plaintiffs are entitled to inspect the supporting documents so as to ascertain if any of the goods and materials they had supplied to Concept, which were not paid for, coincide with any of the items in Schedule 1 of the Cause. The requirement at (b)(i) is therefore satisfied as regards this request.

43. Turning to the issue raised by requirement (b)(ii), I do not think it appropriate to decide whether acceding to the Plaintiffs' Application is necessary for saving costs. The relevant provisions in the White Book—Rules 8 and 13 of Order 24—which I regard as applicable here, are put disjunctively, so that, as I interpret those Rules, if the Court decides that one of the requirements is satisfied—in this instance that the disclosure is necessary for disposing fairly of the cause or matter—then the second, the issue of saving costs, does not fall for decision at this stage. I am fortified in this view in that in Taylor v. Anderton Bingham M.R. considered the two issues separately, and then remitted both to the Judge for reconsideration, but he prefaced his remarks to this part of his judgment by saying that it had to be decided whether production and inspection of the disputed documents was necessary ‘for one or other of those purposes’.

44. For the foregoing reasons I am satisfied that the Plaintiffs are entitled to Orders as prayed in paragraphs 2 and 3 of the Application of 27<sup>th</sup> September. As to paragraph 1, the position is to some extent indeterminate, as it is unclear how much of that document was not disclosed. But I think it is evident that some of it is missing. It follows therefore that the Plaintiffs should have the Order as prayed under this paragraph also, namely that the complete contract should be disclosed and be made available for inspection. I consider the most appropriate course is that the costs hereof be reserved, but I will hear Counsel if they so wish.

Orders accordingly.

A.R.W.Hancox.  
Lieutenant Bailiff  
26<sup>th</sup> January 2005