Fenwick Elliott
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# Dispatch

Issue 84
June 2007

*Dispatch* highlights a selection of the important legal developments during the last month.

**Failing to comply with the Pre Action Protocol**

■ **Charles Church Developments Ltd v Stent Foundations Ltd & Peter Dann Ltd**

In Issue 82 we set out the recent changes to the Pre Action Protocol for Construction and Engineering Disputes and highlighted why it was important that the protocol was complied with. This case which came before Mr Justice Ramsey confirms why. During piling at a development project, there were a number of incidents. CCD first raised these in August 2000. Thereafter there was intermittent correspondence, but this ceased in about September 2004. Then some 20 months later in June 2006, CCD served a formal claim on Stent. No attempt had been made to conduct any pre-action protocol procedure before the service of the proceedings. CCD accepted this and indeed apologised to the court for that conduct.

In early 2007, Stent made an application to the court seeking an order that CCD pay Stent's costs of the claim to 13 April 2007 and that CCD shall, in any event, bear its own costs to 13 April 2007. CCD said two things by way of defence. First, this was a case where there were potential limitation difficulties. Thus their failure was a failure to seek directions as required by paragraph 6 of the pre-action protocol. Second, the question of costs should not be determined now, but at the end of the action, or after settlement, when the position on costs would be clearer, and the court would have more information on which to base its decision.

The Judge questioned whether there was an immediate limitation problem. Rather, in the period from 14 February 2006 to 8 June 2006, when the proceedings were finally served, CCD spent much time and cost in preparing the particulars of claim for service in the proceedings, ignoring the pre-action obligations. A key objective of the pre-action protocol is to enable parties to avoid litigation by agreeing a settlement of a claim before the commencement of proceedings. Therefore the Judge proceeded on the basis that the likelihood was that the matter would have been resolved without recourse to court proceedings, had the protocol been observed. Judge Ramsey said that:

*"in this case, as in many similar cases, experience has shown that it is likely that the pre-action protocol would have led to a settlement without a need for court proceedings."*

CCD also said that Stent's application sought to gain a tactical advantage in relation to a mediation which was due to take place shortly. However, the Judge agreed with Stent that the failure to comply with the protocol meant that the parties were entering the mediation with an additional issue: the increased costs that had been incurred in the context of the proceedings, instead of under the pre-action protocol procedure. To resolve that issue now would remove an extra issue which would allow the parties to deal with the mediation in a way which more closely mirrored a mediation at the end of a pre-action protocol procedure.

The costs position, as disclosed at the first case management conference, showed that as at October 2006, CCD estimated its costs to date as £800,000 including solicitors' costs and experts. Stent had incurred costs of £90,895. In relation to Stent's costs, any order should place them in no worse a position than they would have been in, had the protocol been complied with. The evidence indicated that they would have responded using their in-house technical team initially but that they would have required an element of engineering input from outside experts, and also in relation to delay and quantum issues. The Judge held that Stent were entitled to recover costs to reflect the increased work carried out because of the exchange of information taking place, not in the lower-cost atmosphere of pre-action protocol procedure, but in the higher-cost atmosphere of court proceedings. In all, the Judge decided that Stent should be entitled to recover 50% of the costs incurred from 9 June 2006 (the date the claim was served) until 13 April 2007.

In relation to CCD's costs, the Judge held in mind, his conclusion that these proceedings would have been likely to be resolved had a pre-action protocol procedure been followed, the fact that the proceedings from 14 February 2006 to 13 April 2007 should have been carried out in the lower-cost atmosphere of the pre-action protocol process and also the fact that if the proceedings were not settled and the proceedings continued, were CCD to succeed, it would otherwise be entitled to its costs in the period from 14 February 2006 to 13 April 2007.

The Judge therefore considered that the proper way of dealing with the position on CCD's costs was, like the costs recoverable by Stent, to provide that CCD shall, in any event, bear 50% of its costs of the proceedings from 14 February 2006 to 13 April 2007. That might have been a significant sum, bearing in mind the £800k, CCD said it had incurred by October 2006.

## Critical path analysis

### ■ Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup Partners International Ltd

This is a long running case. We reported on one of the preliminary issues in Issue 42. Recently HHJ Toulmin CMG QC was asked to consider the level of damages owed to Mirant (the contractor) by Arup (the engineer) as a consequence of the defective boiler foundations at a power station in the Philippines. In what is believed to be the largest ever claim faced by an engineer, Mirant sought some $100 million. Ultimately the Judge rejected every element of Mirant's claim save for one, relating to the need to carry out remedial works on the boiler foundations. However this did not lead to the payment of any damages to Mirant as they had already recovered a sum in excess of the $1.4m, the Judge thought the claim was worth.

A case such as this is inevitably dependent to a large extent on its specific facts. A key part of the dispute was the need to identify the dominant cause of the delay. A key issue was whether the boiler foundations were on the critical path. Even if Arup may have breached their contractual obligations, if Arup had not caused Mirant to suffer loss, then it may be that no damages would be payable. In the course of this part of his decision, the Judge made a number of interesting comments about the use and importance of a reliable critical path analysis. This guidance on the use of critical path analysis on construction projects, included:

(i) A critical path is "*the sequence of activities through a project network from start to finish, the sum of whose durations determines the overall project duration;*"

(ii) There may be more than one critical path;

(iii) Critical path analysis is a tool or technique to assist in the management of projects and for analysing, as at a given date, the extent of any delay and what has caused that delay;

(iv) Windows analysis is an *"excellent"* method of critical path analysis. It involves plotting activities on or near the critical path, normally monthly. The aim is to provide a snapshot of progress and therefore identify potential causes of delay on the project at that point. Of course, on many projects regular reviews will be carried out of the project programme;

(v) The windows analysis is to be preferred to the watershed analysis which takes snapshots of progress at less frequent or regular intervals. The longer this interval, the more room there is for error;

(vi) Any delay analysis is only valid if it is comprehensive and takes account of all activities. It must also be considered alongside other evidence;

(vii) If a retrospective delay analysis is being conducted, the analysis must continue through to the end of the Project, otherwise activities may be missed which would otherwise be shown on to the critical path after the date of the final window (or indeed watershed); and

(viii) Ultimately, the question of whether an event has delayed the project is a question of fact.

## Claims for interest when a claim is delayed

### ■ Claymore Services Ltd v Nautilus Properties Ltd

Nautilus engaged Claymore to carry out design and construction works. A dispute arose about the final account. In May 2004, some 18 months after completion, Claymore commenced adjudication proceedings. Slightly surprisingly an adjudicator having held that there was no contract between the parties, decided he had jurisdiction to act and awarded Claymore £575k. Nautilus refused to pay and in May 2004 the matter came before the TCC, where the decision was not enforced. In July 2006, proceedings were issued. Claymore were now claiming £1.5million on a quantum meruit basis. Shortly before a trial listed for March 2007, the claim was settled save for the entitlement to interest and Mr Justice Jackson was asked to determine the period during which interest should apply.

The Judge held that where a claim was based in quantum meruit, interest for non payment should only run from the date when the sum due was ascertainable. Here that meant that interest should run from when Claymore presented its detailed final account and Nautilus had had a reasonable time to assess the account. Nautilus also said that the delay in commencing litigation should be taken into account in calculating the interest payable. Claymore should never have adjudicated and in any event the delay between the end of the adjudication and the issuing of the claim was unreasonable. The Judge agreed that where a claimant has delayed unreasonably in prosecuting proceedings, the court may exercise its discretion, either to disallow interest for a period or to reduce the rate of interest. However in doing so, the court must take a realistic view of the delay. For example, it is not reasonable to expect any party to take every litigious step at the first possible moment. Alternatively, the defendant will have had the use of the money during any period of delay. Thus Claymore's entitlement to interest was reduced by one half for a period of one year.

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