

JUDGMENT : MR JUSTICE JACKSON: TCC. 19th September 2007

1. This judgment is in five parts, namely Part 1 – Introduction; Part 2 – The Facts; Part 3 – The Present Application; Part 4 – The Pre-Action Protocol and its applicability to the present case; Part 5 – The Defendant's Application for a Stay.

Part 1 – Introduction

2. This is an application for a stay on the grounds of non compliance with the Pre-action Protocol for Construction and Engineering Disputes. The claimant is Cundall Johnson & Partners LLP, who are a firm of consulting engineers. The defendant is Whipps Cross University Hospital NHS Trust. In this judgment I shall refer to the Pre-action Protocol for Construction and Engineering Disputes as "the Pre-action Protocol" or "the Protocol".

After these brief introductory remarks I must now turn to the facts.

Part 2 – The Facts

3. The defendant is the NHS Trust responsible for Whipps Cross Hospital in Leytonstone, London E11. At the start of this decade the defendant embarked upon a series of construction projects to re-develop and improve the hospital. The defendant envisaged doing the principal works under the Private Finance Initiative ("PFI"). In the event, the PFI scheme did not proceed.
4. The present litigation is concerned with two preliminary construction projects which did proceed. The first project was for the demolition of certain buildings. This is generally described in the documents as enabling and decant works. I shall refer to it as "*the enabling works*". The second project was for the construction of a new energy centre to replace the existing boiler house. I shall refer to this as "*the EC works*". The claimant provided engineering services for the defendant in respect of both those preliminary projects. The present litigation is concerned with the claimant's claim for outstanding fees in respect of both projects.
5. Let me first summarise the pre-action correspondence in relation to the enabling works. On 31st March 2006 the claimant sent a letter to Mr. Bernard O'Sullivan, the defendant's director of finance and administration, requesting payment of five outstanding invoices. Those invoices were dated between 18th July 2005 and 31st March 2006. The total sum claimed on those invoices was £305,571.00. This letter was followed up by a further letter dated 5th May 2006, which is not in the bundle.
6. On 17th May, Mr. Colville, the defendant's deputy director of finance, responded as follows:
"I apologise for this delayed reply to your letter dated 5th May 2006 addressed to our former Director of Finance, Mr. Bernard O'Sullivan. I am the Deputy Director of Finance. Unfortunately, the Project Director who was responsible for our Enabling and Decant Works project is also no longer employed by this Trust, and I am having difficulty in locating the necessary paperwork to verify that the fees referred to in your letter are payable to your client. I should therefore be grateful if you would forward to me copies of the relevant appointment documents, including the Fee Schedule and Fee Forecast that are referred to in your client's requests for payment".
7. On 30th May 2006 Watson Burton, the claimant's solicitors, replied to the defendant by fax as follows:
"Thank you for your letter of 17th May 2006. Please find attached the fees schedule together with a covering letter sent by our clients to Brian Maloy dated 13th February 2004. There is no fees forecast as the job has been fully invoiced to date. Please note that this matter has been rather protracted and the various invoices are long overdue for payment. Our client is seeking additional interest charges upon the outstanding balance calculated in accordance with the Association of Consulting Engineers conditions of engagement and attach a schedule showing the interest charged. Please therefore forward a cheque in the sum of £314,781.83 as a matter of urgency".
8. There were two enclosures with that letter. The first enclosure was a copy letter from Mr. Carr of the claimant to Mr. Maloy of the defendant dated 13th February 2004. The second enclosure was an illegible fees schedule. I should add that the first enclosure required explanation if its significance, or what is now said to be its significance, was to be understood by the defendant.
9. Two chasing letters were sent by Watson Burton in May and June 2006. However, the next letter of significance was sent by Beale & Co., the claimant's new solicitors, on 27th October 2006 to Nabarro Nathanson, the defendant's solicitors. In that letter Beale & Co. wrote as follows:
"In mid-2002, our client was instructed to perform consultancy services for enabling and decant works in relation to the Energy Centre. This appointment was to be under a bespoke Consultant Framework Agreement, but that form of Agreement was not finalised. The latest draft of that Agreement is dated 6th August 2004, and is modified by an email from Trowers & Hamlin dated 9th August 2004 and our client's reply letter of 24th August 2004. At a meeting on 13th April 2005, our client was instructed to undertake no further Contract Administrator, Lead Consultant or Design Team Duties. By letter dated 5th January 2006, our client confirmed that pursuant to those instructions it had allocated its personnel to other projects (although its involvement in certain outstanding issues continues to the present time). Our client invoiced the Trust for its services as agreed, and £315,958.11 including VAT remains outstanding, as set out below".

There then follows a list of the relevant invoices, including two invoices claiming outstanding interest.

10. On 16th November 2006 Nabarro Nathanson replied as follows:
"We are instructed that Watson Burton first wrote to our client regarding your client's requests for payment on 5th May 2006. The letter was addressed to our client's former Director of Finance, and was responded to by its Deputy Director of Finance on 17th May.
In his reply, the Deputy Director advised that the project manager who was responsible for this project was also no longer employed by our client, and that he was having difficulty in locating the necessary paperwork to verify that the fees claimed by your client were properly payable. He therefore requested copies of the relevant appointment documents, including the "Fee Schedule" and "Fee Forecast" referred to in the requests for payment.
To date, our client has not received any satisfactory response to that letter. Watson Burton's fax letter to our client dated 30th May did enclose a fee schedule (but not the notes that it refers to as being attached) and what purported to be a covering letter dated 13th May 2004. However, the fees schedule was not faxed legibly, and it is not possible to relate it or the covering letter to the requests for payment in any meaningful way.
Our client obviously cannot be expected to make a payment simply because someone asks for it. As was clear from the Deputy Director of Finance's letter of 17th May, our client is concerned to verify that the amounts claimed are properly payable, but because of personnel changes it is in the unfortunate position of being unable to locate its own paperwork in relation to the matter.
We must therefore repeat the request in the Deputy Director's letter of 17th May, that your client provide (legible) copies of all the relevant appointment documents, sufficient to enable our client to verify that the amounts claimed are properly payable. Please also provide a copy of your client's payment request ref. R33160 dated 7th October 2005, which was listed in the statement enclosed with Watson Burton's letter of 5th May 2006 but not itself enclosed".
11. Correspondence followed between the solicitors, which I shall not read out. Suffice it to say that Beale & Co. did not provide a clear and intelligible response to the requests posed by Nabarro Nathanson on 16th November.
12. In May 2007 Beale & Co. put forward the proposition that there was an oral agreement for the payment of percentage fees made either at the outset of the project or alternatively in January 2004. Beale & Co. also proposed a meeting. Nabarro Nathanson replied on 25th May with a request for proper details of the alleged oral agreement. Nabarro Nathanson added: *"We do not think that any meeting can sensibly take place between the parties now until such proper details have been provided and our client has had an opportunity to investigate them".*
13. Beale & Co.'s response to this letter was that the claimant would issue proceedings. The claimant duly issued those proceedings on 17th August 2007.
14. I now turn to the pre-action correspondence in relation to the EC project. On 10th July 2006 Nabarro Nathanson wrote to the claimant intimating a claim for negligent design in relation to the new boiler plant. Nabarro Nathanson estimated the value of the claim at £4 million plus VAT, but added that their investigations were continuing.
15. On 27th October 2006 Beale & Co. wrote to Nabarro Nathanson claiming outstanding fees which were due in respect of the EC project. These fees were said to be attributable to additional works as outlined in a report by Gleeds, which was enclosed. This claim was quantified at £153,178.00. Beale & Co. then went on in their letter to refute the various allegations of professional negligence which had previously been advanced by Nabarro Nathanson.
16. On 16th November 2006 Nabarro Nathanson responded to Beale & Co. that the claim for additional fees had come completely out of the blue and would need to be investigated.
17. Correspondence then followed in which the two firms of solicitors debated whether the claimant was entitled to bring adjudication proceedings in respect of the claim for additional fees. So far as I can see, at no point in that correspondence was there any coherent summary of the claimant's claim in respect of the EC works. The next significant step was the issue of proceedings on behalf of the claimant.
18. Let me now turn to the proceedings which were issued on 17th August. The particulars of claim which accompanied the claim form were drafted with clarity by Ms Packman. They set out the contractual basis of the claimant's claims both in respect of the enabling works and in respect of the EC project.
19. The defendant was aggrieved that the claimant had failed to set out its case properly in pre-action correspondence. Accordingly, the defendant issued the present application.

Part 3 – The Present Application

20. By an application notice dated 11th September 2007 the defendant applied for an order that the action be stayed to enable the parties to attempt settlement, on the ground that the claimant had failed to comply with the Pre-action Protocol or the Protocols Practice Direction.
21. The argument, as set out in the defendant's application notice, may be summarised as follows. Beale & Co.'s letter dated 27th October 2006 gave minimal detail about the claimant's claims. The subsequent correspondence did not make good the deficiencies. That correspondence was confusing and inconsistent. Information was released in a piecemeal manner. Accordingly, the claimant had failed to comply with the Pre-action Protocol or the Protocols Practice Direction.

22. The defendant's application came on for hearing yesterday. Miss Claire Packman represents the claimant; Ms. Alexandra Bodnar represents the defendant. The application has been keenly fought on both sides. Both counsel did further research after the hearing and lodged further material and written submissions at about 5 p.m. yesterday evening. I am indebted to both counsel for their diligence and their considerable assistance.
23. The points they argue are of some importance. I shall first consider the Pre-action Protocol and its applicability to the present case. I shall then address the defendant's application for a stay.

Part 4 – The Pre-Action Protocol and its applicability to the present case

24. The Pre-action Protocol for Construction and Engineering disputes came into force in October 2000. Judge Wilcox outlined the purpose and effect of the Pre-action Protocol in *Daejan Investments Limited v The Park West Club Limited* [2003] EWHC 2872 (TCC) (see in particular paragraphs 9, 14 and 17). I entirely agree with Judge Wilcox's observations in those paragraphs about the purpose and effect of the Protocol. In particular, I agree with Judge Wilcox's observation in paragraph 14 that: "...the Protocol provides the framework for a sensible discussion, or the chance for a sensible discussion so that the option is available to a party to avoid the need for litigation".
25. The Protocol sets out a procedure for the exchange of information between the parties followed by a meeting. Neither the letter of claim nor the defendant's response are required to resemble pleadings either in their length or in their detail. What is required from each side is a clear and concise summary of their respective cases.
26. Concern has in the past been expressed by court users that the Protocol could be used in an oppressive manner. For example, one party could bombard the other with requests for detailed information or evidence under the aegis of the Protocol. In order to eliminate this risk, and following consultation with the profession and with TCC users committees around the country, the Protocol was amended in April 2007 to include the following paragraph:
"1.5 Proportionality
The overriding objective (CPR r.1.1) applies to the pre-action period. The Protocol must not be used as a tactical device to secure advantage for one party or to generate unnecessary costs. In lower value claims (such as those likely to be proceed in the county court) the letter of claim and the response should be simple and the costs of both sides should be kept to a modest level. In all cases the costs incurred at the Protocol stage should be proportionate to the complexity of the case and the amount of money which is at stake. The Protocol does not impose a requirement on the parties to marshal and disclose all the supporting details and evidence that may ultimately be required if the case proceeds to litigation".
27. If both the letter and the spirit of the Protocol are complied with, many disputes can be resolved at proportionate cost without the need for proceedings. Furthermore, disputes which are litigated can be more sharply focused at the outset.
28. Let me now consider whether the Pre-action Protocol applies in the present case. It is common ground that the claimant's claim for additional fees in respect of the EC project is a claim which falls within the Protocol. There is, however, a dispute between the parties concerning the enabling works. The claimant contends that its claim for those fees does not fall within the scope of the Pre-action Protocol. This claim, says the claimant, is simply a matter of debt recovery.
29. The opening paragraphs of the Protocol provide as follows:
"1.1 This Pre-action Protocol applies to all construction and engineering disputes (including professional negligence claims against architects, engineers and quantity surveyors).
1.2 Exceptions. A claimant shall not be required to comply with this Protocol before commencing proceedings to the extent that the proposed proceedings (1) are for the enforcement of the decision of an adjudicator to whom a dispute has been referred pursuant to section 108 of the Housing Grants Construction & Regeneration Act 1996 ("the 1996 Act"), (2) include a claim for interim injunctive relief, (3) will be the subject of a claim for summary judgment pursuant to Part 24 of the Civil Procedure Rules, or (4) relate to the same or substantially the same issues as have been the subject of recent adjudication under the 1996 Act, or some other formal alternative dispute resolution procedure".
30. In my view, a disputed claim for professional fees made by a firm of consultant engineers falls within the term "engineering disputes" in the context of paragraph 1.1 of the Protocol. The fact that this claim (if held to be valid) may also be characterised as debt collection does not take it outside the scope of paragraph 1.1. It should be noted that "debt recovery" is not one of the specified exceptions in paragraph 1.2 of the Protocol. It should also be noted that claims for professional fees form a staple part of the work of the Technology and Construction Court (see the Court's annual reports).
31. In the present case, as can be seen from the correspondence, although the defendant had paid certain earlier invoices, the defendant was unable to accept the various fee claims presented by the claimant in 2006. The defendant may have been lax in its record keeping and may be open to criticism on that account. Nevertheless, the defendant as a public authority was entitled and obliged to verify any substantial claim for professional fees before paying it.
32. I therefore conclude that the Pre-action Protocol applied to the claimant's claim for fees in respect of both the enabling works and the EC project. Against this background I must now turn to the defendant's application for a stay.

Part 5 – The Defendant's Application for a Stay

33. The grounds of this application are non-compliance with the Pre-action Protocol, both in respect of the enabling works and in respect of the EC project. For the reasons set out in Part 4 above, the Protocol is applicable in respect of both matters.
34. I have come to the conclusion, with some regret, that the claimant did not on this occasion comply with the requirements of the Protocol in respect of either claim. So far as the enabling works are concerned, the contractual basis of the claimant's claim remained obscure until proceedings were issued. The claimant's solicitors never sent a letter of claim which complied with the requirements of paragraph 3 of the Protocol. So far as the EC project is concerned, the claimant's solicitors forwarded a copy of their expert report to the defendant's solicitors. That was, of course, helpful, but that is not in itself compliance with the requirements of paragraph 3 of the Protocol. The claimant's solicitors never sent a letter summarising the contractual basis of the claim for additional fees.
35. Ms Packman, for the claimant, criticises the defendant's pre-action conduct in two respects. First, the defendant failed to send a response letter in conformity with paragraph 4.3 of the Protocol. Secondly, the defendant declined to attend a meeting when invited. So far as the first matter is concerned, the defendant's obligations under paragraph 4.3 are only triggered when it has received a proper letter of claim. As to the pre-action meeting, this is dealt with in section 5 of the Protocol. Such a meeting is not required until after there has been a proper exchange of information between the parties. If such a meeting is held prematurely, it is unlikely to serve any useful purpose. I therefore reject the criticisms which are made of the defendant's conduct.
36. Having established non-compliance with the Protocol, the defendant applies for a stay in order to facilitate such compliance. As Ms. Bodnar points out, the grant of a stay in these circumstances is envisaged by paragraph 2.6.1 of the Technology and Construction Court Guide, 2nd Edition.
37. Whether or not to grant such a stay is a matter for the court's discretion. That discretion must be exercised in the light of all the circumstances.
38. In the present case there are three reasons why I consider that a stay should be granted. (1) Having considered all the correspondence, as well as the submissions of counsel during this hearing, I believe that there is a real possibility of settlement if the parties go through the Protocol processes. (2) As a consequence of (1), a stay would be in the best interests of both parties. It may well save both parties from incurring unnecessary litigation costs. It may also lead to an earlier resolution of the dispute between the parties. (3) It is unfair on the defendant to proceed immediately with litigation, when a proper summary of the claim has not been notified in advance.
39. In the result therefore I accede to the defendant's application for a stay. It seems to me that the claim form should stand as the letter of claim. The defendant should be in a position to send its letter of response within one month from today. The meeting between the parties, envisaged by section 5 of the Protocol, should be held during November. That may well lead to settlement before 1st December. If not, the litigation must resume.
40. I therefore make an order that this action be stayed until 1st December 2007, in order to facilitate compliance with the Pre-action Protocol. I request that counsel agree the precise wording of the order.

MS C PACKMAN (instructed by Beale & Co.) appeared on behalf of CUNDALL JOHNSON AND PARTNERS LLP

MS A BODNAR (instructed by Nabarro Nathanson) appeared on behalf of WHIPPS CROSS UNIVERSITY HOSPITAL NHS TRUST