

JUDGMENT : JUDGE THORNTON QC. TCC. 5th November 2004.

1. Introduction

1. The four claimants are related companies involved in the ownership, development and management of the Peacock Centre, a large retail shopping centre in Woking. The development was undertaken by the first claimant ("Peacocks") under a management construction contract entered into with Taylor Woodrow Management Limited, the 11th defendant ("Taylor Woodrow"). The architect for the development was Chapman Taylor Partners ("Chapman Taylor"). The second to tenth defendants were partners of Chapman Taylor's architectural partnership, and are, therefore, no more than a separate manifestation of that firm.
2. Peacocks have applied for procedural relief following service, or attempted service, of the claim form on solicitors acting for Taylor Woodrow who then asserted that they had no instructions to accept that service. Soon after the date on which the proceedings were issued the relevant period of limitation expired as against Taylor Woodrow. After the claim form was received by Taylor Woodrow's solicitors, and before the date on which they notified Peacocks' solicitors that they had no instructions to accept service, the four-month period within which the claim form had to be served also expired. Thus, if effective service was not achieved, all four claimants have lost their respective claims against Taylor Woodrow.
3. All four claimants, however, contend that service was validly effected on Taylor Woodrow by service on its solicitors, and they seek a declaration to that effect. They alternatively seek an order under CPR 6.9 to dispense with service, an application requiring consideration of the applicability of a series of 16 recent decisions, mostly of the Court of Appeal, concerned with the scope of this rule. All but two of these 16 decisions are ones reached in personal injury or medical negligent litigation, and I must consider how the statements of principles set out in those cases should be applied to the particular circumstances of multi-party construction litigation being conducted in the Technology and Construction Court ("TCC").

2. Factual Background

4. The Peacock Shopping Centre is a large retail shopping centre locating in Woking and was constructed between April 1989 and April 1992. Peacocks' contract with Taylor Woodrow required Taylor Woodrow to manage the construction of the Centre. It was entered into under seal and was dated 5 December 1989. Peacocks' engagement of Chapman Taylor, as architects of the development, incorporated the RIBA Conditions and also was entered into under seal. It will have to be decided later whether Peacocks are entitled to join as a separate party to the proceedings the entity known as Chapman Taylor in its firm name having also joined each of the partners individually since the partnership is no more than a collective name for the individual partners who have also been joined.
5. The problems that have been experienced with the Centre, that give rise to these claims, are associated with the extensive areas of tiled roofing. The plain clay tiled roof specification was prepared by Chapman Taylor and the installation works undertaken by a roofing sub-contractor, now in liquidation, pursuant to a works sub-contract entered into with Taylor Woodrow. Chapman Taylor had some supervisory responsibility although an independent clerk of works was also engaged. Practical completion of the entire development was certified as having been achieved on 10 April 1992.
6. Essentially the claimants allege that the roofs failed and had to be completely replaced, due to various factors, particularly relating to the method of fixing. These failures were alleged to be essentially ones of workmanship, but were exacerbated and not prevented by poor supervision. Taylor Woodrow contends that the failures were caused by poor detailing, and Chapman Taylor puts the entire responsibility on to Taylor Woodrow's workmanship, although it also denies the alleged supervision deficiencies.
7. Overall, both potential defendants contend that the extent of the remedial work involving the stripping of the roofs and their replacement was out of all proportion to such deficiencies as the roofs actually exhibited.

8. On the basis of the facts pleaded in the particulars of claim, the second, third and fourth claimants have obtained various interests in the Centre following its completion. The second claimant is pleaded as having acquired Peacocks' shares. This acquisition was allegedly followed by two transactions, firstly a transfer agreement transferring title in the Centre from Peacocks to the fourth claimant; and secondly a partnership agreement between the second and third claimants entered into for the purpose of running the Centre. Both the transfer and the partnership agreements are dated 12 June 1998.
9. It follows that although the relevant contracts were entered into by Taylor Woodrow and Chapman Taylor with Peacocks, all four claimants are now alleged to be necessary parties to claims seeking the losses that have occurred, being the extensive cost of remedial works. This cost has been, at least in part, incurred by and transferred to the other claimants in contract.
10. The second, third and fourth claimants, as non-contracting parties, have in consequence been joined as co-claimants. Since Peacocks' claims may give rise to disputes as to the recoverability of its claimed loss, in the light of a series of House of Lords decisions, culminating in the *McAlpine-v-Panatiown* case, as to the recoverability of transferred loss incurred by breaches of contract in a construction context. Peacocks contend that it may recover the entire loss as a result of these cases but the uncertainty of the law is such that that recovery may require the other claimants to be joined as parties, so as to perfect Peacocks causes of action in contract.
11. A further basis for joining the second, third and fourth claimants is to enable the same loss to be pursued, pursuant to concurrent claims in tort, since the relevant damage was physical, and each claimant has a potentially relevant interest in the Centre.
12. By late 1996 Peacocks became aware of defects in the roofs and had obtained a preliminary report which identified a series of faults. There is no agreement as to the existence or extent of these faults, but they were thought at that time to include the use of an incorrect mortar mix for the hip tiles causing them to work loose, and/or inadequate fixings used for the flat tiles. As a result of the use of inadequate and insufficient nails a number of tiles shattered.
13. Taylor Woodrow and Chapman Taylor were notified of these concerns and investigations continued. As a preliminary precautionary measure, snowguards were erected by Taylor Woodrow in January 1999 on a without prejudice basis to prevent loose tiles and mortar falling on to the public. Taylor Woodrow was also by that time fully aware of the findings of the claimants' forensic experts' advice as to the cause of the defects and their contention that these had arisen following breaches of contract, particularly non-compliance with specified fixing details, and failures of its supervisory duties as the management contractor.
14. On 2 February 1999 Peacocks then solicitors wrote to Taylor Woodrow inviting it liaise with it in devising the details of extensive remedial works that Peacocks had already advised were needed. The letter stated that the cost of such work would be recoverable from Taylor Woodrow. In addition to these temporary works, Taylor Woodrow had a number of meetings and discussions with Peacocks. By July 2000 Peacocks had undertaken sufficient further investigations to have been able to write letters before action to Taylor Woodrow and Chapman Taylor. These letters, both dated 24 July 2000, intimated claims against each of these parties by letters which were in similar terms. The letter to Taylor Woodrow sought confirmation that it had accepted responsibility to replace the hip tiles and was still prepared to replace them, but it accepted that the existence and responsibility for the flat tiles remained in dispute.
15. Both letters indicated that a comprehensive investigation was being carried out into the structure and condition of the roofs, into the nature, extent and cause of the defects, and into the scope and cost of all necessary remedial work. Taylor Woodrow was also informed that this report would be made available to it once it was available and inspection facilities would also be provided during any remedial works.
16. Each letter concluded by stating that if dispute resolution was necessary, mediation and litigation, rather than arbitration, would be preferred as the method to be adopted. The letter also stated "...we

confirm that we and our clients would prefer to settle the dispute by negotiation and we hope that this will be possible, particularly in light of the progress made so far in settlement discussions. It can only be in the interests of all parties to avoid the expense of legal proceedings.

However, should it be necessary for our clients to have recourse to legal proceedings, we invite you to consent to the matter being dealt with by litigation rather than arbitration."

17. The question as to whether the dispute, at least as it involved the first claimant, should be litigated or arbitrated, arose because Taylor Woodrow's contract and Chapman Taylor's engagement each contain separate arbitration clauses. Any contribution proceedings between Taylor Woodrow and Chapman Taylor, and any claim brought by the second, third and fourth claimants, could only be litigated. Thus up to four separate sets of proceedings would be a distinct possibility since Taylor Woodrow and Chapman Taylor might rely on their respective arbitration clauses and might also seek contribution from each other; and the second, third and fourth claimants might seek claims in tort against either defendant. Thus, these various claims might require two separate arbitrations and at least one, and possibly two, separate court claims.
18. This potential procedural complexity was obvious to all three parties from the outset since all were represented by experienced construction litigators from an early stage. Throughout, strenuous efforts were made in an attempt to avoid a multiplicity of proceedings by the only means possibly, namely by an agreed consolidated High Court hearing in the Technology and Construction Court.
19. The response of Taylor Woodrow was dated 18 September 2000. In summary, that response contended that liability for the defects was disputed but that Peacocks appeared to have no title to sue and that the question of whether the claim should be litigated or arbitrated would require instructions from Taylor Woodrow. The suggested without prejudice meeting did not take place. But Peacocks undertook a prolonged investigation into the extent and causes of the defects, an exercise of some difficulty since this had to be undertaken without the benefit of a stripping of the roofs.
20. This investigation led to Peacocks writing letters to Taylor Woodrow and Chapman Taylor dated 30 November 2001. Each letter was written in form and content so as to comply with the Technology and Construction Court Pre-Action Protocol. The letters identified the potential claimants as the fourth claimant, as well as the potential causes of action, the nature of the defects and breaches of contract and the remedial works that these had allegedly necessitated. The heads of damages was stated and the experts who had been instructed were also identified. The letters continued: *"Under the provisions of the Technology and Construction Court Pre-Action Protocol, the Proposed Defendant has 14 days from receipt of this Letter of Claim to acknowledge it in writing and may give details to its insurers, if any. In the event that the Proposed Defendant fails to make any communication the Proposed Claimant reserves its right to commence proceedings forthwith in the Technology and Construction Court having regard to the fact that though under seal the 12 year limitation period is fast effluxing and some of the relevant events took place some considerable time ago.*

The Proposed Defendant has 28 days from the receipt of this Letter of Claim in which it is required to give details of any facts agreed or not agreed, what claims are accepted or rejected and whether damages are accepted or whether there is any other matter which it wishes to raise so far not contained in correspondence. Again in the absence of such response the Proposed Claimant reserves the right to commence proceedings forthwith.

In the event that the Proposed Defendant acknowledges and responds to this Letter of Claim, the Proposed Claimant proposes a pre-action meeting as soon as possible after receipt of the response, as is required by the Technology and Construction Court Pre-Action Protocol. The aim of the meeting will be to agree what the issues are, to identify the root cause of any disagreement and to consider whether, and if so, how the issues might be resolved without recourse to litigation. It is expected that this procedure will have been completed prior to the remedial scheme commencing. In the event that litigation is unavoidable it is proposed that parties also discuss what steps should be taken to conduct the dispute having regard to the overriding objectives of the Civil Procedure Rules Part 1."

21. These letters led to without prejudice meetings between the parties, a consensus that dialogue should continue in conjunction with the parties' expert investigations carried out during the remedial works

and an exchange of views and information. These steps took place during 2002 and in the course of them Peacocks submitted a great deal of information concerning the state of the roofs, the required remedial work, relevant documentation and various expert reports.

22. Once the remedial works were completed, draft experts' reports were prepared by Peacocks' experts, who had been retained as experts in relation to the disputes, and these were provided to the proposed defendants on a without prejudice basis.
23. Peacocks then attempted to establish a three-way without prejudice meetings, pursuant to the Technology and Construction Court Pre-Action Protocol procedure. The purposes of such meetings were intended to be three-fold, namely to discuss:
 - (1) whether Peacocks or any of the other potentially interested related parties, essentially the second, third and fourth claimants, had title to sue;
 - (2) a possible compromise in the light of all the material submitted by Peacocks and the investigations and information obtained by the proposed defendants;
 - (3) the nature of the proceedings, particularly whether all disputes between all possible parties could be litigated in the Technology and Construction Court, or whether instead a multitude of separate arbitrations and court proceedings would be necessary.

3. The Proceedings

24. Peacocks wrote on 28 October 2003 to suggest that a without prejudice meeting should take place in the near future, but by late March 2004 Taylor Woodrow's solicitors were still without instructions.
25. There then followed a significant exchange of correspondence, initiated by the imminence of the expiry of the 12-year period of limitation of Peacocks' claims in contract.
26. On 1 April 2004, almost 12 years to the day after practical completion of the works, proceedings, by way of a notice to concur in the appointment of the arbitrator, and separately by way of the issue for non-service of the claim form, were initiated by Peacocks' solicitors.
27. The correspondence started with a letter from Peacocks' solicitors to Taylor Woodrow's solicitors a little earlier on 10 February 2004. This stated: *"Our client is keen to either resolve this matter amicably or, if no resolution can be reached, to have the matter determined one way or the other in litigation or in arbitration. We are instructed to put forward the same request as has been forward to Chapman Taylor and that is that, unless you can confirm unconditionally, within 14 days to the date of this letter:*
 1. *that you client will agree to have the matter dealt with by the courts; and*
 2. *that your client will not take any point based on the existence of an arbitration agreement between our respective clients and will not seek to stay any such legal proceedings to arbitration under section 9 of the Arbitration Act 1996.**We have instructions to serve a Notice of Arbitration in relation to this dispute."*
28. This letter was followed by a further fax, dated 20 February 2004, in which the earlier letter was referred to. The letter continued: *"Morton Pugh Welch [acting on behalf of the architects] have confirmed that they will agree to have the matter dealt with by the courts and will not take any point based on the existence of an arbitration agreement between their client and ours and will not seek to stay such proceedings to arbitration. Could you confirm, please, whether your client agrees to this and whether your client is now in a position to agree a date for a without prejudice meeting?"*
29. A third letter followed on 29 March 2004. This referred to the earlier fax and to subsequent telephone conversations between representatives of the parties respective solicitors. The letter continued: *"We note that you are still without instructions as to the without prejudice meeting suggested back in October 2003. This is, obviously, disappointing and we have instructions to issue proceedings against your client. In that regard, please confirm by return whether you have instructions to accept service of proceedings on your client's behalf."*
30. Campbell Hooper replied on 1 April 2004. This was a reply to the earlier letters that I have already referred to. It reads: *"Following our recent emails, we have now received instructions with regard to the*

proposed without prejudice meeting. You have suggested that it should be clients-only although our client would prefer if its in-house solicitor and/or ourselves to be present. We therefore suggest that solicitors attend initially but if it becomes apparent that it is preferable for commercial issues to be discussed just between clients, then the solicitors can withdraw.

With regard to dates, we please ask you to propose some suitable dates after Easter.

We repeat our comments from our letter dated 20 February 2004 that any proceedings issued by you should be used as a last resort and we do not consider that such a position has yet been reached, in part because of your failure to address the issues debated at length in previous correspondence. However, your proposals with regard to a venue (should you subsequently decide the proceedings are necessary) can be discussed at the proposed meeting."

31. That letter was answered by a fax of 1 April 2004 from Kendall Freeman. The fax read: *"We note your comments and will revert with some suitable dates for a without prejudice meeting after Easter. In the meantime, we are still instructed to issue proceedings against your client and note that you have not confirmed that you are instructed to accept service of such proceedings on behalf of your client. Therefore, we shall be serving your client direct."*

32. By a letter of the same date, Kendall Freeman wrote to Taylor Woodrow: *"We understand that Messrs Campbell Hooper are currently acting for you in relation to the above dispute. Despite our request for them to confirm that they have instructions to accept service of proceedings on your behalf, we have received no such confirmation.*

We enclose by way of service, therefore, the Notice to Concur in the appointment of an arbitrator in relation to the above matter. It is our client's preference, rather than to have a multiplicity of arbitrations, to proceed via the Courts. Unfortunately, we have not yet received any confirmation from you as regards the suggested route. As such, and to protect our client's position, we have served on both you and Chapman Taylor a Notice to Concur. The next best alternative to proceedings in the TCC is to join any arbitration proceedings between all interested parties and we have asked both you and Chapman Taylor to agree to the appointment of the same arbitrator."

That letter enclosed a detailed notice inviting Taylor Woodrow to concur in the appointment of an arbitrator that was served in the name of Peacocks.

33. The response to both communications of 1 April came from Campbell Hooper. It is dated 16 April. It starts in these terms: *"We confirm we are instructed on behalf of Taylor Woodrow Management Limited in relation to your Notice to Concur, served on 1 April 2004.*

Please ensure all subsequent correspondence is sent to ourselves.

We note that the claimant is Peacocks Centre Limited."

The letter then set out in some detail possible objection that Taylor Woodrow might have to the identity of the proposed claimant as being the appropriate party to pursue the claims then in play.

The letter then continued: *"Given the circumstances outlined above, we must make clear at the outset that we fully reserve our client's rights with regard to the right of Peacocks Centre Limited to commence arbitration proceedings. Neither what we say below nor any subsequent action that we take should be interpreted in any way as our client acquiescing to have this matter resolved at arbitration, should it transpire that Peacocks Centre Limited do not have the right to do so in the first place."*

34. The without prejudice meetings that Peacocks had been seeking to initiate for some months and which Taylor Woodrow had accepted should take place, then did take place. These were followed by Taylor Woodrow's letter, written by Campbell Hooper, dated 24 June 2004, and addressed to Kendall Freeman. It is in these terms: *"You have previously written to us seeking our client's agreement to the dispute between the above parties being heard in court as opposed to arbitration. We have now had a chance to take instructions.*

Subject to the conditions below, we confirm that our client will not enforce the arbitration clause contained within the Management Contract in respect of the claim brought by Peacocks Centre Limited by its Notice to

Concur dated 1 April 2004. Instead, we agree that this claim may be heard by the Technology & Construction Court. Our client will not apply to stay such proceedings under the Arbitration Act 1996.

The conditions referred to above are that:-

- *you receive (and copy to us) equivalent written agreement to that above from Chapman Taylor Partners, and*
- *you confirm to us in writing that your Notice to Concur dated 1 April 2004 is withdrawn and acknowledge that it may not be revived in the future. This is to avoid any risk of there being two sets of "live" proceedings.*

Subject to these conditions being satisfied, we agree that one set of court proceedings is sensible.

For the avoidance of doubt, the above agreement does not extend further than expressly stated and, in particular, does not amount to affirmation that PCL necessarily has any cause of action against our client."

This letter was responded to on 25 June 2004: *"We refer to your letter of 24 June 2004.*

As requested, please find enclosed a copy of a letter from Morton Pugh Welch dated 16 June 2004 stating that Chapman Taylor Partners agree that the dispute should be resolved by a single set of court proceedings as opposed to arbitration.

We also confirm that we shall permanently withdraw our Notice to Concur dated 1 April 2004."

The letter that is referred to is one from Morton Pugh Welch, dated 16 June 2004. This read: *"This letter is to confirm that our client, Chapman Taylor Partners, wishes this dispute to be resolved by a single set of Court proceedings.*

To this end our client agrees not to enforce the Arbitration Agreement as set out in our client's Appointment Agreement dated 13 March 1991 and also agrees not to make an application to stay any court proceedings pursuant to the relevant provisions of the Arbitration Act 1996."

35. Campbell Hooper replied to Kendall Freeman on 28 June 2004 and stated: *"You have referred to the fact that your Notice to Concur 'shall' be withdrawn. For the avoidance of any possible doubt in the future, please confirm that it is now, presently withdrawn, as requested in our letter dated 24 June 2004."*

Proceedings in the form of detailed particulars of claim were then drafted.

36. On 22 July 2004 Kendall Freeman wrote to Campbell Hooper a letter in these terms: *"We refer to your letter of 16 April 2004 agreeing to accept service.*

We enclose by way of service a Claim Form, Particulars of Claim and a Response Pack in the above action."

The letter enclosed those documents.

37. On 28 July 2004, there not having been any response in the meantime, a second letter was written, which was a reference to the letter of 28 June 2004, and which apologised for the delay in responding to it. The letter then continued with this one paragraph, but significant sentence: *"We can confirm that our notice to concur is withdrawn."*

38. Finally, on 3 August 2004 Campbell Hooper wrote to Kendall Freeman as follows: *"We refer to your letter dated 22 July 2004 with the enclosed claim form and note that this was not served directly upon our client.*

You suggest that we agreed to accept service of such court proceedings in our letter dated 16 April 2004. This is clearly not the case. Our letter stated: 'We confirm we instructed on behalf of Taylor Woodrow Management Limited in relation to your Notice to Concur, served on 1 April 2004.'

We are not instructed by our client to accept service of any proceedings other than the specific arbitration proceedings referred to in that letter. We refer you to CPR 6.5.3.

In the circumstances, we are returning the claim form to you."

39. Peacocks' solicitors then issued an application, dated 10 August 2004, seeking to extend time for service of the claim form under CPR 7.6(3) and to dispense with service under CPR 6.9. The first of these applications was not pursued and, at the hearing, Peacocks sought permission to amend the application by adding an application for a declaration which, although not formulated in precise terms, may be fairly formulated in these terms: *"...the service of the Claim Form by post on Campbell Hooper on 22 July 2004 was good service on Taylor Woodrow Management Limited, pursuant to CPR 6.4.2."*

Since good notice of this application had been given in advance of the resumed hearing of the application, and since no further evidence could reasonably be served by Taylor Woodrow to respond to it, in addition to the evidence already served, I gave Peacocks permission to amend the application in that way.

4. Were the Proceedings Validly Served?

4.1 Introduction

40. CPR 6.4 reads as follows:

“(1) A document to be served may be served personally except as provided in paragraph (2).

(2) Where a solicitor -

(a) is authorised to accept service on behalf of a party; and

(b) has notified the party serving the document in writing that he is so authorised,

a document may be served on the solicitor, unless personal service is required by an enactment, rule, practice direction or court order.”

For the service of the original claim form on Campbell Hooper to be effective, service, therefore, must be shown by Peacocks:

(1) To be such that Kendall Freeman, Peacocks' solicitors, had been notified in writing that Campbell Hooper had Taylor Woodrow's authority to accept service on his behalf; and,

(2) That Campbell Hooper had been authorised by Taylor Woodrow to accept service.

4.2 Campbell Hooper's Authority

41. Peacocks contend that Taylor Woodrow's solicitors' letters, dated 1 April, 16 April and 24 June 2004 read together, amounted to a statement or representation that the solicitors had Taylor Woodrow's authority to accept service of the Technology and Construction Court proceedings on its behalf. By way of repetition, the relevant words in those letters were: *“Your proposals with regard to venue, should you subsequently decide that proceedings are necessary, can be discussed at the proposed meeting...”*

“We are instructed on behalf of Taylor Woodrow in relation to your Notice to Concur...please ensure all correspondence is sent to ourselves...”

“You have previously written to us seeking our client's agreement to the dispute between the above parties being heard in court as opposed to arbitration. We now have a chance a take instructions...we confirm that our client will not enforce the arbitration clause...in respect of the claim brought by Peacocks by its notice to concur. Instead, we agree that the claim may be heard by the TCC...our client will not apply to stay such proceedings under the Arbitration Act 1996.”

The core sentence, therefore, is: *“Please ensure all subsequent correspondence is sent to ourselves.”*

42. Taylor Woodrow submits that that sentence refers, and only refers, to the arbitration proceedings initiated by the notice to concur. If Peacocks chose to pursue Technology and Construction Court proceedings in parallel with, or in replacement of, those arbitration proceedings, such had to be served on Taylor Woodrow personally, unless Campbell Hooper, on its behalf, had notified Peacocks, or its solicitors, in a separate communication in writing that Campbell Hooper had authority to accept service of the claim form.

43. In deciding what ambit to place on the critical phrase, it is necessary to place that phrase in its context of the salient background facts, out of which the letter emerged. These facts are that Peacocks had, for several years, been seeking Taylor Woodrow's permission to litigate, and not arbitrate, the Peacock Centre's roofs dispute. However, arbitration proceedings had only been initiated because the limitation period was about to expire since no agreement was yet forthcoming from Taylor Woodrow as to the method by which the dispute should be resolved. Finally, Taylor Woodrow had informed Peacocks' solicitors, through its own solicitors, that the proceedings initiated on 1 April were premature until the forthcoming without prejudice meetings had taken place to discuss, among other topics, the most appropriate form of proceeding. Taylor Woodrow also challenged Peacocks' continuing entitlement to arbitrate.

44. Against that background, Campbell Hooper's letter inviting Kendall Freeman to ensure that all subsequent correspondence *“in relation to”* the notice to concur was sent to Campbell Hooper. The

letter enclosing the claim form did relate to the arbitration proceedings since it was sent as a direct response to Kendall Freeman's offer to Peacocks, made with Taylor Woodrow's express authority, that, in return for Peacocks withdrawing its notice to arbitrate and terminating the arbitration and not reviving it, Taylor Woodrow would agree to the claim being heard by the Technology and Construction Court.

45. The submission of the claim form on the following day was stated to be, by Kendall Freeman, a submission by reference to the earlier letter which contained that offer. Thus, against the background I have summarised, the instruction to Kendall Freeman to ensure that all subsequent correspondence relating to the arbitration should be sent to Campbell Hooper embraced a letter sent by Kendall Freeman on Peacocks' behalf, which enclosed the original claim form by way of postal service. In other words, objectively construed, the letter of 16 April amounted to an invitation or representation that Kendall Freeman should be served with any TCC proceedings against Taylor Woodrow that related to Peacocks' roofs claims which were the subject matter of the proposed arbitration, since they directly related to that arbitration.

4.3 Campbell Hooper's Authority

46. Taylor Woodrow contended that it did not authorise Campbell Hooper to accept service of the TCC proceedings on its behalf. Mr Simon Foster is the in-house solicitor employed by Taylor Woodrow who directly instructed Campbell Hooper. He explained that Campbell Hooper's retainer contained this express provision: *"We [TWC] have in-house expertise in legal and non-legal areas. Insofar as it is practical and appropriate you will address the possibility of using these resources in connection with any matter handled on our behalf, in particular, in respect of tactical decisions to be taken.*

At our [TWC] absolute discretion we [TWC] chose to deal with work using in-house resources." [Quotation unchecked]

His witness statement informed the court: *"I was involved with the discussion that led to the Service Level Agreement."*

That is the document from which I have just quoted. *"Although TWC were content to enter into it with Campbell Hooper, it was important for the TWC Legal Department to maintain a right to control what work Campbell Hooper were entitled to receive. In particular, we wanted to ensure that, where appropriate, the work could be undertaken using our own, extensive in house resources. We did not want a situation where we were obliged to pay for external lawyers if we could undertake it ourselves."*

47. This evidence, according to Taylor Woodrow, shows that Campbell Hooper did not have prior or express authority to accept service of the Technology and Construction Court litigation relating to the Peacock Centre roofs.
48. However, Mr Foster, on Taylor Woodrow's behalf, stated that he had authorised and approved the terms of, and the dispatch to, Kendall Freeman of Campbell Hooper's two letters of 16 April and 24 June 2004. He may not have personally understood that the terms of the letters, when construed objectively against the factual background out of which they were written, contained an unequivocal statement whose meaning and effect was that TCC proceedings, particularly those previously issued which Peacocks had not yet served and which Peacocks had made clear should replace the arbitration proceedings also in play, should be served on Campbell Hooper and not on Taylor Woodrow. However, that is the natural and objective meaning of those letters, and, therefore, Taylor Woodrow did authorise such service, since it authorised the dispatch of the letters whose meaning was to that effect.

4.4 Conclusion

49. The proceedings were validly served in conformity with the provisions of CPR 6.4(2) and indeed would have been invalidly served had they been served on Taylor Woodrow personally. Peacocks are entitled to a declaration to that effect.

5. CPR 6.7

5.1 Introduction

50. Peacocks seek, as an additional head of relief, an order dispensing with service. This is because it is not confident that a finding that service was validly effected on Campbell Hooper would survive an appeal. Since this alternative approach was fully argued, and the conclusion involves an exercise of judicial discretion, I am prepared to indicate how I would have decided that application had I found against Peacocks on the first application, although strictly, logically and procedurally, such a finding is not necessary.

5.2 The Law

51. CPR 6.9 reads as follows: "*The court may dispense with service of a document.*"
52. In the light of the authorities, all the relevant ones of which were cited, the following guidelines, as I find, are clearly established in relation to the way in which a court should apply this rule when a claimant applies for permission to dispense with service of proceedings:
- (1) An application to dispense with service that is to be heard and determined after the time for service has expired and after a relevant period of limitation has, or may have, expired will not ordinarily be allowed, since to do so would circumvent the express prohibition contained in CPR 7.6(3).
 - (2) The court may make an order in such circumstances in an exceptional case.
 - (3) In order to determine what is "*an exceptional case*", the court must apply the overriding objective. This requires the court to balance in a proportionate manner the needs of efficient, economy, speed and use in the most effective manner of scarce judicial resources.
 - (4) In undertaking that balancing exercise, the mere fact that the proceedings will be statute barred on limitation grounds is not, on its own, a basis for dispensing with service, whatever the circumstances that resulted in the late or non-service of the proceedings and even if the proceedings came to the notice of the proposed defendant prior to the expiry of the limitation period.
 - (5) In deciding whether, notwithstanding the expiry of the limitation period, the circumstances exceptionally allow service to be dispensed with, the court should consider and balance proportionately the conduct of the parties, any criticism of the claimant and of the defendant, the reasons why service of the proceedings were only first attempted just before or just after the expiry of the relevant period of limitation and all potential prejudice to both the claimant and the defendant.
53. In this case I need to consider the possible exceptional exercise of the discretion to order that service be dispensed with under four broad headings, being: the conduct of the parties; the reasons why service had not been attempted earlier; the prejudice to the parties; and the criticisms of the parties' conduct. I must then consider in the round whether in CPR terms this is an exceptional case, so as to warrant the exercise of the use of the power to dispense with service.

5.3 Further Facts

54. I need first to state certain further relevant facts. Firstly, the original claim form was served through the document exchange on Campbell Hooper under cover of a letter dated 22 July 2004. The letter was received within Campbell Hooper on the same day. A copy was received by Taylor Woodrow from Campbell Hooper later that day. Kendall Freeman accepted Campbell Hooper's offer relating to the future conduct of proceedings by communicating through Campbell Hooper its withdrawal of the arbitration notice. That was a letter sent by fax and DX on 28 July 2004. The last date for the service of the proceedings was 1 August 2004, and Campbell Hooper's letter informing Kendall Freeman that the proceedings had been invalidly served were sent out on 3 August 2004. Secondly, the proceedings themselves advanced by the service of a detailed defence by Chapman Taylor and a part 20 claim by Chapman Taylor on Taylor Woodrow claiming full contribution for any liability it might have. This is a contribution claim made under the Contribution Act.

5.4 The Possible Agreement

55. There was much debate at the hearing as to the meaning and effect of a possible agreement reached by the parties as to the future conduct of proceedings. This debate was inconclusive, and it is not strictly

necessary for me to make clear findings as to whether, and, if so, in what terms, an agreement was reached.

56. However, as I see it, whether or not there was an agreement is highly relevant to the exercise of discretion, and so I must, at the very least, express a provisional view on this question.
57. In my view, Peacocks would be likely to establish that a concluded agreement was reached by the process of offer acceptance. Taylor Woodrow's offer was set out in the letter of 24 June 2004, and Peacocks' acceptance of that offer was contained in its letters of 25 June 2004 and 28 July 2004.
58. As I see it, the effect of those letters, if a finding had to be made, would be that a contract had been entered into whose salient terms were:
 - (1) that Peacocks withdrew its notice of arbitration and agreed not to revive an arbitration in the future; and,
 - (2) that Taylor Woodrow agreed that Peacocks' claim could be heard by the TCC and that Taylor Woodrow would not seek a stay for arbitration of those proceedings.
59. It is also clear to me that Peacocks would be likely to succeed in establishing that these two promises were interdependent, and that the consideration grounding the contractually enforceable promise to withdraw the notice to concur was provided by Taylor Woodrow's cross-undertaking that Peacocks' claim could be heard by the TCC.
60. Furthermore, the claim referred to encompassed the proceedings that had been issued before the offer was made, and which had been purportedly served and brought to Taylor Woodrow's notice before that offer was accepted.
61. Finally, Taylor Woodrow's promise, "*We agree that this claim may be heard by the TCC*", was a promise that the proceedings then in train need not be formally or further served on Taylor Woodrow and that subsequent procedural steps, leading to a trial in the TCC, should now take place.
62. Taylor Woodrow contended that if it gave a promise at all, the promise in the terms that I have referred to did not extend to a representation that the proceedings did not need to be served. However, the phrase "*May be heard by the TCC*" must clearly mean in context, that the TCC was now to be taken as being seized of the proceedings and that all necessary progress to trial may, and indeed should, now commence.
63. That would not be the case if the proceedings still required to be served, since until service had taken place the TCC's procedure for trial, and for any pre-trial preparatory steps, would not be engaged.

5.3 The Litigation

64. I must also take account of the nature of the action under the proposed procedure. The claim is a typical construction dispute. It involves six separate parties, lengthy limitation periods, two separate arbitration clauses and contribution claims that can only be heard in court proceedings, relatively small sums in issue in a construction dispute context and potentially numerous series of factual disputes involving the scope and existence of defects, the factual cause of those defects, the linkage between those causes and the specific breaches of contract alleged, the existence of the breaches that are referred to, the consequences of those breaches in terms of remedial work, scope of duty, remoteness of damage, mitigation of damage and the quantification of damage.
65. In relation to the claims in tort, questions relating to the date and means of knowledge of the defects will also be in issue.
66. The TCC, in order to help promote early resolution of construction disputes by compromise, and to encourage economical disposal of those disputes, which in pre-CPR days were notorious for their delays, expense and cost, has put in place a detailed Pre-Action Protocol which all litigants are required to comply with. The relevant features of this protocol, which is set out in full in the Civil Procedure Volume 1 (see 5.001 and following) provide for the Protocols' objectives, for compliance with it, for a Letter of Claim, for a response, for the parties to consider objections to the court's jurisdiction or of named defendants; and then to progress to pre-action meetings at which it is envisaged that the parties will consider what the contents of the dispute are, whether it can be

resolved without recourse to litigation, and whether, and, if so, in what form alternative means of the resolution of fact dispute should take place.

67. The objectives of this protocol and the overview of the protocol are defined. They are set out in the practice direction, namely, to encourage the exchange of early and full information about the prospective legal claim; to enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings; and to support the efficient management of proceedings were litigation cannot be avoided.
68. The general aim of the protocol before proceedings commence is to ensure
- (1) that the claimant and the defendant have provided sufficient information for each party to know the nature of each other's case;
 - (2) that each party has had an opportunity to consider the other party's case and to accept or reject all or any part of the case made against him at the earliest possible stage;
 - (3) that there is more pre-action contact between the parties;
 - (4) that there is better and earlier exchange of information;
 - (5) there is better pre-action investigation by the parties;
 - (6) that the parties have met formally on at least one occasion with a view to defining and agreeing the issues between them and exploring possible ways by which the claim may be resolved;
 - (7) that the parties are in a position where they may be labelled to settled cases early and fairly without recourse to litigation; and,
 - (8) proceedings will be conducted efficiently if litigation does become necessary.

5.4 The Relevant Discretionary Factors

5.4.1 Conduct of Peacocks

69. Taylor Woodrow focused on what it saw as Peacocks solicitors' failing that led to the allegedly incorrect service of the proceedings on Kendall Freeman. The criticism is summarised in counsel's written summary of Taylor Woodrow's case in these terms: *"The Claimants' solicitors are entirely culpable for not serving the claim form correctly and for leaving the matter to the last minute when they were aware of the limitation problem and of the need to check whether Campbell Hooper were authorised to accept service. The Claimants solicitors had not taken all reasonable steps to serve the claim form upon TW (and they were not 'unable to do so'). Mr Griffiths who had day to day conduct of the matter (and his supervising partner) are responsible for not checking for themselves whether TW or Campbell Hooper had confirmed in writing that Campbell Hooper had authority to accept service of the claim form. Mr Griffiths should not have left the matter in the hands of his trainee, nor allowed a letter to go out in the firm's name asserting that Campbell Hooper had agreed to accept service without checking the basis for making that assertion - which is now accepted by him to be incorrect. Had these basic checks been carried out, Mr Griffiths would have realised that service needed to be effected upon TW itself given the absence of written confirmation that Campbell Hooper were authorised to accept service. It was all the more important for Mr Griffiths or his supervising partner to have carried out those checks given that limitation would have been the issue of service was not validly effected."*
70. This conduct must be considered on the basis that, contrary to my finding, Campbell Hooper's letter of 16 April instructing Kendall Freeman to ensure that all subsequent correspondence relating to the arbitration be sent to Campbell Hooper did not extend to service of the TCC proceedings. A trainee, asked to check whether Campbell Hooper had instructions to accept service, clearly read the file diligently and concluded that the 16 April letter showed that they did have such instructions. That the trainee formed that view is clear from the letter of service, or rather attempted service on the basis on which on which I am considering this matter, which accompanied the claim form, which states: *"We refer to your letter of 16 April 2004 agreeing to accept service."*

That view of the letter was, if erroneous, nonetheless a reasonable and highly understandable view. Had the trainee's principal, or the principal supervising partner, read the file personally, each would probably have formed the same view of the letter's meaning. Moreover, both would have been wary of serving Taylor Woodrow personally, given the distinct possibility that such service would have been both potentially ineffective and unprofessional, given Campbell Hooper's letters of 1 and 16 April and 24 June.

71. It follows that Kendall Freeman's conduct was at best exemplary, and at worst mildly venial in this regard, and is, on any view, both reasonable and not deserving of censure.

5.4.2 Conduct of Taylor Woodrow

72. Inevitably, Taylor Woodrow's conduct came in for criticism. This was to the effect that in the critical period from October 2003 until June 2004 it caused delay by not being prepared in that period to meet and conclude the TCC Pre-Action Protocol procedure. This led to the proceedings not being ready to be served until mid-July 2004, just before the end of the critical four-month period, which itself was just before the end of the expiry of the relevant limitation period.
73. More serious criticism was to the effect that Campbell Hooper waited until after it had obtained a binding agreement from Kendall Freeman to the effect that the arbitration was withdrawn and could not be revived, and until the four-month period of service had elapsed, before raising with Kendall Freeman the question of erroneous service.
74. Fairness, it was contended, required Campbell Hooper to have notified the opposing solicitors at this point promptly on receipt of the letter of purported service which was received on 24 July. Had that notification been prompt, re-service could have been effected within the four-month period.
75. There is an inherent tension between a solicitor's duty to its client and to the CPR process. On the one hand, a client's interest is served by not drawing possible procedural failings or procedural errors of the client's opponent's legal team to the attention of that team so as to deprive the client of the advantage which might otherwise accrue to it. On the other hand, the duty of co-operation, and of proportionate procedural conduct imposed on solicitors by the CPR often points to such gratuitous assistance being provided to an opposing legal team.
76. In an earlier age of litigation by management clerk, the situation that developed in this case would have been cured by an informal telephone call between managing clerks on 24 or 25 July, and the prompt re-service on Taylor Woodrow of the proceedings prior to 1 August.
77. Wherever the dividing line now lies between the interests of the client and the interests of fairness and proportionality to all involved in the CPR process, I am clear that in this case the failure to "tip-off" the opposing party of the potential procedural error of what, in my analysis, was a minor and inconsequential kind, erred on the side of a failure to draw to the attention of the opposing party the potential error that had occurred.
78. The history of these proceedings was such that fairness required notification. If Taylor Woodrow can now capitalise on the perceived failure to serve correctly it will benefit from three cumulative and significant unfairnesses.
- (1) The misleading way that its solicitors appeared to invite service of the proceedings on them as opposed to the client personally.
 - (2) The reliance on an agreement or series of exchanges which came as close to reaching an agreement as it is possible to reach, to terminate the arbitration without Peacocks being able to rely on the quick *pro quo* of an action in the Technology and Construction Court.
 - (3) Being able to capitalise on Campbell Hooper's failure to warn Kendall Freeman of its apparently erroneous service of the claim form in a way that would very seriously prejudice Peacocks' position.
79. It follows that on those grounds alone the situation that has developed in this case is both very unusual and, in terms of the exercise of discretion in favour of dispensing with the service so as to allow the proceedings to continue, highly exceptional. But that matter does not stand there alone.
80. Without prolonging the length of this judgment by a more detailed analysis of the other factors that exist, but which clearly emerge from the recitation of the factual background which I have now summarised in some detail, they may be summarised as follows.
81. The first is that the parties have, for a number of years, engaged with agreement and co-operation and to a significant extent in the procedure followed in construction dispute to be litigated in the Technology and Construction Court, unless earlier compromised as adumbrated in the Pre-Action

Protocol procedure that I have already referred to. Indeed, save possibly for the timescale over which the procedure was followed, it seems to me that the parties have mutually co-operated in a way that might be regarded as an exemplar to parties whose construction dispute is potentially heading for resolution in the Technology and Construction Court.

82. In relation to the periods of time, much, if not all, of those periods can be excused by the fact that the detailed investigations and information exchange and gathering processes were appropriately, in this case, undertaken during the course of the remedial programme which was undoubtedly and inevitably prolonged, and by the subsequent need to consider that material in some detail.
83. Secondly, the parties have provided to each other very full information and documents, much of it, it is true, on a without prejudice basis, but that is to be commended in the phase of the proceedings before proceedings are issued, which is a phase in which co-operation, negotiation and compromise are intended to be the substitute of dispute, antagonism and trial.
84. Thirdly, it is clear to me that the progress that the parties have made in relation to all aspects of the dispute is such that, if a trial is now needed, the length of that trial has been enormously reduced. Indeed, it seems to me, with the rigorous time limits now imposed on the conduct of proceedings of trial by this court, and with the dispensing of discovery, much of the other pre-trial preparatory stages that are frequently needed that will be possible, given the exchanges over a period of nearly four years that have already occurred, that a four-day trial within the next two months would be a distinct possibility, if the parties are prepared, willing and able to engage in that procedure.
85. Fourthly, there are inevitably going to be proceedings involving Taylor Woodrow in this court if the action brought by Peacocks against Taylor Woodrow is not able to proceed, since the contribution proceedings under the Contribution Act, as is frequently the case in disputes of this kind involving that process, will involve exactly the same recitation of issues and engagement of Taylor Woodrow as will be required if the action brought by Peacocks and the other claimants proceeds in tandem with the contribution proceedings.
86. Fifthly, if the action does not proceed there is inevitably going to be further, and indeed more complex, expensive and time-consuming proceedings. For one thing, the parties will have to litigate whether or not there is still a binding agreement as to whether the arbitration proceedings have been irretrievably stopped and incapable of being revived, or whether, either by a virtue of mistake, misrepresentation or breach, it is possible for Peacocks to show that, insofar as it is bound by an agreement not to revive the arbitration, that agreement not to arbitrate is no longer enforceable and binding upon it.
87. This will be followed, as I see it - or certainly there is a real risk of it being followed - by a multiplicity of proceedings which the parties conduct throughout has been clearly intended to avoid. It will also leave the architect in the unenviable position of having foregone its entitlement to an arbitration on the basis that three-way proceedings in one forum would be possible, only now to find itself unwittingly no longer able to take advantage of such collective proceedings, but having given up any advantage that it might have had in relation to an arbitration involving the private resolution and dispute between it and Peacocks.
88. Sixthly, there will be undoubtedly further delay and the disruption that will occur because Peacocks may well feel it necessary to change its legal team in the light of the hiatus that would occur if the proceedings it is seeking to bring against Taylor Woodrow may not proceed in the Technology and Construction Court.
89. Seventhly, there is, as I see it, every reasonable explanation for the apparent delay in issuing proceedings until just before the expiry of the period of limitation, and in the attempt to serve those proceedings towards the end of the four-month add-on period. It does not seem to me that it is productive or necessary to analyse the culpability of the various parties since, as I have already found, the parties, instead of being culpable in what they were doing, were working in an admirably constructive way towards, if at all possible, resolving, and, if not resolving, reducing the scope of the disputes that clearly had been in train for many years and required resolution.

90. The consequence of that attempt by all concerned to resolve or minimise the disputes led, without there being, as I see it, any reasonable criticism capable of being directed to any one party, to the fact that both the limitation period was nearly at an end before proceedings were initiated and the four-month period was nearly at an end before service was attempted.
91. Finally, the fact and knowledge of the detail of the dispute have been known to Taylor Woodrow for many years. It has had every opportunity, which it has and appropriately taken advantage of over that period of time, to inform itself of the nature and content of the dispute.
92. Furthermore, insofar as it is a material additional point, Taylor Woodrow was fully aware of the detail of the proceedings, the fact of the proceedings, and indeed the content of the pleaded allegations a number of days before the four-month period had expired, having received a copy of the claim form on the very day that purported service was attempted on its solicitors.
93. In conclusion, and standing back from the detail that I have sought to identify, and the complex series of inter-related discretionary factors that must be weighed, it is clear to me that this is one of those exceptional cases which is clearly envisaged as being one allowing for the court to dispense with service under CPR 6.9.
94. It, therefore, follows that had I been required to formally exercise that discretionary power, I would have done so without hesitation in favour of dispensing with service.

Neil Kitchener (instructed by Kendall Freeman) for the claimant.

Alexander Hickey (instructed by Campbell Hooper) for the eleventh defendant.