JUDGMENT : The Hon Mr Justice Ramsey: TCC. 23rd March 2007

Introduction

1. This case concerns a project at 60 Vauxhall Bridge Road, London, which are premises that the claimant, ("CCD") bought and wanted to develop. During the course of the piling for that development, there were three incidents, the first of which occurred in August 2000. CCD alleges that the first defendant ("Stent") is liable for the losses from the first and third incidents, and by amendment the second incident, and that the second defendant ("Peter Dann") is liable for losses suffered in the second incident.

2. In August 2000 and February 2001 there was some communications in relation to the first and second incident, but after that Stent received nothing else from CCD making any formal claim in respect of the incidents.

3. In and after March 2003, CCD informed Stent that they were investigating claims against Stent and others, and asked Stent to provide information and documentation in connection with that investigation. There was correspondence between DLA, acting for Stent's insurers, and Nabarro Nathanson, acting for CCD, but this correspondence ceased in about September 2004.

4. The next event was the receipt by Stent of the claim form and particulars of claim from CCD on 8 June 2006. The claim form had been issued on 14 February 2006. It can be seen that no claim was articulated by CCD to Stent before June 2006, and no attempts were made to conduct any pre-action protocol procedure before the issue or service of the proceedings. That is accepted by CCD, who, in a number of documents and in this court have apologised for that conduct.

5. The matter came before this court on 31 October 2006, for a first case-management conference. By that stage, the position was as follows:
   (1) Berwin Leighton Paisner, BLP, who were instructed by Stent, had written to Nabarro Nathanson on 19 June 2006, on receipt of the claim form and particulars of claim, to point out that there had been no attempt to comply with the pre-action protocol for construction and engineering disputes ("the TCC pre-action protocol"), setting out the consequences. They reserved Stent's rights and sought an initial extension from the defence from 6 July 2006 to 3 August 2006.
   (2) Nabarro Nathanson had responded to that letter on 26 June 2006 to say this: "*We accept that the parties have not had the opportunity to attempt to resolve this disputed by means of the pre-action protocol for construction and engineering disputes (the protocol). Our client was not in a position to initiate the procedures of the protocol for the following reasons: The contractual and factual complexities of this case, and the extensive input required from our client's engineering expert in relation to liability.*"
   (3) On 19 July 2006 BLP sought an extension of time for service of the defence to 2 October 2006 and said, "*We also put you on notice that in the light of the fact there has not been any pre-action disclosure by your client, we will be writing to you requesting, over the next seven days, that your client provides to us particular documents that will assist our client to better understand the nature of your client's case.*" The extension of time for the defence was granted and on 17 August 2006 Nabarro Nathanson agreed to provide disclosure by 25 September 2006.
   (4) The defence was served on 5 October, 2006.
   (5) On 16 October 2006 Nabarro Nathanson wrote to BLP and to Fishburns, acting on behalf of Peter Dann, and said, "*A central feature of the correspondence received from you both, following service of the proceedings, has been the criticism that our client did not proceed in accordance with the procedures of the pre-action protocol for construction and engineering disputes (the protocol). We have attempted to explain that, due to the complexity of the issues, the work which was necessary in order to establish a proper and meaningful factual matrix, and indeed understanding of what occurred on this project, and the input required from our client's engineering expert, it was not possible to engage in a meaningful pre-action procedure without creating potential limitation problems. We have, following service of the particulars of claim, made it very clear that our client would wish to discuss, and indeed commit to a procedure, akin to that of the protocol. This would, of course, be subject to the approval of the court, both in terms of structure and time period. We thought it would be useful, in the lead-up to the CMC, to elaborate on what our client has in mind, and to set out what we would describe as a settlement strategy, both in terms of structure and proposed time frame.*"

6. At the hearing on the 31 October, 2006, submissions were made by Stent pointing out that it was only now, after proceedings had been issued, and all the parties had completed the first round of pleadings, that CCD had proposed a procedure akin to that of the protocol. They said that this proposal was too little, too late.

7. In relation to disclosure, Stent pointed out that it had provided extensive pre-action disclosure in January 2004, and said that, "*If the parties are to be fully informed, as they should have been if the protocol had been followed, there must be full disclosure. At the very least, the parties should be provided with all the documents upon which CCD relies in order to prove its case.*"

8. In relation to expert evidence, Stent said, "*If there is to be a mediation, it is more likely to succeed if the experts have had a chance to consider the evidence, and then meet to discuss the merits and narrow the many technical issues in dispute. Again, none of the parties is likely to want to commit to a settlement without knowing what are the preliminary views of the experts.*"

9. In relation to witness evidence, Stent said that it was unlikely that either the parties or the experts would be unduly concerned to know what the experts would say, before attempting a mediation.

10. In relation to a stay of proceedings, Stent submitted that there was no advantage in having a stay at this stage, whether for six months or any other period.

11. In conclusion, Stent submitted that the best course would be for the court to order the disclosure and expert-meetings reports, and then, only at that stage, to have a stay for mediation. The stay, it said, "*Need only be for about one month. In that way, the court process would not have been unduly delayed if it has to be resumed subsequently*."

12. As a result, the court gave directions which led to the service of replies to the defences; certain amendments to the particulars of claim; disclosure; experts' reports being served on a without-prejudice basis by CCD, in relation to quantity surveying and delay expert matters; that experts of like discipline were to meet, and expert engineers, quantity surveyors and delay experts were to produce a joint memorandum on matters agreed and not agreed. The action, at that stage, would then be stayed, at that stage from 17 March to 11 May 2007, to enable the parties to take part in the mediation.

13. One of the orders was in the following terms: "*For the avoidance of doubt, the question of costs incurred up to and including 16 March, 2007, is reserved for further consideration in the light of the claimant's failure to comply with the pre-action protocol.*"

14. The current position is that there has been some delay in that timetable, and a stay of proceedings is now proposed from 13 April to 25 May 2007, with a mediation taking place in May 2007.

The current application

15. Stent have now made an application in which they seek orders that:
    (1) The claimant shall pay the first defendant's costs of the claim to the 13 April, 2007, to be subject to detailed assessment if not agreed.
    (2) The claimant shall, in any event, bear its own costs of the claim against the first defendant to the 13 April, 2007.

16. In summary, Stent say that CCD have failed to comply with the pre-action protocol, and under paragraph 2.3 of the Practice Direction - Protocols, it is provided as follows: "*If, in the opinion of the court, non-compliance has led to the commencement of proceedings which might otherwise not have been needed to be commenced, or has led to costs being incurred in the proceedings that might otherwise not have been incurred, the orders the court may make include: (1) An order that the party at fault pay the cost of the proceedings, or part of those costs, of the other party or parties.*"

17. Stent refer to the decision in ***Daejan Investments v Park West Club Ltd*** [2004] BLR 223, in which His Honour Judge Wilcox came to the conclusion that it was appropriate to make it a condition of permission to amend in a case where the pre-action protocol had not been complied with, that the amending party should pay the other parties' costs up to that stage.

18. CCD essentially submits two things. First, that this is a case where there were potential limitation difficulties. In this respect, they point to paragraph 6 of the TCC pre-action protocol, which provides: "*If by reason of complying with any part of this protocol, a claimant's claim may be time-barred under any provision of the Limitation Act 1980, or any other legislation which imposes a time limit for bringing an action, the claimant may commence proceedings without complying with this protocol. In such circumstances, a claimant who commences proceedings without complying with all or any part of this protocol must apply to the court on notice for directions as to the timetable and form of procedure to be adopted, at the same time as he requests the court to issue proceedings. The court will consider whether to order a stay of the whole or part of the proceedings pending compliance with this protocol.*"

19. In those circumstances, CCD says that their failure was, as they accept, a failure to seek directions under paragraph 6 of the TCC pre-action protocol.

20. Secondly, CCD submits that the question of costs should not be determined now, but at the end of the action, or after settlement, when the position on costs will be clearer, and the court will have more information on which to base its decision. They say that ***Daejan,*** relied on by Stent, is not in point in this case, and that that was a case where the judge held that, on the facts of the case, there had been wasted costs on experts and other matters so that, when the amendments were made, it was as if the action was commencing afresh on that date.

Breach of the pre-action protocol

21. There was, in this case, a serious breach of the TCC pre-action protocol. I accept that on the 14 February 2006, when CCD issued the proceedings, while there was not an immediate problem of limitation, the pre-action protocol process would probably have led to a position where it could not be completed before there were limitation difficulties. In those circumstances, I consider that CCD were in the position whereby, in complying with the pre-action protocol, their claim might become time-barred under the Limitation Act 1980, and therefore they came within paragraph 6 of the TCC pre-action protocol. However, as they accept, they failed to apply to the court, on notice, for directions as to the timetable and form of procedure to be adopted, on the 14 February, 2006, when they issued the proceedings.

22. I consider that where, as appears to be the case here, active consideration was being given by CCD, and obviously had been given by February 2006, in relation to a claim against Stent, the TCC pre-action protocol could and should have been commenced prior to any limitation date. While paragraph 6 of the pre-action protocol allows an exception where there are possible limitation dates, it is not there to encourage parties to delay commencement of the TCC pre-action protocol until there are limitation difficulties. Rather, parties should generally commence the pre-action protocol process at an earlier stage.

23. However, whatever the general position, the importance for a party to apply for directions, if proceedings are commenced under paragraph 6 of the TCC pre-action protocol, cannot be over-emphasised. On such an application, the court would usually stay proceedings so that the pre-action protocol could be carried out. In this case, there are no grounds for thinking that there would be a departure from that usual position, and indeed the contrary was not argued.

24. As a result, I have come to the conclusion there was a breach of the pre-action protocol which led to CCD issuing proceedings on 14 February, 2006, and taking no steps thereafter to implement the TCC pre-action protocol in clear breach of that protocol. Indeed they did nothing to alert Stent to the contents of the claim or the fact that proceedings were imminent. Rather, in the period from 14 February to 8 June 2006, when these proceedings were finally served on Stent without advance notice, it seems that CCD spent much time and cost in preparing the particulars of claim for service in the proceedings, ignoring the pre-action obligations.

25. As I have said, at the time CCD issued proceedings it did not apply for directions but, instead, served those proceedings without reference to the TCC pre-action protocol. As a result, the provisions of the CPR, including those relating to proceedings in the TCC, applied from that date. I do not consider that there was an obligation on Stent itself to apply for a stay of proceedings, and indeed, Mr David Friedman QC, who appeared on behalf of CCD, accepted that there was no such duty. While Stent could have done so, it was entitled to deal with the proceedings in the usual manner under the CPR. In this instance, by BLP's letter of 19 June 2006, Stent's rights, in connection with CCD's failure to comply with the pre-action protocol, were expressly reserved.

Effect of the breach of the pre-action protocol

26. There was, therefore, clearly non-compliance with the protocol, and under paragraph 2.1 of the Practice Direction-Protocols, "*The court may take that non-compliance into account when making an order as to costs.*" It is part of the conduct which is relevant on a question of costs: see CPR rule 44.3(v)(a).

27. In addition, as I have said, paragraph 2.3 of the Practice Direction Protocol provides that, where the non-compliance has led to the commencement of proceedings which might otherwise not have been needed to be commenced, or has led to costs being incurred in the proceedings that might otherwise not have been incurred, the court may make certain orders as to costs.

28. Mr Friedman accepts that the threshold which has to be reached under paragraph 2.3 is one which is not particularly difficult to achieve. That must be correct; the objectives of the pre-action protocols, as set out in paragraph 1.4 of the Practice Direction Protocols, include a sub-paragraph (2), to enable parties to avoid litigation by agreeing a settlement of a claim before the commencement of proceedings. Experience has shown that this objective is frequently achieved.

29. In this case, there is evidence from Miss Axton, an in-house solicitor providing advice to two operating companies of the Balfour Beatty group, one of which is Stent. She refers to her experience since May 2001. She says this, at paragraphs 26 and 27 of her witness statement: "*It is Stent's policy to avoid litigation wherever possible. Had we received a proper letter of claim, we would have responded in detail to the technical matters, using our in-house technical team. I would have provided any legal input which might have been required…. Stent has not had many claims made against it in the past, but such experience as it has leads it to believe that most, if not all, disputes can and should be resolved without the need for legal proceedings. In the last six years, we have had a number of contractual disputes, which we have dealt with via our commercial team. In this case, we were deprived of the ability to resolve this dispute at an early stage, because CCD failed to comply with the pre-action protocol. My experience of acting on behalf of Stent enables me to say that, if CCD had complied with the pre-action protocol, and Stent had had the opportunity to consider CCD's complaint in detail, then I think there is a good chance that this matter would have settled pre-action.*"

30. I accept that and consider 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.

31. The wording of paragraph 2.3 of the Practice Direction-Protocols refers to a situation where non-compliance with the pre-action protocol has led to the commencement of proceedings which might otherwise not have been needed, have been needed to be commenced. Mr Friedman submits that this is not apposite to cover a position where paragraph 6 of the TCC pre-action protocol applies and proceedings need to be commenced before the pre-action protocol procedure. That, it seems, is correct, on a strict reading of paragraph 2.3. However, whether under the wider interpretation permitted by CPR Rule 1.2, or by the application of the other limb of paragraph 2.3 of the Practice Direction, the provision of paragraph 2.3 would apply to this case. The non-compliance has led to costs being incurred in the proceedings that might otherwise not have been incurred. In this case, the likelihood is that the matter would have been resolved without recourse to court proceedings, and I proceed on that basis.

32. In those circumstances, the court has a discretion whether or not to make an order.

Timing of an order for costs

33. Mr Friedman submits that no order should be made at this stage because the decision as to the consequences of the failure to comply with the pre-action protocol will be easier to make at a later stage when, for instance, the court knows the outcome of the mediation which is due to take place in May 2007. He also submits that Stent's application seeks to gain a tactical advantage in relation to one issue – the costs up to the date of the mediation – whereas that can be dealt with in the context of the mediation.

34. Mr David Sears QC, who appears for Stent, submits that non-compliance with the protocol has been established and the court is in as good a position now as it will be in the future to decide on the question of costs. He points out that if the mediation were to fail, then the court would not know why it had failed, because such matters would be, and remain, confidential. For instance, he submits, it might fail because the parties could not agree on the issue of the costs pre-mediation. He also submits that the mediation is more likely to fail if the question of those costs is not resolved now, removing one stumbling block from the mediation.

35. I accept Mr Sears' submissions. In this case, the parties are about to commence a period when they will be seeking to mediate the claims. The failure to comply with the pre-action protocol has meant that the parties are entering the mediation with an additional issue: the increased costs that have been incurred in the context of the proceedings, instead of under the pre-action protocol procedure. There are good reasons why that issue should be resolved now rather than later.

36. First, it removes that additional issue, and therefore allows the party to deal with the mediation in a way which more closely mirrors a mediation at the end of a pre-action protocol procedure.

37. Secondly, I do not consider that the information which might be placed before the court at a later stage will materially improve the ability of the court to assess the position. A failed mediation, or the outcome of the action, may provide additional information, but those occurrences are unlikely to assist in assessing the effect of the initial failure to comply with the pre-action protocol.

38. On that basis, I am satisfied that I should now proceed to consider whether to make an order, and if so, what order to make. I note that similar arguments to delay the order were made and rejected in ***Daejan.*** I consider that the courts should generally deal with the cost consequences of failure to comply with a pre-action protocol at any early stage.

39. Paragraph 2.3 of the Practice Direction - Protocols states that the order may include an order that the party at fault should pay the costs of the proceedings, or part of those costs, of the other party or parties. That is a non-exclusive provision and, in my judgment, permits the court to deal with the relevant element of the costs of the proceedings.

Stent's costs

40. In this case, Stent submit that I should make two orders. First that I should order CCD to pay Stent's costs of the claim to the 13 April, 2007; and that CCD should, in any event, bear its own costs of the claim to the 13 April. As there is to be a stay from the 13 April to 25 May 2007, the practical effect of this is to cover the costs until the end of that period of stay.

41. In this case, I have held that the likelihood is that the matter would have been resolved without recourse to court proceedings. As paragraph 2.4 of the Practice Direction Protocol states, "*The court will exercise its powers under paragraph 2.1 and 2.3 with the object of placing the innocent party in no worse a position than he would have been in if the protocol had been complied with.*"

42. The costs position as disclosed at the first case management conference is instructive. In the case-management information sheet, dated October 2006, CCD estimated its costs to date as £800,479, with an overall costs, at the end of the hearing, being £1.8 million. Stent's figures were £90,895 and £665,000 and Peter Dann's figures were £80,000 and £900,000. The costs incurred by CCD of £800,000 included £405,000 for solicitors' costs, the balance being for counsel and for experts.

43. In relation to the costs incurred in complying with the pre-action protocol, then I remind myself that the general position which, in my judgment, is as follows:
    (1) If the pre-action protocol procedure leads to settlement, without the need to issue proceedings, or does not lead to proceedings, the court cannot make an order in respect of liability for the costs of complying with the pre-action protocol procedure, as they are not costs of and incidental to proceedings in the High Court, which, under Section 51(1) of the Supreme Court Act 1981 are in the discretion of the court. The court does, though, have a limited power to assess costs under CPR Rule 44.12A, if liability is agreed.
    (2) If the pre-action protocol procedure does not lead to settlement, and proceedings are issued, the costs of the pre-action protocol will include costs reasonably incurred before the proceedings were commenced, and this may include costs incurred in complying with the pre-action protocol. See the judgment of Lord Woolf in ***Callery v Grey*** [2001] 1WLR 2112, at paragraph 54.
    (3) If the pre-action protocol procedure does not lead to settlement, and proceedings are issued, but certain claims are not included in those proceedings, although they form the subject of the pre-action protocol procedure, then generally those costs of the abandoned claims cannot be recovered. See ***McGlinn v Waltham Contractors*** [2005] BLR 432.

44. In this case, had the action been settled by the pre-action protocol procedure then both parties would have incurred costs which would have had to have been the subject of the settlement between them. Therefore, any settlement would have had to deal with the costs incurred by CCD, Stent and the second defendants, up to that settlement. They would, though, have been costs incurred prior to the commencement of proceedings.

45. In relation to Stent's costs, any order under paragraph 2.3 of the Practice Direction Protocols should place them, as I have indicated, in no worse a position than Stent would have been in, had the protocol been complied with. Miss Axton's evidence indicates that they would have responded using their in-house technical team and her legal input. I have no doubt that this would have been the initial position, but that they would have required an element of engineering input from outside experts, and also in relation to delay and quantum issues. As I have said above, when the matter came before me for directions on 31 October 2006, Stent submitted that the mediation would be unlikely to take place without there being some outside expert input. I consider, therefore, that some, albeit more limited input from experts, would have been needed in any event.

46. In my judgment, Stent are 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 relation to solicitors' costs, this should reflect, to some extent, the use of in-house solicitors, rather than external solicitors.

47. I have been provided with a breakdown of the costs expended Stent to date of £354,000. This shows that about two thirds of the costs have been spent on solicitors and counsel, and about a third on experts. If CCD had complied with the pre-action protocol, the parties would have had to deal with Stent's costs, and I consider that it is only the additional element of costs expended within the period which I should deal with.

48. I am conscious that there are now two possible outcomes to the mediation. If there is a settlement, the additional element of the costs expended in that period will have been spent unnecessarily. If there is no settlement, then there will be benefit to Stent in not having to expend certain elements of cost in the proceedings. However, given my view that it is likely that proceedings could have been resolved by the pre-action protocol process, I consider that my costs order should also reflect that fact.

49. In all the circumstances, it is appropriate that I should assess the additional element of costs and taking the above factors into account I consider that Stent should be entitled to recover from CCD 50% of its costs incurred from 9 June 2006 until 13 April 2007.

CCD's costs

50. In relation to CCD's costs, had the pre-action protocol procedure been followed, then the costs from 14 February 2006 to 13 April 2007 would have been incurred in the lower cost regime of the pre-action protocol, rather than the higher cost regime of High Court proceedings. Such costs will only generally become relevant if, at any stage, a costs order is made in CCD's favour. Because, in principle, in that event, CCD could seek payment of costs of and incidental to the proceedings, which might include the costs of complying with the pre-action protocol, I consider that I should only be concerned, again, with the additional cost incurred by dealing with High Court proceedings, rather than the pre-action protocol procedure in the period from 14 February 2006 to the 13 April 2007.

51. Mr Friedman submitted that the likelihood is that the letter of claim in this case would have been equivalent to the particulars of claim, and therefore the work would have been no less. If that is the position and CCD were to produce in the pre-action protocol precisely what it would provide in High Court proceedings then this would reflect, in my judgment, a failure to comply with the pre-action protocol. I do not consider that such an approach is consistent with the ethos of the pre-action protocol procedure. If the same costs were to be expended during the pre-action protocol stage as would be expended during the proceedings, then there would be little benefit in having the informal exchange which that procedure encourages.

52. In addition, as set out in paragraph 2.1.3 of the TCC Guide (Second Edition) and now expressly made part of the revised TCC pre-action protocol: "*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 detail and evidence that might ultimately be required if the case proceeds to litigation.*"

53. I consider that the proper way of dealing with the position on CCD's costs is, like the costs recoverable by Stent, to provide that CCD shall, in any event, bear a percentage of its costs of the proceedings from 14 February 2006 to 13 April 2007.

54. In assessing that percentage, I bear in mind:
    (1) My conclusion that these proceedings would have been likely to be resolved had a pre-action protocol procedure been followed.
    (2) 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.
    (3) The fact that if the proceedings are not settled, the proceedings will continue, and if CCD succeeds, it would otherwise be entitled to its costs in the period from 14 February 2006 to 13 April 2007.

55. Taking those factors into account, I consider that CCD should, in any event, bear 50% of its costs of the proceedings from 14 February 2006 to 13 April, 2007.

Conclusion

56. Those orders that I have given seem to me to reflect the proceedings of paragraphs, 2.1, 2.3 and 2.4 of the Practice Direction Protocol where, as here, there has been a clear failure to comply with the pre-action protocol, and in particular paragraph 6 of the TCC pre-action protocol.

57. While, therefore, the outcome of this case is different from that in *Daejan*, I consider that principle that a failure to comply with the TCC pre-action protocol will lead to early adverse cost orders is the same as was applied to the different facts in the case of ***Daejan.***

MR SEARS: *My Lord, I am very much obliged. There are two other orders that I seek in the terms of my draft order, my Lord.*

MR JUSTICE RAMSEY: *Yes.*

MR SEARS: *One is an order for payment of a sum on account of the costs that your Lordship has ordered. Now, my Lord, I accept straight away that it is rather more difficult to ask for a payment on account when your Lordship has made an order in terms of percentage.*

MR JUSTICE RAMSEY: *A percentage, and clearly that would be a percentage of costs which would be assessed.*

MR SEARS: *Yes, but as your Lordship said in his judgment, some information as to costs which have been incurred in these proceedings.*

MR JUSTICE RAMSEY: *Yes.*

MR SEARS: *And in those circumstances, given the terms of your Lordship's order, I wonder if your Lordship would make an order that the first defendant should pay a sum to be calculated as a percentage of the percentage, if I will put it that way, by way of interim payment. And, my Lord, given that we have an overall bill of costs for £350,000, your Lordship has said 50% of that, 175, and in those circumstances, my Lord, I would say that an interim payment of somewhere about £75,000 would be appropriate, because it must be very unlikely, in my submission, that the claimant would better that on a detailed assessment.*

MR JUSTICE RAMSEY: *Yes. So that was the first element.*

MR SEARS: *That was the first. And the second relates to item four, which is the provision for a detailed assessment. And, my Lord, in my submission, the fact that your Lordship has made it, as it were, a percentage order, and does not impact upon that, that is something that could still go ahead, as we say, some time after the 25 May.*

My Lord, I think the final thing which is not reflected in the terms of the draft order is an application for the costs of the application. My Lord, I know your Lordship has had, whether you have had a chance to look at it, a bill of costs in connection with this application, which I think was updated to take account of today, which I think was sent to your Lordship's clerk this afternoon. Perhaps I could pass that up in case your Lordship –

MR JUSTICE RAMSEY: *One question is that I remember it being mentioned that there had been at least some costs for which there has already been an order. I think they are the costs probably the costs thrown away by CCD's amendment.*

MR SEARS: *Yes.*

MR JUSTICE RAMSEY: *It seems to me that, clearly, for the avoidance of any doubt, this order only applies to those costs for which there has not yet been any order.*

MR SEARS: *Yes. Yes.*

MR JUSTICE RAMSEY: *Yes, Mr Friedman.*

MR FRIEDMAN: *Dealing with those points in the same order.*

MR JUSTICE RAMSEY: *Yes.*

MR FRIEDMAN: *The first one is payment of a sum on account.*

MR JUSTICE RAMSEY: *Yes.*

MR FRIEDMAN: *Two points about that. The first is that we are in a somewhat curious area in a sense, that we are now talking about a percentage of a percentage, and that makes it, in my submission, unusual, and I would suggest, unsatisfactory. So I invite your Lordship, on that basis, not to order an interim payment now.*

There is a second point, which is one of detail. In the draft order, what was sought was a sum, and there was a square bracket, and £100,000. Now, that was £100,000 on the basis of the full cost. Your Lordship has ordered 50%, and if the £100,000 has any meaning, it is difficult to see how my learned friend can justify a figure above 50,000, and certainly it is difficult to see how he can justify the 75,000 that he has mentioned.

So, my submission on that is to ask your Lordship to make no order, but if you do, to make an order that is no higher, at the very highest, than 50,000. That is the first point

The second point is the detailed assessment. My Lord, that causes a concern for this reason: Now, your Lordship knows about the timetable to trial, because if the case settles at mediation, well and good, but if it does not, it is extremely tight for everyone, and a detailed assessment of costs, although it does not involve precisely the same people as those who are involved in the preparation for a trial, there is an overlap, and it would detract from the, it would take time. My submission, therefore, is that, so far as that is concerned, there should be no detailed assessment until the end of the case. Now, which I think is the normal position.

The third matter is the costs of today. I cannot resist an order for costs of today. So far as the cost summaries are concerned, it is in fact the case, as I think I mentioned to your Lordship during submissions, that both parties put in statements which were in roughly the same sums, so in those circumstances it is difficult for me to object to details of Stent's summary. Just – and it may be trivial – but just one matter that I do notice. If your Lordship is looking at what I think is a revised version of it.

MR JUSTICE RAMSEY: *I have certainly got one version.*

MR FRIEDMAN: *Which totals, excluding VAT, 27,126.*

MR JUSTICE RAMSEY: *Yes.*

MR FRIEDMAN: *Yes. Well, on that one, at the bottom of the first page, there is really a lot of time spent by solicitors on analysis of what are described as [inaudible] exhibits, witness statement, costs analysis, skeleton arguments. You see 22.5 [inaudible]. My Lord, it really is, in a sense, trivial compared with the total, and that is the only specific one that I draw to your Lordship's attention. And it is right to say that our summary reaches a similar total to that of Stent.*

MR JUSTICE RAMSEY: *Yes.*

MR FRIEDMAN: *My Lord, can I mention one other matter? And that is this: I have no instructions on permission to appeal, but, and to a substantial degree, your Lordship's judgment has been based on findings about the facts of this particular case. But your Lordship has also made certain general remarks about the Protocol, and how it should apply, and how it should be approached in a case of this sort.*

My Lord, may I ask for permission to appeal? I do so, not on the basis that I know that I am going to be instructed to pursue an appeal, but simply to avoid problems that can arise if the application is not made.

MR JUSTICE RAMSEY: *Yes. Mr Sears.*

MR SEARS: *My Lord, very briefly, if I may. So far as interim payment is concerned, obviously the power of the court is, to make an order for interim payment of costs is CPR 44.3, sub-paragraph 8, on page 1137 of the White Book. And in the note, in the commentary, at page 1151, at the top, it says, 'In general, an interim order for payment of costs should be made, but the court has to take into account all the circumstances in the particular case, including the unsuccessful party wish to appeal, the relative financial position of each party, the court's overriding objective to deal with cases justly,' etc. And, my Lord, in my submission, there is nothing in this case which would compel the court to refuse the application for an interim payment.*

So far as the amount is concerned, my Lord, I have already made my submissions in relation to that. Your Lordship sees the explanation of the claim, of Stent's costs, and in my submission 50% of the 50% which your Lordship has ordered is a fair payment to be made on account now.

So far as detailed assessment is concerned, my Lord, in my submission nothing my learned friend says should persuade your Lordship to put off the detailed assessment after the 25 May.

And so far as Stent's bill of costs is concerned, the only comment my learned friend could make is in relation to the work done on documents, and my Lord, yes, [inaudible] the fact that 22 hours, or thereabouts, spent by a solicitor working on documents in this case is a high number of hours. It is, perhaps, to be compared to the 8.5 hours done on his side, on documents, in circumstances where, on his side, there was no evidence that was put to him. The 22 hours spent by the two solicitors was, as I understand, spent very largely in the compilation of the table attached Mr Pope's[?] witness statement, which was a work which took some doing.

My Lord, unless I can assist further, those are my submissions.

MR JUSTICE RAMSEY: *Yes, I have four applications I have to deal with. The first is that Mr Sears, on behalf of Stent, seeks a sum on account of the order that I have made in relation to CCD paying 50% of Stent's costs in the relevant period. It seems to me that this is a case where it is appropriate to make an interim payment in relation to those costs, but I accept Mr Friedman's submission that, given the findings I have made, the appropriate sum is £50,000.*

In this case, the trial is later this year, and I consider that a detailed assessment of a part of the costs, at this stage, is not something that I should order in this case. Rather, as in the normal way, I consider that any detailed assessment should wait until the end of the case.

So far as the order for costs is concerned, Mr Friedman does not realistically contest that an order for costs should be made. He points out the hours spent on the work on documents. In relation to a case where there is summary assessment, the court always has to bear in mind that it is summarily assessing these costs on a standard basis, and that on a detailed assessment the hours would come under more scrutiny than they do on a summary assessment. In those circumstances, it seems to me that the appropriate order for me to make on a summary assessment is the sum of £21,500.

Mr Friedman seeks permission to appeal in this case. I do not consider that this is a case where I should give permission to appeal. It seems to me that I have followed the wording of the pre-action protocols, and the Practice Direction Protocols, and applied them to the particular facts of this case, in an area which is particularly for the discretion of the judge. In those circumstances, it is not appropriate for me to give permission to appeal in this case as there are no real prospects of success. This is a final decision on this particular aspect, and if CCD wish to pursue any appeal, then the appropriate permission to appeal, can be sought from the Court of Appeal.

In those circumstances, those are the orders I make.

MR FRIEDMAN: *My Lord, might I, as we have you, mention one other thing?*

MR JUSTICE RAMSEY: *Yes.*

MR FRIEDMAN: *Your Lordship mentioned the timetable slippage -*

MR JUSTICE RAMSEY: *Yes.*

MR FRIEDMAN: *And the revised order. My Lord, it has gone into the court but it has not come back yet, and we are slightly concerned. Not simply in case your Lordship, or anyone else, perceives there is a problem with the draft.*

MR JUSTICE RAMSEY: *Yes, no, well I have not seen it. Do you have a copy of that order ?*

MR FRIEDMAN: *I do not in the papers before me, I am afraid. We can have one sent to the court tomorrow.*

MR JUSTICE RAMSEY: *I think the most efficient way of dealing with it is just to check the court file, bring up the order, and we can then make it now.*

MR FRIEDMAN: *I would be obliged -*

MR JUSTICE RAMSEY: *Yes.*

MR FRIEDMAN: *If your Lordship could.*

MR JUSTICE RAMSEY: *I should just add that, clearly, again for the avoidance of doubt, I have just made a costs order, and that obviously is, comes within the rubric, as I said earlier, excluding any existing costs orders. So it is 50% of the costs, but obviously to the extent that you have got a costs order in your favour, it is only the balance of those costs.*

MR SEARS: *Yes, yes. My Lord, obviously your Lordship has made the order, or orders have been made in the past, effectively reserving costs, with a view to this application -*

MR JUSTICE RAMSEY: *Yes.*

MR SEARS: *And this costs order would those into account, are within its ambit, I should say.*

MR JUSTICE RAMSEY: *Yes.*

MR FRIEDMAN: *My Lord, I have found a draft of the order. I am sorry; I had forgotten that it was there. May I show [inaudible] your Lordship?*

MR JUSTICE RAMSEY: *Yes. Thank you very much.*

MR FRIEDMAN: *I also, if your Lordship needs it, have, I think, the covering letter.*

MR JUSTICE RAMSEY: *No, do not worry about the letter. If I just read. Yes, the only change I would make is obviously to take out, for the avoidance of doubt, paragraph -*

MR FRIEDMAN: *Is this the reserving costs?*

MR JUSTICE RAMSEY: *Yes, the reserving costs.*

MR FRIEDMAN: *Yes.*

MR JUSTICE RAMSEY: *That obviously -*

MR FRIEDMAN: *Yes.*

MR JUSTICE RAMSEY: *I will wait another minute; if it has not come back then, I will sign this, and then it will be issued by the court tomorrow. Out of the abundance of riches, we have got two. Thank you very much.*

MR FRIEDMAN: *Hopefully the same.*

MR JUSTICE RAMSEY: *Ah. No.*

MR FRIEDMAN: *Not the same.*

MR JUSTICE RAMSEY: *They are not the same, actually.*

MR FRIEDMAN: *Oh dear.*

MR JUSTICE RAMSEY: *As a result of, the only difference – let me just have a look – is that, yes I think it is only the costs. One says, 'costs reserved' on the order, the other says, 'costs in the case', and one says, 'liberty to apply', the other does not say, 'liberty to apply'.*

MR FRIEDMAN: *Liberty to apply was something that one of the defendants, I think, required, so the one that says that -*

MR JUSTICE RAMSEY: *So should I order costs reserved.*

MR FRIEDMAN: *Yes.*

MR JUSTICE RAMSEY: *I think, as a result of that, probably the easiest thing is for me to leave the one I have signed, which I got from you, as the formal order.*

MR FRIEDMAN: *Thank you.*

MR JUSTICE RAMSEY: *And perhaps I could ask if a copy of that order can then be emailed through, in the form with the paragraph 6 just saying, 'costs reserved'.*

MR FRIEDMAN: *Yes.*

MR JUSTICE RAMSEY: *Then…*

MR FRIEDMAN: *…I am sorry. I was going to say, the one with 'liberty to apply' must be the later one, because both defendants asked for that to be inserted.*

MR JUSTICE RAMSEY: *Yes, I think one says 'b2' and the other 'b3', as I can read it. Good, well, I will make that order, and that will be issued then tomorrow.*

Well, I am most grateful to you, and coming back to court at 4.30.

MR FRIEDMAN: *We are grateful to your Lordship.*

Mr David Friedman QC, and Mr Ben Pillin for the Claimant
Mr David Sears QC for the Defendant