J U D G M E N T : HIS HONOUR JUDGE DAVID WILCOX : TCC **:** 3rd November 2003

1. Daejan Investments Limited, the Claimant, seek permission to reamend its Part 20 particulars of claim. Those amendments are characterised as minor by Mr Jourdan who makes the application. Instead of the Seka 1 waterproofing system being patched, the whole it is said now needs to be stripped off and renewed.
2. Seven days ago at the last case management conference he produced a draft of his reamendment, which was circulated to the parties and to the court, in which it was pleaded that the Seka 1 system was wholly inappropriate and that the proper waterproofing system that a competent engineer should have advised was that of a drain cavity system, on the basis that no competent engineer could have advised a Seka 1 system. The only reason advanced by Mr Jourdan at that hearing why he did not seek the formal permission of the court to amend in those terms was that the details of the costings needed to be fully worked out.
3. Because I judged it to be necessary that the court and the Part 20 Defendant should finally know what Daejan's case was as to professional negligence, I directed that this matter should come back before me on the 1st of November. I heard lengthy argument on the 1st of November. An argument arose as to the terms upon which any reamendment should be allowed, and because if I acceded to the submissions of Mr Sears the financial consequences were severe to Daejan, at 4.30 I adjourned the hearing so that Mr Jourdan should be under no pressure of time when he came to address me upon this aspect of the matter. I have heard in effect almost two hours of argument this afternoon at the adjourned hearing.
4. The reamendment that was finally sought on the 1st of November is not the same as that on the earlier occasion because Daejan's expert cannot now support the case pleaded by Mr Jourdan in the draft circulated last week. Whilst the reamendment now sought is not quite as radical as that canvassed last week, nonetheless in my judgement it is not the "minor change" as is characterised by Daejan.
5. The professional negligence case against Buxton relates to waterproofing work which was completed as long ago as March of 2001. In the original action between Daejan Investments Limited and Park West Club Limited as early as the 15th of February 2002 there were complaints made as to the quality of the waterproofing works undertaken by Daejan. A schedule of outstanding works was served in that part of the action on the 22nd of March 2002, and on the 22nd of July 2002 there was a schedule of defects and outstanding works ordered, and that schedule was supplied in early August of 2002. In respect of the areas not waterproofed, which were predominantly at the south end of the basement, damp penetration was evident, the state of the brickwork in this area would have been evident to anyone who bothered to look, and the parties discussed the possibility of having waterproofing experts. Park West already had one on board, that being the expert whose report has been adduced before me in the course of this afternoon's proceedings. He is Mr Paul Carter who is not an engineer. It is clear that his report, which is an interesting report, emphasises the need for further investigation of matters. He understandably was not in a position to proffer any sound diagnosis as to what was the matter with the system that had been used, the Seka 1. He was able to offer some penetrating observations as to the difficulties that might be encountered in applying and installing the system. He made the point that he had not seen a geotechnical report in relation to the particular basement. He wanted sight of one. He describes his experience in inspecting cementitious based waterproof systems such as the one in this case as having points of potential or actual failure. It is evident that he could not in fact come to any firm conclusion as to what had happened. He emphasized however, at 4.3, that there may have been a failure to give sufficient consideration to the varying climatic conditions within the basement. He mentioned the difficulties arising in the installation and conditions requiring sulphate resisting cement. In short, he said that Seka 1 might have been appropriate. It calls for great care in its installation. He also said that other systems perhaps could and maybe should have been looked at.
6. That is a report that on the face of it is perhaps critical of Buxton, but not reasoned because the data upon which an expert could found a firm opinion simply was not available to him. And of course there is the fundamental defect in his report, he was not an engineer who was applying engineering standards to the judgement of this matter.
7. Mr Carter in his report reveals that there was discussed between the parties, (who could only have been Daejan Investments and the Park West Club), the possibility of using him as a waterproofing expert who

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was a joint expert. He states that one party, clearly not Park West Club, the Defendant, had refused to use him as an expert. Thus it was Mr Carter who had been rejected as being a joint expert by Daejan whose report was used as the basis of the allegations of professional negligence by one of the parties. By December they sought leave of the court to join Buxton as Part 20 defendants.

8. It is interesting when one pauses to reflect here in November/December of 2002 what was the position that would have been open to Daejan. They had the report of someone they had rejected as an expert in the sense that they did not adopt his as a joint expert. They had not taken the elementary precaution of investigating the matter themselves by instructing another waterproofing expert. It appears that that was not done until April or May of 2003.

9. They nonetheless on the 10th of December, when PWC applied for permission to call Mr Carter as a waterproofing expert, sought permission to join Buxtons and Lingards as Part 20 defendants. The original trial date was vacated in order to accommodate the new parties and the new situation, and a new date, the 16th of June 2003, was given. There was no suggestion that at that time that was not appropriate so far as the preparation or investigation was concerned. The decision to apply to join Buxton as a Part 20 defendant was made by Daejan and no other. Insofar as they chose to make allegations of professional negligence against consulting engineers by way of a Part 20 claim, or any other claim for that matter, the court was entitled to assume that the appropriate investigations had been made warranting such allegations, that there is a respectable body of expert opinion from someone practising in that field to found such allegations, and that the prospective responding party had some notice of the allegations so that he was able to consider his position prior to litigation. That is of course apart from the requirements of the protocol for construction and engineering disputes which governs these matters. The civil procedure rules, the practice direction as to protocols and the protocol relative to this case provide a system whereby, in relation to dispute resolution, recourse to the courts and to the expense and consequences of the litigation process is a final resort. Thus, open handedness as to information and documentation is to be encouraged, and the opportunity for realistic discussion leading to solutions that enable parties to compromise or settle their differences where by they can live, work and trade together thereafter with the least damage. This is the object of the system comprising the CPR, the practice direction and the protocol. There is a world of difference between common sense discussions in an informed way informed by commercial considerations, continuation of relationships and the like and the strict procedures of a court of law. Of course, as I have adverted to already, there are considerations of expenditure too.

10. After the particularised claim in December of 2002, the reamendment in April of 2003 and now the proposed reamendment, the Part 20 Defendant now faces the position that he probably would have been in had the construction and engineering protocol been complied with. There would have been an informed and supported claim to deal with from a professional and commercial point of view. The option of avoiding litigation altogether would have been available to the Part 20 Defendant. A Part 20 claimant is not relieved of the obligation to comply in substance with the terms of the approved protocol, otherwise parties to litigation brought otherwise in accordance with the protocol might be subject to unfair commercial advantage and to threats of litigation and persisted in litigation based on allegation without any real substance.

11. Daejan does not accept that it should be criticised for not having complied with the pre-action protocol. They say that the spirit of the protocol in fact has been complied with. A comparison of the allegations that they made at the outset with what now purports to be their finalised case clearly indicates to me that that is not the position. It is abundantly clear upon the evidence before me which is contained in the correspondence, and indeed is mirrored in the pleadings, that this is not a series of allegations that had been properly or thoroughly investigated until very recently prior to the reamended pleading that has been proffered to the court and in relation to which permission is sought.

12. I have described in the course of the submissions that I have received from Mr Jourdan certain elements of his pleading as being speculative. They have been wholly speculative and not borne out by contemporaneous investigation. I have heard in the course of his submissions the assertion that he was entitled to make allegations of professional negligence based upon Mr Carter because if they were reliable

or accurate that would have founded such allegations. But Mr Carter was not an engineer and was not competent to give expert opinion as to engineering matters.

13. There has been no satisfactory explanation before me as to why, in the light of what happened in December, and the state of knowledge as to waterproofing that Daejan as a responsible landlord in the light of the defendants allegations would have been in possession of, why they did not instruct a waterproofing expert until April, and why they amended their statement of claim in April seemingly without the full investigation that warrants their final application to amend the pleadings seven days ago.

14. This has been a case of shifting allegation whereby the Defendant has been robbed of the proper opportunity in the course of litigation to consider what his true position is. As to part 36 offers, how do you make an informed judgement in the light of the shifting allegations that this case brings? It is submitted to me that the amended particulars of claim in April constituted a proper agenda letter in the spirit of the preaction protocol. The pre-action protocol provides that there should be a claim letter with a clear summary of the facts on which each claim is based. Mr Jourdan accepted that that was not the position even in the spirit that could have been provided in the outset of this case, and clearly in my judgement was not even in April. The particulars of such matters as names of experts already instructed, and identifying the issues as to which evidence will be directed, are part of the claim letter requirements. No matters such as these were available at the outset. But the object of the protocol is not to bind one party unilaterally; it is a reciprocal obligation. It is to get people to put their cards on the table and to honestly and rationally discuss matters. To that end meetings are provided for, and there is a requirement in paragraph 4.3 which prescribes that there should be a rational and sensible response. It is in that context that the protocol provides the framework for a sensible discussion, or the chance for a sensible discussion so that the option is available to a party to avoid the need for litigation. I hold that the service of the amended particulars in April or the letter before action are not steps that show that Daejan were complying with the spirit of the protocol. They were matters within litigation which protocol hopefully seeks to avoid.

15. There has been no compliance actually or in spirit with the protocol. A Part 20 defendant who seeks to limit its liability may be in a difficult position. It has the choice if and when to make an application. It has the choice, as was exercised by Buxton in this case. It was a choice that was exercised at the time that in the event visited disadvantage on Buxton.

16. I am minded to give leave for the amendment in this case. I am now told that getting on for a year after these matters came to light, ten months, the investigation that should be the prelude to these proceedings is now complete. It would be wrong for me not to give leave because the proper issues between the parties must be the subject of resolution. They should have been the subject of resolution in the manner that has been discussed before me today. I am told that the parties, certainly Daejan and Buxton, are willing to mediate. I note that as long ago as the 27th of June Buxton's solicitors were making it clear that they wanted to know what was the true position, and the outcome of investigations, because then and only then could they exercise the rights that they should have had had the protocol been observed and the opportunity was made available to them to sensibly discuss this matter and avoid the costs of litigation. It strikes me that if mediation is to be undertaken on a sensible commercial basis, then the number of outstanding matters should be minimised.

17. Mr Jourdan seeks to persuade me that I should not make a costs order today. He said I should reserve the position until I see what the consequences are in terms of the litigation. He invites me to say "Well, look here, you must assume that Daejan's case is a case that can be wholly made out, they may succeed" and I should deal with the case upon that basis. That is not the approach that commands itself. The CPR practice directions and the protocol are there to ensure that parties have a chance prior to litigation to settle their differences. They may do it on a strictly legalistic basis, they may do it on a commercial basis, they may do it on any basis that they sensibly choose. They should not be deprived of the opportunity to so resolve their difficulties. Today, the emphasis of my consideration must be whether there has been prejudice to Buxton on loss of the opportunity to resolve their difficulties pre litigation. There clearly has. The practice direction as to protocols give a court power to make good any disadvantage suffered.

18. Mr Jourdan contends I am not in the position to judge what would have happened had the pre-action protocol had been complied with. By analogy the Court of Appeal in a recent case considered the position

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whereby a party withdrew from a mediation without seemingly good reason. In the case of **Leicester Circuits Ltd v Coates Brothers** [March 2003] EWCA 333. In the course of his judgment, paragraph 27, LJ Judge made this comment: *"It seems to us that the unexplained withdrawal from an agreed mediation process was of significance to the continuation of this litigation. We do not for one moment assume that the mediation process would have succeeded but certainly there is a prospect that it would have done so if it had been allowed to proceed".*

That therefore bears on the issue of costs. The failure to comply with the pre-action protocol in this case in my judgement very much bears upon the position of costs. It is clear to me that this case was started without any proper investigation, it was proceeded with and amended in the course of preliminary investigation, and we are now in the position that would have confronted Buxton had the protocol been observed.

19. Have Buxton done anything themselves that would lead to them being deprived their option to avoid litigation? It seems to me that looking at the history of the matter and the correspondence here upon the contrary they have done their utmost to ensure that this matter if at all possible should have been considered and resolved without the necessity to go to the expense of a full court action. So I can exclude that matter and so do.

20. I can see no good reason why they should not be put in the position any worse than they would have been had things properly been done. I propose therefore as a condition of giving permission for this reamendment to impose the obligation upon Daejan to pay on a standard basis the costs of Buxton to date.

21. So far as the costs of Daejan to date, it seems to me that Buxton should not be liable to pay those costs, and I direct that Daejan in any event shall be responsible for their own costs to date. In making that Order I have taken account of the fact that even in mediation and in the preceding stages of compliance with the protocol, which imposes reciprocal obligations, monies may have to be expended on experts, perusal of papers, obtaining advice. There seems to me no basis on which I can arrive at a figure representing a deduction to take account of this pre trial expenditure. Henceforth the parties enter into the mediation. Daejan will be paying their own way and Buxton properly confronted with the issues will be paying their own way, subject to any agreements that they may reach in the mediation.

22. That therefore is my Order today. I see that in his skeleton Mr Jourdan invites me to give leave to appeal if I come to such a conclusion so that the whole of this matter can be considered by the Court of Appeal at some stage in the future when they come to determine other matters. What do you say about that further?

MR JOURDAN: *That is my submission.*

HHJ WILCOX: *Mr Sears?*

MR SEARS: *My Lord, I am never quite certain to what extent one is expected to make submissions in opposition to an application for permission to appeal. I simply observe that the question of costs is a matter for your discretion, and we invite your Lordship to say therefore the Court of Appeal should decide whether or not you should give permission.*

HHJ WILCOX: *It is a matter of discretion, is it not, Mr Jourdan?*

MR JOURDAN: *My Lord, yes, but the matter that the Court of Appeal has already given permission to appeal on is the question of the role of the Defendant bringing in other parties by way of a Part 20 claim and the extent to which a person in my position is entitled to pass on a claim without having to add to it, and that is a matter which is very much raised by the criticisms which my learned friend has made and the court has accepted and that is a matter the Court of Appeal is going to consider in January unless the case settles before then, and…*

HHJ WILCOX: *I think if the Court of Appeal want to hear you they will tell you. It is a matter of discretion. I do not give leave.*

MR JOURDAN appeared on behalf of the Claimant.

MS TASKIS appeared on behalf of Park West Club.

MR SEARS appeared on behalf of Buxton Associates