JUDGMENT : MR JUSTICE AKENHEAD: TCC. 13th June 2008

Introduction

1. This application arises out of a claim made by the Claimants, T J Brent Limited ("Brent") and A J Loveland Thames Limited ("Loveland"), against the Defendant, Black and Veatch Consulting Limited ("Black and Veatch"). It relates to damage caused by an oil leak in a pipe and there is what might be called a demarcation issue between Black and Veatch, who was employed by Southern Water as a consulting engineer in respect of the work whilst Brent and Loveland were employed as contractors at Southern Water's supply works in Andover, Hampshire, where the problem is said to have arisen.

2. The claim in this case really arises out of a claim which was made against by Southern Water in respect of breach of contract and/or negligence which was ultimately settled by Southern Water and Brent and Loveland with the sum of about £1.4 million being payable by Brent and Loveland. So it is that these proceedings relate to a claim over by Brent and Loveland, against Black and Veatch. The primary ground is on the grounds of an entitlement alleged to be under the Civil Liability Contribution Act 1978 on the basis that it is said that the loss and damage suffered by the Claimants was caused, it is alleged, also by the Defendant's breach of its alleged contractual and/or common law duties owed to Southern Water. There is also a plea that Black and Veatch, the Defendant, owed the Claimants a duty of care in tort.

3. The facts, to which the claim relates, happened a substantial time ago in 2000 and 2001. Proceedings were issued on 8 June 2007 at a time, I accept, when the Claimants, Brent and Loveland, believed that there might be a limitation risk if they left off serving their proceedings until later. Particulars of Claim were served in the first week of October 2007 and go in some detail to the complaint, such as it is, against the Defendant. The real issue on the application which I have to deal with today arises out of whether or not the Claimants have complied with the pre-action protocol process laid down for use in this court and generally and, if not, whether orders can or should be made against the Claimants so far as costs incurred to date are concerned.

4. When the matter last appeared before me on 9 May 2008, I made an order setting a trial date for 19 January 2009, giving the Defendant leave to serve some re-amendments to its defence by 23 May. The parties then agreed – and I so ordered – that the claim would then be stayed until 4 July 2008 to permit a mediation to take place. I am extremely disappointed that, in the light of what was clearly an agreement to stay these proceedings, the Defendant has felt it necessary to pursue this application. It is within its rights technically to do so because it issued the application on 9 May, before the stay came into place, but I had certainly left that directions hearing believing that the parties had embarked on a sensible course to seek to resolve the disputes between them. The application is one which Miss Willems, for the Defendant, has made it clear is being made to enable Black and Veatch to go into the mediation knowing, if it be the case, that they have a credit in respect of costs incurred to date. That would probably, Black and Veatch perceive, put the Defendant into a better tactical position in its negotiation and mediation. Whether that is right or not, I do not know.

The practice

5. The first issue therefore which I have to decide is whether or not there has been compliance with the Pre-action Protocol. The relevant parts of the Pre-action Protocol for Construction & Engineering Disputes are:

> *"1.3 The objectives of this Protocol are as set out in the Practice Direction relating to Civil Procedure Pre-Action Protocols, namely:-*
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> *(i) to encourage the exchange of early and full information about the prospective legal claim;*
>
> *(ii) to enable the parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings; and*
>
> *(iii) to support the efficient management of proceedings where litigation cannot be avoided.*
>
> *1.4 If proceedings are commenced, the court will be able to treat the standards set in this Protocol as the normal reasonable approach to pre-action conduct. If the court has to consider the question of compliance after proceedings have begun, it will be concerned with substantial compliance and not minor departures, e.g. failure by a short period to provide relevant information. Minor departures will not exempt the 'innocent' party from following the Protocol. The court will look at the effect of non-compliance on the other party when deciding whether to impose sanctions. For sanctions generally, see paragraph 2 of the Practice Direction – Protocols 'Compliance with Protocols'.*
>
> *1.5 The overriding objective (CPR rule 1.1) applies to the pre-action period. The Protocol must not be used as a tactical device to secure advantage or to generate unnecessary costs…In all cases the costs incurred at the protocol stage should be proportionate to the complexity of the case and the amount of money which is at stake. The protocol does not impose a requirement on the parties to marshal and disclose all the supporting details and evidence that may ultimately be required if the case proceeds to litigation.*
>
> *2. The general aim of this Protocol is to ensure that before court proceedings commence:*
>
> *(i) the claimant and the defendant have provided sufficient information for each party to know the nature of the other's case;*
>
> *(ii) each party has had an opportunity to consider the other's case, and to accept or reject all or any part of the case made against him at the earliest possible stage;*
>
> *(iii) there is more pre-action contact between the parties;*
>
> *(iv) better and earlier exchange of information occurs;*

(v) there is better pre-action investigation by the parties;

(vi) the parties have met formally on at least one occasion with a view to

- *defining and agreeing the issues defining and agreeing the issues between them; and*
- *exploring possible ways by which the claim may be resolved;*

(vii) the parties are in a position where they may be able to settle cases early and fairly without recourse to litigation; and

(viii) proceedings will be conducted efficiently if litigation does become necessary."

3. Prior to commencing proceedings, the claimant or his solicitor shall send to each proposed defendant…a copy of his letter of claim which shall contain the following information:

(i) the claimant's full name and address;

(ii) the full name and address of each proposed defendant;

(iii) a clear summary of the facts on which each claim is based;

(iv) the basis on which each claim is made, identifying the principal contractual terms and statutory provisions relied on;

(v) the nature of the relief claimed: if damages are claimed, a breakdown showing how the damages have been quantified; if a sum is claimed pursuant to a contract, how it has been calculated; if an extension of time is claimed, the period claimed;

(vi) where a claim has been made previously and rejected by a defendant, and the claimant is able to identify the reason(s) for such rejection, the claimant's grounds of belief as to why the claim was wrongly rejected;

(vii) the names of any experts already instructed by the claimant on whose evidence he intends to rely, identifying the issues to which that evidence will be directed.

4.3.1 Within 28 days from the date of receipt of the letter of claim…the defendant shall send a letter of response to the claimant which shall contain the following information:

(i) the facts set out in the letter of claim which are agreed or not agreed, and if not agreed, the basis of the disagreement;

(ii) which claims are accepted and which are rejected, and, if rejected, the basis of the rejection…

5.1 Within 28 days after receipt by the claimant of the defendant's letter of response…the parties should normally meet.

5.2 The aim of the meeting is for the parties to agree what are the main issues in the case, to identify the root cause of disagreement in respect of each issue, and to consider (i) whether, and if so how, the issues might be resolved without recourse to litigation…

6. 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."

6. Relevant parts of the Practice Direction are:

"2.1 The Civil Procedure Rules enable the court to take account of compliance or non-compliance with an applicable Protocol when giving directions for the management of proceedings (see CPR Rules 3.1(4) and (5) and 3.9(e) and when making orders for costs (see CPR rule 44.3(a)).

2.2 The court will expect all parties to have complied in substance with the terms of an approved Protocol.

2.3 If, in the opinion of the court, non-compliance has led to the commencement of proceedings which might otherwise not have needed to be commenced, or has led to costs being incurred in the proceedings that might not otherwise have been incurred, the orders the court may make include:

(1) an order that the party at fault pay the costs of the proceedings, or part of those costs, of the other party or parties;

(2) an order that the party at fault pay those costs on an indemnity basis; ….

2.4 The court will exercise its powers under paragraphs 2.1 and 2.3 with the object of placing the innocent party in no worse position than he would have been in if the protocol had been complied with."

7. Paragraph 2.6.1 of the Second edition of the TCC Guide (October 2007) provides that:

"There can often be a complaint that one or other party has not complied with the Protocol. The court will consider any such complaints once proceedings have been commenced. If the court finds that the claimant has not complied with one part of the Protocol, then the court may stay the proceedings until the steps set out in the Protocol have been taken."

The facts and whether there was compliance

8. I think it is accepted that the first question to consider is whether or not there has been compliance with primarily the Construction Pre-action Protocol. I am not going to refer to every single letter that was sent; I will only refer to the main ones. On 26 April 2005 Southern Water wrote to the Claimants indicating that there would be a substantial claim against them arising out of the oil spill that had occurred. It was made clear in that letter that

Southern Water did not consider that Black and Veatch was liable but if it was it would only be contingently upon the Claimants avoiding liability.

9. Following that letter, Solicitors for Brent (I should say that there were two solicitors acting, one for Brent and one for Loveland) wrote on 26 July 2005 to Black and Veatch at its Redhill address. The following are extracts:

"Our Clients: TJ Brent Limited

Claim by Southern Water

Fuel oil leak at Andover

Introduction

Clausen Miller LLP has been retained to represent [Brent] and its liability insurers in connection with the above incident.

Mayer Brown Rowe and Maw have been retained to represent [Loveland] and its liability insurers in connection with the above incident.

This letter is written on behalf of both Brent and Loveland and explains the basis of the claim that Brent and Loveland make against you ("BV").

Relevant events

Southern Water employed Brent as main contractor to execute works to facilitate improvements to the disinfection process at four water supply works … including Andover…

Brent employed Loveland to carry out the civil and building works…

BV … was the consulting engineer responsible for the design of the works employed by Southern Water.

The terms of Brent's employment are recorded in a written contract…dated 12 March 2001.

[There then follows 1½ pages of explanation about the escape of oil]

The total costs that will be incurred by Southern Water as a result of the incident are likely to be substantial.

The claim

[Details are given of Southern Water's claims with references to letters]

BV's duties as water treatment engineers

Brent and Loveland's case is that responsibility for the incident lies with BV.

We do not know upon what terms BV was employed by Southern Water…but the purpose of BV's employment was to audit and revise the facilities at…Andover..

We also note that BV was on site at the time of the relevant works, supervising their execution.

Accordingly we believe that BV assumed a contractual duty, and probably a common law duty also, to design and supervise the works at Andover to the standard of care expected of consulting engineers professing your specialism in water treatment design and construction.

It is clear that BV failed to discharge those duties at two stages in the project.

The first stage was in the audit and revision of the Andover facilities…[explanation is provided]

The second stage was when the line was damaged and exposed for repair… [explanation given]

In summary, BV was aware of the presence of the shallow buried fuel line at the original design stage and should have critically reviewed whether the line could safely be retained…

BV's failure to remove the gas oil pipeline resulted in the very damage, the contamination of the aquifer, that BV had been employed by Southern Water to prevent.

BV's legal liability

We consider that BV will be liable to Southern Water for breach of its duties both in audit, design and supervision in relation to the fuel line and its repair.

Consequently, if Brent and Loveland are found liable for the damage, they will have claims for contribution against BV under the Civil Liability (Contribution) Act 1978 since the damage is the same as that sustained by Southern Water as a result of BV's breaches of duty.

Conclusion

…If, however, Southern Water were to succeed in its claim against Brent, then Brent has a claim for, at the least, a very significant contribution, if not equivalent damages, against BV.

… we have no alternative but to now turn to BV

We think that it will be helpful for representatives of BV to meet with Clausen Miller LLP and Mayer Brown Rowe & Maw to discuss how best this matter may be taken forward in advance of any adjudication or litigation.

Such a meeting would clearly benefit if the parties meet on level terms. The best way to achieve this would be for each party to give disclosure in advance of the meeting,

On BV's part this disclosure would include, but not be limited to:

(i) the contract between Southern Water and BV..

We look forward to your prompt response."

10. I conclude from the above that in that letter, which was I believe intended to be a letter of claim under the Pre-action Protocol, in effect it was made clear who the Claimants were likely to be. It was likely to be Brent and Loveland; although their addresses were not given, their full names were given. There was a clear summary of events set out in terms of how it is alleged that the oil pipe became damaged and how oil leaked. There is spelt out as best as could be done in the circumstances the basis on which the claim was made. Of course, it was not

possible to identify the principal contractual terms relied upon because at that stage Brent and Loveland did not have Black and Veatch's contract with Southern Water but, on the other hand, they made it clear not unreasonably – but I make no ultimate finding about that – that Black and Veatch owed a contractual and probably common law duty to design and supervise the works with reasonable care and skill. It is spelt out that a claim would be made for breach of duties and a claim for contribution under the Civil Liability Contribution Act.

11. It is not the purpose of the Pre-action Protocol requirements for the letter of claim that information is given in ultimate detail at least unless it is critical to the claim. At the stage at which this letter of claim was written, it is clear that no settlement had been achieved with Southern Water and so it was not possible to identify what figure was going to be claimed. It is possible that proceedings would have had to have been commenced before it was known what the settlement was. Indeed, that was the case here. As can be seen from the letter, the solicitors suggested a meeting and, as can be seen later, that suggestion was turned down.

12. That letter was responded to by Black and Veatch briefly on 5 August, in relatively dismissive albeit polite terms, about the possible claim. It was surprised about causation of loss and stated:

"It seems to us that the direct cause of this damage was a defective repair by your client's subcontractor. In the circumstances, it would seem likely that Southern Water would have grounds for pursuing their claim solely against your client as the design build contractor."

13. That was amplified a few weeks later, probably because the solicitor, Mr Tuffin, the in-house solicitor for Black and Veatch, was about to go on holiday, so there was a more detailed response on 23 September 2005. It is clear that that letter, although it only runs to a page and a half is again politely but firmly dismissive of any claim made against it by Brent and Loveland. Relevant extracts are:

"The potential liability of your clients to Sothern Water is clear...

The potential for there to be a duty in tort upon Black & Veitch towards your clients, as a design and build contractor, in these circumstances is not apparent to us…

Furthermore negligence by Black & Veatch is not apparent…

In any event the facts set out in your letter seem to us to demonstrate that your clients' breaches of contract and/or duty are intervening acts…

It would seem to us that there is no real prospect of your clients establishing that a duty was owed towards your client…or that…Black & Veatch were negligent or that in the event of negligence there is a causal connection to the damage.

With regard to the Civil Liability (Contribution) Act 1978… Black & Veatch are not liable to Southern Water…we do not accept your statement that any such liability (if established) would be in respect of the "same damage" for the purposes of section 1(1)…

If there was any room for argument under the 1978 Act, we consider that its is extinguished by the existence in our appointment of the following provision:

"[The Client shall indemnify and keep indemnified the Consulting Engineer against demands proceedings damages costs charges and expenses arising out of or in connection with pollution or contamination".]"

Hence Black & Veatch is not liable to Southern Water and the Act is not applicable.

In conclusion we do not see that there is any cause of action available to your clients in tort or for a contribution under the Act. For these reasons we are not inclined to accept your proposals for voluntary disclosure and a meeting…"

14. Points are made about there being no breaches of contract and no negligence, no duty of tort owed by Black and Veatch towards the potential Claimants and the like. Arguments are still alive about the contribution and there is a clear and emphatic and reasoned rejection of the claim.

15. Not much appears to have happened after that for a few months but, on 24 April 2006, Southern Water submitted to Brent's solicitors a very detailed claim and quantum narrative which put the claim at a very substantial sum, £1.5 million, together with a possible capital diminution of £5 million. It appears – and I do not imply anything underhand in this – that by one means or another a copy of that letter sooner or later found its way into the hands of Black and Veatch.

16. Over 2006, there was an exchange of correspondence involving Mayer, Brown, Rowe & Maw who were Loveland's solicitors. They wrote a letter on 18 May 2006 to Southern Water, copied to Black and Veatch, which was headed "*Without prejudice save as to costs.*" In that, they suggested that there should be a without prejudice meeting and they said this:

"We assume that Brent would be willing to attend such a without prejudice meeting. Indeed, there would be little point in holding a meeting if it was not present. We also consider it appropriate that Black & Veatch is present at this meeting, although we are aware of the fact that in previous correspondence it has rejected any claim advanced by Brent. We consider Black & Veatch as potentially liable to Brent and/or Loveland pursuant to the Civil Liability Contribution Act 1978 for the reasons previously canvassed in correspondence. No doubt this can be discussed on a without prejudice basis at the meeting. By a copy of this letter we request that Black & Veatch also confirms it is prepared to take part in a without prejudice discussion. We look forward to hearing from you and Black & Veatch in due course."

17. The letter, unsurprisingly from its contents, was copied to Black and Veatch who took some time to respond to it, but the response came in an email on 2 June 2006 in these terms from Mr Handford, who was an assistant solicitor who answered in Mr Tuffin's absence.

"In the absence of a reasoned response to Mr Tuffin's letter to Clausen Miller dated 23 September 2005 from either Clausen Miller or yourselves, we could not contemplate participating in the without prejudice meeting that you propose."

18. The consequence of that was a few days later Brent's solicitors replied directly to Mr Handford on 9 June 2006 by letter and dealt, point by point, with Mr Tuffin's letter of 23 September 2005 to which I have referred earlier. Again, it deals under chapter heads - duty of care, remoteness, causation, the 1978 Act and indemnity – with the points raised by Mr Tuffin. Of course, I do not have to deal in this application with the issue as to whether any of these responses are good responses in law or in fact.

19. There was a continuing exchange over the next few weeks as to whether or not Black and Veatch would attend the meeting. They did not do so and on 3 July 2006 Loveland's solicitors wrote to Mr Handford as follows:

"We and Clausen Miller and our respective clients were very disappointed to note that you elected not to attend the without prejudice meeting with Southern Water on 23 June, despite our and their prior emails, telephone calls and letters. Whilst the meeting proved constructive in that the parties were able to discuss various aspects of Southern Water's claim, in your absence we were unable properly to debate your role and culpability…

In the circumstances, our clients and Brent intend to continue to pursue their claims against you robustly. Accordingly, we look forward to receiving as soon as possible the contractual documentation requested by Clausen Miller in their letter dated 26 July 2005, together with a detailed response as to why you do not consider that you are liable in the respects previously highlighted…"

20. Since July 2005 and over the months and the year or two that followed, the Claimants' solicitors did seek documents from Black and Veatch relating for instance to the contract between Southern Water and BV, a detailed survey of the site and various other documents. To that end, Loveland's solicitors again wrote on 12 September 2006 in some detail making a formal request for such documents. There was a response from Ms Kiernan, the company solicitor at Black and Veatch, on 28 September 2006. She was reviewing the position and trying to do what she could to find various documents. There had been no final response and at some time in 2007 Black and Veatch retained Howrey LLP, solicitors. On 18 May 2007, Loveland's solicitors wrote to Howrey to say that they were "very disappointed that to date we have not received a response regarding our formal request for pre-action disclosure dated 12 September 2006."

21. On 30 May 2007, there was a conference call between various representatives of Howrey and the Claimants' solicitors and there was a discussion about documents and about what was called a stand still issue. This was being raised because the Claimants were becoming uneasy as to whether or not they were beginning to run into a potential area of limitation difficulty. Ms Willems of Howrey explained at that conference call that she wanted her clients to be kept "in the loop" with regard to meaningful discussions that were taking place with Southern Water.

22. On 1 June 2007, Howrey wrote a very detailed (7 page) response to the request which had originally been made some ten months before relating to pre-action disclosure. It made clear, amongst other things, that it did not believe it had any duty to disclose the documents but it is obvious, when one reads that document, that it contained the most emphatic and reasoned rejection of the Claimant's claims. For instance, there is a chapter headed *"Brent/Loveland's Contribution Claim Has No Reasonable Prospects of Success." There are other chapters: "B&V Is Not Liable for Negligent/Defective Workmanship by Contractors", "B&V's Duty as regards Supervision of Contractor's Works", "Causation" and "limitation".* It is clear that the strong message that was sought to be imparted to the Claimants' solicitors was that the Claimants' claim had no realistic prospect of success. That said, it was perfectly proper of them to disclose a number of documents, including a number of those which had been requested in September 2006, including documents relating to Black and Veatch's contract; but there was no agreement on what might be called the stand still agreement which would have enabled matters to continue to be discussed or at least liaised on between the various parties and Southern Water. On 5 June 2007, Mayer, Brown Rowe & Maw wrote as follows:

"As explained during the discussion of 30 May 2007, we and Clausen Miller consider that there are potential claims in tort against your clients arising from the circumstances in which the repair to the pipe was carried out. The repair took place on 11 June 2001 and there is a possible imminent deadline in this respect. If, as you state, limitation is not an issue, then we do not understand why your client is reluctant to enter into a stand still agreement. To refuse to do so will simply increase costs and possibly attract publicity as we and Clausen Miller will have little option but to issue a protective Claim Form.

In the circumstances, we invite you to agree by close of business today that your client will enter into a stand still agreement with effect from 6 June 2007."

23. The response to that from Miss Willems on 6 June 2007 was by email, which was:

"In a situation where there is no cause of action in respect of which a limitation issue arises, it is wasteful of time and cost to enter into a stand still agreement. Issuing a claim in such circumstances exposes your client to costs and that is of course a decision for you."

24. So it was that on 8 June 2007 the Claimants felt that it was necessary to issue the claim. That claim was not served until early October 2007. It was served within time and it was accompanied by the Particulars of Claim. The response of Howrey, having received that, was contained in their letter of 10 October 2007. In that, it raises a number of points, including the fact that it looked as if the wrong Defendant had been named, the wrong Black and Veatch company, and so far as the Pre-action Protocol is concerned it said this:

"9. The Pre-action Protocol for Construction and Engineering Disputes requires that you should, prior to commencing proceedings, have sent a letter of claim to the proposed defendant setting out, amongst other things, the full name of that Defendant. This would have enabled Black and Veatch to alert you to your error in good time before proceedings were issued. Black and Veatch Limited received no letter of claim. The Claimants have not, therefore, complied with the Protocol and we reserve our position on costs in this regard."

25. Clausen Miller, who were the only solicitor on the record for the Claimants at this stage, wrote back to deal with the point about the wrongly named Defendant and, having referred to its letter of 26 July 2005 (set out above) they also said this:

"A considerable amount of letters and emails were subsequently sent by your client, Black and Veatch Limited, which dealt with substantive issues in the defence of the claims as well as our client's request for pre-action disclosure."

26. Howrey responded in more detail on 17 October 2007 and went into a substantial amount more detail about the Pre-action Protocol and the letter of claim. They formed the view, as they indicate in that letter, that there had not been compliance. They said that the letter of 26 July 2005 did not comply with the Pre-action Protocol in some respects. What is perhaps interesting is the fact that, although the point was taken about the Pre-action Protocol by Howrey, they took no steps to suggest that a further Pre-action Protocol process be gone into, not I hasten to say that there was any expressed legal or procedural obligation on them to do so.

27. So it was that, following various amendments to the Particulars of Claim, a Defence and then an Amended Defence had been served and it is clear that a substantial series of issues has arisen between the parties. I have formed the view that in substance the Particulars of Claim reflect the claim that was put forward in July 2005. One thing that happened between the time that the proceedings were issued and the time when the Particulars of Claim were first served was that settlement was reached between the Claimants and Southern Water. The Particulars of Claim assert that the settlement achieved was a total of £1.4 million and that it was reached on 3 August 2007.

28. It took until the 9 May 2008 for the Defendant to issue its application for an order that the Claimants pay the Defendant the costs of claim to 9 May 2008 or such portion of those costs as the court thinks, to be subject to detailed assessment if not agreed, and that the Claimant should in any event bear its own costs of the claim to 9 May because:

"The Claimants failed to comply with the Pre-action Protocol for Construction and Engineering Disputes. The court has a power to make such an order pursuant to 2.1 of Practice Direction: Protocols and CPR r 44.3(v)(a)."

29. Various witness statements have been put in, one from each side, and I have to say that the statement from Mr Hall for the Claimants is much more weighty – and I mean physically weighty – than it need have been with substantial repetition and quoting of letters. I do have to say that I think much too much appears in that witness statement. Be that as it may, the statement of Mr Esly of Howrey deals with the history and at Paragraphs 35 to 37 he makes it clear:

"35. I confirm that, had the Claimants followed the normal procedure after their claim crystallised in August 2007, B&V (for whom Howrey by then had conduct of the matter) would have provided a Defendant's Response and attended a pre-action meeting in the usual way.

36. Howrey would have also advised B&V to accept any offer of mediation made at that stage, and I believe B&V would have followed that advice.

"37. A failure to follow the pre-action protocol, or a refusal to mediate, can have serious cost consequences. Had these issues arisen, I consider that it would have been the professional duty of Howrey LLP to warn B&V of these risks and to advise that the relevant positive steps should be taken. I have no reason to believe that B&V would not have followed that advice."

30. There is certainly no opining from Mr Esly on instructions or otherwise as to whether any mediation stood any prospect of success, good or bad. That said, the parties have now agreed that there will be a mediation in several weeks' time, but it is not for me to speculate about what the prospects of success in two weeks' time, or whenever the mediation is going to take place, will be.

31. What the Court should do in considering the Pre-action Protocol is to look at the matters in substance, not as a matter of semantics. Thus, a complaint that is made that the Claimants' address was not given seems to me to be really immaterial. If that was a real issue, I have no doubt that it could have been very easily raised, but certainly the Defendant knew who their solicitors were and so complaints such as that really do not assist.

32. The gravamen of the complaint is that there could not really be a proper letter of claim in the circumstances until there had been a settlement with Southern Water because the claim as now pursued through the Particulars of Claim is not a general, prospective claim for a contribution contingent upon a finding made against them with regard to Southern Water. It is actually for a contribution towards the full sum which was actually the subject matter of a settlement between the Claimants and Southern Water.

33. It seems to me that that is not a major or substantive point, at least in the context of this case. The Defendant was aware in 2006 or, if not in 2006, well before the issue of proceedings, that the claim being made against the Claimants by Southern Water was a very substantial one, as I have indicted, something over £6 million arguably. Secondly, it is always possible and indeed it is quite properly accepted by Mr Blackett, who has appeared here for the Defendant with Miss Willems, that it is always possible, for a prospective claim for contribution to be made; indeed many such claims are made by way of Part 20 proceedings against third parties in court. The fact that, between the time of issue of the proceedings and the time of service of the Particulars of Claim, something has changed whereby the sum which is the subject matter of the claim has crystallised is not of such substance that it needs to form the basis of yet another letter of claim under the Protocol. It is abundantly clear that by June 2007, by correspondence, the lines were very clearly drawn with the Claimants enthusiastically asserting that their claim was a good one against Black and Veatch whilst Black and Veatch were emphatic – indeed, more emphatic than many Defendants at this stage – that they simply had no liability. Additionally it argued that there was no loss and no causation that could be claimed against it.

34. It is the court's job in reviewing this matter to look at matters in substance and not for technical non-compliances with the letter of claim requirements in the Pre-action Protocol. For instance, there is non-compliance or possible non-compliance in that there was no reference to the names of any experts instructed by the Claimants on whose evidence they intended to rely. There is actually no evidence before me one way or the other whether experts were in place by that stage. Be that as it may, the absence of that information was not such as to prevent or make it difficult for the Defendant to respond in detail as it did in September 2005 and again emphatically in its solicitor's letter of 1 June 2007. It would be unfortunate if these rules about the Pre-action Protocol were used as a tactical weapon to secure some tactical advantage. I am not suggesting that this application has been brought in bad faith, I hasten to say.

35. I am satisfied that the Protocol was in substance complied with. There was a clear summary of the facts on which the claim was based; there was set out the basis on which the claim was made and an identification so far as possible of the principal contractual terms and statutory provisions relied on and the nature of the relief claimed was set out (contribution).There was a suggestion for a meeting. This was repeated on, as far as I can tell, a dozen occasions in 2006 going into 2007, but it was clear that the Defendant, because it believed that it had no conceivable liability, thought that it was inappropriate to attend any such meeting. It would of course arguably have made sense for there to be a round table discussion, not only between the Claimants and the Defendant, but also Southern Water. That was something which, for good reason or bad – it matters not – the Defendant decided it did not want to take part in, but certainly there were numerous invitations to meetings which were not taken up.

36. Given the limitation difficulties, it was wholly reasonable for the Claimants to issue the Claim as and when they did. I do not consider that, even if they had come to the Court in October 2007 to raise the possible need for further Pre-action Protocol steps to be taken, it would have been necessary to embark upon them unless both parties were keen to do so, which was not the case.

37. I am satisfied that there was compliance in substance. Given that, it has been properly accepted by Miss Willems and Mr Blackett for the Defendant that that is the end of their application. Out of deference however to the remaining arguments, I will briefly address those.

38. I have formed the view that, whilst it was not incumbent upon the Defendant as a matter of practice or procedure to have to raise the issue of the Pre-action Protocol process once the Particulars of Claim were served, the fact that they did not ask or suggest in October 2007 or at any time between them and early May 2008 that a Pre-action Protocol process would assist undermines the stance which they have taken.

39. Secondly, it does seem to me that, if it was to succeed on this application, Black and Veatch would have to establish that there was some realistic prospect, prior to the issue of these proceedings or at least the service of these proceedings, of (a) a mediation taking place and (b) some prospect (but no certainty or even necessarily probability) that a resolution would be achieved. I have to say that there is no evidence which supports that from the Defendant and it is the Defendant which makes this application. Therefore the onus of proof is on it, that such a settlement would or could realistically have been achieved at that stage. Given the Defendant's unwillingness to attend any meetings or discuss any matters without prejudice in any forum, it suggests to me an unlikelihood at that stage of any resolution being achieved. I very much hope that the position has changed since the service of the detailed pleadings in this action. If not, then it may be that the mediation in two weeks' time is simply a waste of time. I should primarily judge the position not on the basis of what would happen now but what would have happened if there had been an attempt at alternative dispute resolution during the period when the Pre-action Protocol process would take place.

40. Therefore, even if it had been established that there was non-compliance with the protocol, I would have found that the failure to follow aspects of the Protocol would be unlikely to have led to a resolution.

41. I am not going to deal with the quantum of the Defendant's claim for costs. Suffice it to say that if I had thought that it was appropriate to allow anything my first step would have been notionally to assess the costs overall downwards, as it would be on a costs assessment, before making any allowance in favour of the Defendant. It would not have been half of the gross costs in any event.

42. I should just briefly deal with some of the authorities. Reliance has perfectly properly been placed on the case of ***Charles Church Developments v Stent Foundations Ltd*** [2007] EWHC 855 (TCC), a decision of Mr Justice Ramsay. That was a case in which the Claimants on any account had not begun at any stage to comply with the Pre-action Protocol process and there was a finding by the learned judge at Paragraphs 29 and 30 that there was a good chance that the matter would have settled pre-action. That is not the case here. Similarly, it is not the case here that there has been a wholesale, conscious, non-compliance with the Pre-action Protocol process. Efforts were made to comply with the Pre-action Protocol in substance and that was not the case in ***Charles Church v Stent.***

43. Other cases have been relied from which I do not get much assistance. Cases such as ***Halsey*** and ***Midland Linen Services*** relate to orders being made by the court at the end of the trial or at the end of the case. The court has to take an overall view as to whether it is likely that if there had been a mediation the matter would have settled. That is an easier proposition to deal with because by then the court is fully informed about all the rights and wrongs of the claim and the defence, as the case may be. That said, in so far as it points to the burden of proof being in effect upon the persons seeking to make the application, it is obviously right.

44. There has been reference, although not in detail, to a decision which I reached earlier this year, ***Orange Personal Communication Services Ltd v Hoare Lea*** [2008] EWHC 223 (TCC). It involved a somewhat different set of facts but I made it clear in Paragraph 31 of the judgment that the Overriding Objective is concerned with saving expense, proportionality, expedition and fairness. The court's resources are a factor and this objective, whilst concerned with justice, justifies a pragmatic approach by the court to achieve the objective. The Overriding Objective is recognised even within the protocol as having material application. I went on to say:
"The court should avoid the slavish application of individual rules, practice directions or protocols if such application undermines the overriding objective."

45. That observation applies in this case because, in substance, the Defendant was very well aware, before these proceedings commenced, what the nature of the claim was against it. It did not know every detail. It did not know because the Claimants themselves did not know precisely what amount was to be claimed, but it knew in substance and it was able to deal with it in substance. The Defendant was able to work out what its defences were in some detail. The Defendant was given every opportunity to attend meetings to discuss matters and to settle the disputes. The Court should be slow to allow the rules to be used in those circumstances for one party to obtain a tactical or costs advantage where in substance the principles of the Protocol have been complied with.

Decision

46. The Defendant's application is dismissed.

RIAZ HUSSAIN appeared on behalf of the Claimant instructed by Clausen Miller.
MELANIE WILLEMS and ROBERT BLACKETT of Howrey LLP appeared on behalf of the Defendant.