**IN THE HIGH COURT OF JUSTICE Case No. HT-05-210**
**QUEEN'S BENCH DIVISION**
**TECHNOLOGY AND CONSTRUCTION COURT**

**[2005] EWHC 3139 (TCC)**

St. Dunstan's House

Monday, 19th December 2005

Before:

MR. JUSTICE JACKSON

B E T W E E N :

ALFRED McALPINE CAPITAL PROJECTS LIMITED

(formerly ALFRED McALPINE CONSTRUCTION LIMITED) Claimant

- and -

(1) SIAC CONSTRUCTION (UK) LIMITED

(2) SIAC CONSTRUCTION LIMITED

(3) NORMAN & DAWBARN LIMITED

(in creditors' voluntary liquidation)

(4) WHITE YOUNG GREEN CONSULTING LIMITED Defendants

A N D B E T W E E N :

(1) SIAC CONSTRUCTION (UK) LIMITED

(2) SIAC CONSTRUCTION LIMITED Part 20 Claimants

- v -

(1) NORMAN & DAWBARN LIMITED

(in creditors' voluntary liquidation)

(2) POWELL TOLNER & ASSOCIATES

(3) WHITE YOUNG GREEN CONSULTING LIMITED

(4) PARKER DESIGN ASSOCIATES Part 20 Defendants

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**J U D G M E N T**

(As approved by Judge)

**APPEARANCES**

MR. PAUL DARLING QC (instructed by CMS Cameron McKenna) appeared on behalf of the Claimant.

MS. KATE GRANGE (instructed by Osborne Clarke) appeared on behalf of SIAC.

MR. SIMON HARGREAVES (instructed by Reed Smith) appeared on behalf of Norman & Dawbarn.

MS. KATE VAUGHAN-NEIL (instructed by Hill Dickinson) appeared on behalf of Powell Tolner Associates.

MS. S. SOOD and MR. KEITH SELL (Solicitors of Beale & Co.) appeared on behalf of White Young Green Consulting Ltd.

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MR. JUSTICE JACKSON:

1
This judgment is in seven parts, namely: Part 1, introduction; Part 2, the facts; Part 3, the present proceedings; Part 4, how does the Protocol apply to additional parties who are brought into a multi-party action? Part 5, Norman's application for a stay of the Part 20 proceedings; Part 6, McAlpine's application to join Norman as defendant in the main action; Part 7, the position of White Young and Powell Tolner.

**PART 1: INTRODUCTION**

2
This is an application by a Part 20 defendant for a stay of Part 20 proceedings pending compliance with the Pre-action Protocol and an application by the claimant to join that Part 20 defendant into the main action.

3
The claimant in these proceedings is McAlpine Projects Ltd. (to which I shall refer as "McAlpine"). The first defendant is SIAC Construction UK Ltd. The second defendant is SIAC Construction Ltd. The second defendant is the parent company of the first defendant and is involved in these proceedings by reason of a parent company guarantee. For present purposes nothing turns on the relationship between the first and second defendants or upon their respective roles. I shall therefore refer to these defendants collectively as "SIAC".

4
In this judgment I shall refer to Norman & Dawbarn Ltd. (a company which has recently gone into liquidation) as "Norman". I shall refer to the firm Powell Tolner & Associates as "Powell Tolner". I shall refer to White Young Green Consulting Ltd. as "White Young". I shall refer to the firm Parker Design Associates as "Parker".

5
The owner of the property with which this litigation is concerned is a company called Tilebox Ltd. I shall refer to this company as "Tilebox". The subcontract which was made between McAlpine and SIAC on 21st March 2002 will be referred to as "the subcontract". In this judgment I shall refer to the Civil Liability (Contribution) Act 1978 as "the 1978 Act". I shall refer to the Pre-action Protocol for Construction and Engineering Disputes as "the Protocol".

6
After these introductory remarks, I must now turn to the facts.

**PART 2: THE FACTS**

7
By a contract dated 27th April 2001 Tilebox employed McAlpine to carry out substantial works at Onslow House in Guildford. These works comprised the removal of the existing building envelope, the strengthening and extension of the building's primary concrete structure and the replacement of the original façade and roof with new curtain walling and roofing systems to form a part four storey and part five storey air conditioned office block. McAlpine engaged Norman to act as architects and Powell Tolner to act as structural engineers. Subsequently McAlpine engaged White Young to act as structural engineers in place of Powell Tolner.

8
McAlpine engaged SIAC as subcontractors to carry out the façade works to Onslow House. These façade works comprised the design and installation of curtain walling, glazing, roofing and secondary steelwork. SIAC commenced work on site on 7th January 2002. On 21st March 2002 the subcontract between McAlpine and SIAC was entered into. SIAC engaged Parker to act as SIAC's structural engineer in connection with the subcontract works.

9
Unfortunately, delays and mishaps occurred during the course of the subcontract works. The nature and extent of those delays and mishaps and the responsibility for them will be a matter for investigation at a later stage of this action. Suffice it to say for present purposes that on 19th May 2003 McAlpine determined SIAC's subcontract. It is in issue between the parties whether SIAC was in default of its obligations under the subcontract and whether McAlpine was entitled to determine the subcontract in the manner that it did.

10
Whatever the rights and wrongs of the dispute between McAlpine and SIAC, it became clear that McAlpine would not achieve completion of the main contract works by the specified completion date, namely 14th August 2002. McAlpine thus incurred a liability to Tilebox in damages for delay. In an attempt to reduce those damages, McAlpine commenced an action to establish that the liquidated damages clause in the main contract was not unenforceable as a penalty. However, that action was unsuccessful and I dismissed McAlpine's claim in a judgment dated 25th February 2005: see McAlpine v. Tilebox[2005] EWHC 281 (TCC); [2005] BLR 271.

11
In the meantime the claims made by McAlpine and SIAC against one another were ventilated in correspondence. On 8th December 2003 McAlpine provided a copy of its expert report to SIAC. On 23rd April 2004 SIAC's solicitors wrote a Protocol letter to McAlpine. McAlpine's response to the Protocol letter came in two parts, respectively dated 30th July and 23rd August 2004. SIAC's formal reply to these letters came on 3rd March 2005.

12
On 13th April 2005, McAlpine's solicitors wrote to Norman, enclosing expert reports and other documents relating to the dispute about Onslow House. On the second page of their letter the solicitors wrote:

"As you will see, SIAC UK are threatening to commence proceedings against AMCP (see page 2, paragraph 1.2 of Osborne Clarke's letter of 3rd March 2005). Equally, AMCP might have to sue SIAC UK. An issue has arisen concerning the allowances, if any, that were made in the cladding and glazing systems for structural and other movements in the building (see pages 16 and 17, paragraphs 1.5 to 1.12). SIAC UK suggest that if AMCP commences proceedings against them, they will bring

contribution proceedings against Powell Tolner Associates and/or White Young Green (page 16, paragraph 1.9). As you know, they were the structural engineers on the project (the latter replacing the former). We do not know what SIAC's intentions, if any, are concerning you. Given your role on the project, we should be grateful for your comments on SIAC's allegations at paragraphs 1.5 to 1.12 on pages 16 to 17 of Osborne Clarke's letter of 3rd March 2005."

13
On 14th April a company called Capita Symonds Ltd. responded to that letter as follows:

"We advise that as of 11th April 2005 Norman & Dawbarn Ltd. entered into administration and its assets and business was subsequently acquired by Capita Symonds. Capita Norman & Dawbarn are now operating as a trading division of Capita Symonds. Prior to reviewing and commenting on your document, a new set of appointment documents will need to be put in place between Capita, Norman & Dawbarn and Alfred McAlpine for this project. In addition, our involvement with this particular issue will be an additional service. We will therefore need to agree hourly rates to cover our time input."

14
On 25th April 2005, McAlpine's solicitors wrote to Norman & Dawbarn Ltd. (in administration) as follows:

"It is clear from the background documents (copies of which we have provided to you) that Norman & Dawbarn played a significant role in relation to the provision of required allowances for structural and other movements to SIAC. Although it appears that SIAC will be alleging that the structural engineers involved in the project, PTA and WYG, were responsible for any inadequacies in the allowances for movement, from the documentation we have seen SIAC's allegation could apply equally to Norman & Dawbarn Ltd. In the event that SIAC's version of events is correct, AMCP are entitled to compensation from Norman & Dawbarn Ltd. for the losses they have suffered as a result of the inadequate allowance for movement in the cladding installed by SIAC at Onslow House. AMCP therefore have a claim against Norman & Dawbarn Ltd. Please confirm that this claim has been notified to your insurers and provide us with their identity and contact details. We consider it very much in your interest to assist AMCP in clarifying Norman & Dawbarn Ltd.'s role in respect of allowances for movement without the need for formal action to be taken by our client."

15
Subsequent correspondence sent by McAlpine to Norman or the administrators indicated that it was a possibility, but not a certainty, that Norman would be joined in the litigation.

16
On 14th June 2005 a meeting took place between representatives of McAlpine and representatives of SIAC in accordance with the Protocol. This meeting did not give rise to a settlement. However, McAlpine did agree to give disclosure of documents relating to their consultants. SIAC needed these documents in order to decide whether to bring Part 20 proceedings against Norman and/or Powell Tolner and/or White Young. SIAC also needed these documents in order to formulate any Part 20 claim which they might bring.

17
On the main issues, however, McAlpine and SIAC remained divided. Accordingly, in order to resolve those issues McAlpine commenced the present proceedings.

**PART 3: THE PRESENT PROCEEDINGS**

18
By a claim form issued in the Technology and Construction Court on 28th July 2005, McAlpine claimed against SIAC damages for breach of the subcontract. In its particulars of claim, served on the following day, McAlpine alleged: (a) that McAlpine had lawfully determined the subcontract on 19th May 2003 and (b) that SIAC's work failed to comply with SIAC's obligations in 123 different respects. McAlpine claimed approximately £17 million as damages, representing McAlpine's liability for delay to Tilebox, the cost of remedial works, and so forth.

19
A non-compliance schedule was annexed to McAlpine's particulars of claim. This schedule sets out the 123 alleged breaches of the subcontract as follows: items SPN 1 to SPN 55 relate to the span wall system; items KAW 1 to KAW 52 relate to the Kawneer system; items INT 1 to INT 7 relate to the interface between the span wall system and the Kawneer system; items ROOF 1 to ROOF 4 relate to the roofing; items GEN 1 and GEN 2 are alleged breaches of a general nature.

20
On 27th September 2005 a case management conference was held. On that occasion SIAC indicated that they were considering the possibility of joining Norman, Powell Tolner, White Young and Parker as Part 20 defendants. After hearing argument from leading counsel for McAlpine and for SIAC, I directed that SIAC should serve their defence and their Part 20 claims (if any) by 30th November 2005. I also fixed the start date of trial as 10th January 2007. This date was three months later than the agreed trial date of October 2006 proposed by McAlpine and SIAC. I took this course because it seemed to me that the Part 20 defendants would need further time in order to be ready for trial. This was the best estimate that the court could make without the benefit of hearing submissions from the Part 20 defendants. I also gave directions (by consent) for a mediation to take place during February and March 2006.

21
On 30th November 2005 SIAC served their defence and counterclaim against McAlpine. SIAC also served Part 20 claims against Norman, White Young and Parker. (It is not yet known whether Parker will take any points as to the validity of service upon their French office; no such points have yet been indicated). On 9th December SIAC served a Part 20 claim on Powell Tolner.

22
SIAC's Part 20 claim against Norman relates to eight of the breaches alleged in McAlpine's schedule, namely items SPN1, SPN 2, SPN 19 to 23 inclusive, and KAW1. SIAC contend that Norman was in breach of a contractual duty to McAlpine in two principal respects: One, failure to inform SIAC about differential movements in the building structure, which is relevant to items SPN1, SPN 2 and KAW1. Two, failure to carry out appropriate checks prior to selecting the "C-shaped" panels, which is relevant to items SPN 19, SPN 20, SPN 21, SPN 22 and SPN 23. SIAC claim against Norman a contribution or indemnity pursuant to the 1978 Act in respect of SIAC's liability (if any) to McAlpine.

23
SIAC's Part 20 claim against Powell Tolner relates to three of the breaches alleged in McAlpine's schedule, namely items SPN 1, SPN 2 and KAW 1. SIAC contend that Powell Tolner was in breach of contractual duty to McAlpine in a number of respects, in particular failing to advise about the likely differential movement and the allowances which should be made for such differential movement.

24
SIAC's Part 20 claim against White Young relates to 15 of the breaches alleged in McAlpine's schedule, namely items SPN 1 to SPN 7 inclusive, SPN 9, SPN 11, KAW 1, KAW 7, KAW 10, KAW 11, KAW 21 and KAW 22. SIAC contend that White Young was in breach of contractual duty to McAlpine in a number of respects, including design, co-ordination, checking and so forth.

25
It is not necessary for present purposes to review the Part 20 claim against Parker.

26
The second case management conference in this action was fixed for Friday 16th December at 3.30 p.m. The late start time for this case management conference with a substantial agenda was fixed in order to accommodate other commitments of certain counsel. The hearing duly started at 3.30 p.m. and continued for two and a half hours. In the first part of the hearing I heard and determined of the application of Powell Tolner that it should be discharged from the action on the grounds that the Part 20 claim form was served nine days after the date fixed in the first directions order. I dismissed that application. Powell Tolner remains a Part 20 defendant in these proceedings.

27
In the second stage of the hearing on Friday evening I heard (a) McAlpine's application to join Norman as third defendant in the main action and (b) Norman's application for a stay of the Part 20 proceedings, in order to facilitate compliance with the Protocol. These linked applications were heavily contested on all sides and the argument continued until 6.00 p.m. By then it was too late to give judgment. I said that I would give my decision on these two applications at 9.00 a.m. on Monday morning. This I now do.

28
It is appropriate for me first to consider the correct approach to the applications which have been made and then to deal with the specific applications themselves.

**PART 4: HOW DOES THE PROTOCOL APPLY TO ADDITIONAL PARTIES WHO ARE BROUGHT INTO A MULTI-PARTY ACTION?**

29
The Protocol sets out a procedure to be followed before the commencement of litigation. The objectives are set out in paragraph 1.3 as follows:

"The objectives of this Protocol are as set out in the Practice Direction relating to Civil Procedure Pre-Action Protocols, namely:

(i) to encourage the exchange of early and full information about the prospective legal claim;

(ii) to enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings;

(iii) to support the efficient management of proceedings where litigation cannot be avoided."

30
The aim of the Protocol is set out in paragraph 2 of the Protocol as follows:

"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 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."

31
Section 3 of the Protocol requires the claimant to send a letter of claim to each prospective defendant. Section 4 requires the defendant to send a letter of response within 28 days (subject to extension) and the claimant to respond to any counterclaim within a similar period thereafter. Section 5 of the Protocol requires a pre-action meeting between the parties following the exchange of letters.

32
Paragraph 1.4 of the Protocol provides:

"**COMPLIANCE**

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'."

33
Paragraph 2 of the Practice Direction - Protocols provides:

"2.1 The Civil Procedure Rules enable the court to take into account 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(5)(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 otherwise not 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;

(3) if the party at fault is a claimant in whose favour an order for the payment of damages or some specified sum is subsequently made, an order depriving that party of interest on such sum and in respect of such period as may be specified, and/or awarding interest at a lower rate than that at which interest would otherwise have been awarded;

(4) if the party at fault is a defendant and an order for the payment of damages or some specified sum is subsequently made in favour of the claimant, an order awarding interest on such sum and in respect of such period as may be specified at a higher rate, not exceeding 10% above base rate (cf. CPR rule 36.21(2), than the rate at which interest would otherwise have been awarded.

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 a position than he would have been in if the protocol had been complied with."

34
It will be noted from the provisions which I have read out that the ordering of a stay to facilitate compliance with the Protocol procedures is not specifically spelt out as a sanction or remedy for non-compliance with the Protocol. Nevertheless, paragraph 6 of the Protocol, which deals with proceedings which need to be started urgently because of limitation difficulties, does provide for the possibility of the court ordering a stay of litigation to enable the Protocol procedures to be complied with.

35
Furthermore, paragraph 2.6.1 of the second edition of the TCC Guide provides:

"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."

36
The language of the Protocol suggests that it is directed to parties who are about to embark upon litigation. That is the claimant and those defendants whom the claimant is proposing to sue. The Protocol procedures are carried out before any proceedings are begun. Thus, neither party at the time of the Protocol procedures is working within the constraints of a timetable imposed by the court.

37
The Protocol does not expressly address the position of other parties who may become involved as the litigation proceeds. The joinder of additional parties, however, is a commonplace event in the Technology and Construction Court, where litigation arises out of a major building project (as in the present case) in which numerous subcontractors and professional firms have been involved.

38

His Honour Judge Wilcox considered the position of Part 20 defendants in Daejan Investments Ltd. v. Park West Club Ltd. [2004] BLR 223. Judge Wilcox held that a Part 20 claimant is obliged to comply in substance with the terms of the Protocol. The judge made a costs order in that case to compensate the Part 20 defendant for certain non-compliances with the Protocol which had occurred. Daejan was a case in which, so it appears, the Part 20 claimant had a proper opportunity to comply with the Protocol before commencing Part 20 proceedings. I respectfully agree with the reasoning of Judge Wilcox in that case.

39
What is the position in relation to parties who are brought into an ongoing action without having been involved in the previous Protocol procedures? In this situation there are two conflicting considerations. On the one hand, the new parties should not be deprived of the benefits of the Protocol. On the other hand, it is desirable, if possible, that the existing trial timetable should be maintained.

40
I have come to the conclusion that there is no simple formula or universal answer to this problem. The following considerations are, however, relevant to the exercise of the court's case management powers:

(1) When was it known that the party in question was going to be joined in the action?

(2) What information about the action and the underlying dispute was given to that party before joinder and when?

(3) How large a part does the new party play in the action as a whole?

(4) What stay, if any, could be accommodated in the proceedings against the new party without jeopardising the overall timetable?

(5) Does justice require that the whole timetable should be put back and that a new trial date should be fixed?

(6) Could the new party be compensated in costs for any non-compliance with the Protocol? If so, should the question of costs be addressed immediately or should that question be addressed at the end of the action?

(7) Is there any way (other than a stay) within the parameters of the existing timetable by which the new party could be put in the same position that it would occupy if the Protocol had been followed?

41
In exercising its case management powers, the court will be concerned, if possible, to maintain the timetable to which the existing parties are working. Any change of trial date may lead to a change of counsel, additional costs and all manner of problems for the existing parties. On the other hand, the court will also be concerned to protect new parties against injustice and to protect the procedural rights of weaker parties against the big battalions.

42
The considerations which I have set out above all seem to me to be consistent with the overriding objective contained in Part 1 of the Civil Procedure Rules.

**PART 5: NORMAN'S APPLICATION FOR A STAY OF THE PART 20 PROCEEDINGS**

43
Mr. Simon Hargreaves, on behalf of Norman, applies for a stay of the Part 20 proceedings against Norman on the grounds that SIAC commenced those proceedings without first complying with the Protocol. In support of his application, Mr. Hargreaves took me through the correspondence in some detail, including, but by no means limited to, the letters referred to in Part 2 above. It can be seen from the correspondence that it was McAlpine rather than SIAC who communicated with Norman. Norman was sent a good deal of information about Onslow House and the related claims. However, Norman never received any formal letter of claim under the Protocol. It can also be seen that at some point in 2005 Norman went into creditors' voluntary liquidation. Norman and its representatives never sent any substantive response to the various letters intimating claims or possible claims. Norman's insurers did not accept that insurance cover would extend to the claims concerning Onslow House until 3rd November 2005. Furthermore, those insurers did not instruct solicitors and counsel to act on Norman's behalf until 13th December 2005. That was just three days before the second case management conference.

44
Mr. Hargreaves submits that SIAC had ample opportunity to go through the Protocol procedures between 27th September 2005 (the date of the first case management conference) and 30th November 2005 (the date for service of the Part 20 proceedings). It is not clear to me, however, that this is so. It must be remembered that SIAC first gained access to McAlpine's correspondence with the professionals during the summer of 2005. I am not sure what progress SIAC had made on digesting this correspondence by 27th September. Certainly SIAC had not made a decision as at that date about which professionals it would join.

45
More importantly, however, I do not think that the Protocol process would have achieved anything during that period. Norman was treating the Onslow House matter as an unsecured claim in the liquidation. It appears from the correspondence that no one on Norman's side was able or willing to grapple with the issues.

46
Let me now go through the relevant considerations. I shall use the same numbering as set out in Part 4 of this judgment.

47
First consideration - it was uncertain until some date in October or November whether SIAC would join Norman as a Part 20 defendant. Second consideration - a considerable amount of information about the claims concerning Onslow House was provided by McAlpine to Norman in and after April 2005. Third consideration - in the Part 20 proceedings only eight of the alleged breaches are pursued against Norman and I have previously identified which breaches those are. Fourth consideration - in my view, a stay of Part 20 proceedings against Norman for any significant period would jeopardise the trial date of January 2007. Mr. Hargreaves stated during argument, when asked by me, that he was looking for a stay until mid February, i.e. a period of some two months. Fifth consideration - in all the circumstances, I do not consider that justice requires that the whole timetable should be put back. Sixth consideration - if and insofar as Norman has suffered loss as a result of SIAC's non-compliance with the Protocol, this loss can be redressed by the costs order at the end of the litigation. Seventh consideration - in my view, Norman's difficulties can be accommodated within the present timetable. SIAC's Part 20 claim form conveys the same information as a Protocol letter. Mr. Hargreaves' queries about that pleading, which he raised in argument, can be addressed by a request for information.

Furthermore, the present litigation timetable contains a window for mediation in February and March. This mediation could serve the same purposes as the meeting which is required under the Protocol. Furthermore, it seems to me that if any party so requests, it would be possible for the court to order a modest extension of the mediation window.

48
Let me now draw the threads together. I certainly do not condone SIAC's failure to comply with the Protocol. On the other hand, in the situation we are now in, it is not appropriate to stay the Part 20 proceedings. Insofar as Norman has suffered loss through non-compliance with the Protocol, that loss will have to be quantified at the end of the action and that loss can be compensated by costs in due course.

49
Accordingly, Norman's application for a stay of the Part 20 proceedings is refused.

**PART 6: MCALPINE'S APPLICATION TO JOIN NORMAN AS DEFENDANT IN THE MAIN ACTION**

50
The relevant partner in McAlpine's solicitors has made a witness statement in support of McAlpine's application to join Norman as defendant in the main action. Paragraphs 10 and 11 of that witness statement read as follows:

"10. Although [McAlpine] originally intended to pursue this litigation against only SIAC (the party which appears to [McAlpine] to be primarily responsible for the deficiencies in the curtain walling), [McAlpine] has (particularly since it became clear that SIAC intended to join other parties to the proceedings) been actively considering whether and if so to what extent it has claims against the other parties which SIAC has joined. [McAlpine] considers that it has claims against [Norman] and [White Young], which it wishes to pursue in these proceedings and have determined at trial together with its claims against SIAC, and SIAC's Part 20 claims against those (and other) parties. Accordingly [McAlpine] has prepared an Amended Claim Form which adds [Norman] and [White Young] as Third and Fourth Defendants in the main action… and is well advanced in preparing (a) Amended Particulars of Claim which incorporate claims against these two additional parties, and (b) an Amended version of the Non-Compliance Schedule which deals with [McAlpine's] claims against [Norman] and [White Young] by reference to the specific Non-Compliances. [McAlpine] expects to be in a position to serve final versions of these Amended Particulars of Claim and supporting documents within six days of the [case management conference] on 16 December, i.e. by 22 December 2005.

11. There is a significant degree of overlap between the Part 20 claims made by SIAC against [Norman] and [White Young] and [McAlpine's] proposed claims against those parties, in that, as against each of [Norman] and [White Young]:

(a) plainly, both SIAC's Part 20 claim and [McAlpine's] proposed claim arise out of the same design, co-ordination and inspection work carried out by (and obligations owed by) the particular consultant in relation to the Project;

(b) like SIAC, [McAlpine] proposes to claim against each consultant in relation to the movement joint allegations, i.e. there is complete overlap in the claims so far as these allegations (Spn01, Spn02, Kaw01) are concerned. As against [Norman], [McAlpine] first told [Norman] that it would claim against them in respect of these allegations on 25 April 2005. In early June 2005 [White Young]

confirmed that they had produced a document for us setting out their position in respect of the movement joints allegations... We have yet to see this document;

(c) as regards the further Non-Compliances in respect of which SIAC pursues these consultants, listed at paragraph 9 above, [McAlpine] proposes to proceed against [Norman] and [White Young] in respect of some but not all of these. However, it is [McAlpine's] present intention to pursue [Norman] and [White Young] also in relation to further Non-Compliances which are not (presently) pursued by SIAC in relation to these consultants. In relation to [Norman] there are about 50 such further Non-Compliances, and in relation to [White Young] there are about six. Two thirds or more of these further Non-Compliances which [McAlpine] intends to pursue (particularly against [Norman]) relate purely to failures on the part of [Norman] to notice (and notify [McAlpine]) of the Non-Compliances during the course of [Norman's] inspections of the works."

51
Mr. Hargreaves, for Norman, opposes McAlpine's application on the ground that McAlpine has failed to comply with the Protocol. Furthermore, Norman has lost touch with relevant staff and has lost relevant documents following the administration and the transfer of Norman's business. Furthermore, says Mr. Hargreaves, McAlpine are proposing to pursue a more extensive claim against Norman than the claim which SIAC are pursuing, but the full extent of McAlpine's claim against Norman will not be apparent until the amended particulars of claim are served, and it is not yet known which are the 50 additional non-compliances referred to in paragraph 11 of the witness statement.

52
It seems to me, from reading the correspondence, that McAlpine has not complied with the Protocol as against Norman. On the other hand, McAlpine did provide a fair amount of information to Norman and received precious little response. It seems to me that Norman's present difficulties arise from matters unrelated to the Protocol, namely the departure of staff, the going into administration of Norman, and the loss of documents.

53
I shall not go through for a second time the exercise undertaken in Part 5 of this judgment. Consideration of the relevant factors leads me to two conclusions. (i) Despite McAlpine's non-compliance with the Protocol as against Norman, this is not an appropriate case in which (a) to refuse leave to join Norman as defendant or (b) to order a stay of McAlpine's claim for the purpose of going through the Protocol procedures. (ii) If and insofar as Norman can establish financial loss as a result of non-compliance with the Protocol, this can be compensated for by an appropriate costs order at the end of the case.

54
There is, however, one matter which causes me concern. If McAlpine expands the claim against Norman in the manner indicated in paragraphs 10 and 11 of the witness statement, then Norman may have difficulty in keeping up with the trial timetable given the other handicaps mentioned above. It is not possible to gauge this matter until McAlpine's amended particulars of claim and amended schedule of non-compliance have been served.

55
In the result, my decision on McAlpine's application is as follows. I grant permission for McAlpine to join Norman as defendant in the main action. If Norman wishes to apply for the trial timetable or the trial date to be put back, I will hear that application after the amended particulars of claim have been served.

**PART 7: THE POSITION OF WHITE YOUNG AND POWELL TOLNER**

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On 15th December 2005 (the day before the second case management conference), White Young's solicitors sent a letter to McAlpine's solicitors in the following terms:

"We confirm our client's consent to your application to join them as defendants in the main action. We confirm our client's agreement to the sensible proposed directions contained in your letter of 14th December with the following caveats. We note you accept our clients have agreed to a time for service of their defence without seeing the amended particulars and as such this may give rise to unforeseen difficulties with the timetable. We agree our client will be in a position to deal with this and raise it with the court during January if necessary. While we do not consider it is appropriate for experts to meet prior to the mediation, it would facilitate resolution if they prepare and exchange preliminary reports. We are grateful for your willingness to provide advanced disclosure as we anticipate some disclosure will clearly be of benefit to us in assessing the claim made against our client. It is likely that advanced disclosure will be sought from other parties."

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In view of the substantial agreement between White Young and McAlpine, White Young did not instruct counsel to attend the case management conference. However, Ms. Sood of Beale & Co., White Young's solicitors, has attended the hearing and I am grateful for her assistance. Ms. Sood does not seek to resile from her letter dated 15th December. In the course of her brief submissions she said that White Young wished to move forward and to have the matter resolved. However, she expressed the fear that McAlpine's amended particulars of claim (when served) will be deficient. After some discussion between myself and her during her submissions, it seemed to me, and I think that she accepted, that the best way to deal with this concern is for me to hear any application which White Young may wish to make after it has received and considered the amended particulars of claim.

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Let me turn now to Powell Tolner. Powell Tolner are only involved in the Part 20 proceedings. McAlpine do not seek to join Powell Tolner in the main action. Powell Tolner did not indicate any application for a stay in advance of the case management conference. However, during the hearing and having heard Mr. Hargreaves' forceful submissions, Ms. Vaughan-Neil for Powell Tolner submitted, perfectly reasonably, that if there is a stay of the Part 20 proceedings against Norman, then there should be a similar stay of the Part 20 proceedings against her clients. In the event I have held that there should be no stay of the Part 20 proceedings against Norman. In the circumstances, and having regard to all of the correspondence which I have read, I see no ground for granting a stay of the Part 20 proceedings against Powell Tolner.

59 That deals with the issues which have been argued. It only remains for me to thank all advocates for their considerable assistance. I anticipate that the remaining matters in the case management conference can be dealt with expeditiously.

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