Neutral Citation Number: [2009] EWHC 2139 (TCC)

Claim No: HT-09-26

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 18/08/2009

Before:

MR JUSTICE CHRISTOPHER CLARKE

- -

Between:

CITY & GENERAL (HOLBORN) LTD **Cla**

- and -

STRUCTURE TONE LIMITED **First Defe**

-and –

AINSCOUGH CRANE HIRE LIMITED Second

Defendant

AND

Claim Number HT-09-27

BETWEEN:-

CITY & GENERAL (HOLBORN) LIMITED Claimant

-and –

(1) ROYAL & SUN ALLIANCE INURANCE PLC

(2) ZURICH INSURANCE PLC

(3) ALLIANZ INSURANCE PLC

(4) NORWICH UNION INSURANCE LIMITED

(5) AXA INSURANCE UK PLC

- -

- -

Mr Manus McMullan (instructed by **Clyde & Co**) for the **Claimant**

Mr Terry (instructed by **DWF LLP**) for the **Defendant**

Hearing dates: 23rd July 2009

- -

Judgment

MR JUSTICE CHRISTOPHER CLARKE :

1
This is an application by the defendants in both actions to set aside an order made by Ramsey, J on 1st June 2009 by which he extended the claimant's time for serving the claim form in the actions.

2
City & General (Holborn) Limited ("City"), the claimant, is the owner and developer of 25 Southampton Buildings/11 Staples Inn ("the Premises"), which was formerly the patent office. From 2001 onward works ("the Works") were being carried out at the Premises by Kier Regional Ltd ("Kier"), which traded as "Wallis", pursuant to a contract ("the building contract") with City. The building contract was in the JCT 1998 Standard form. The contract sum was £ 11,650,000. By clause 20 City was responsible for all risks insurance and insurance of existing structures.

3
Clause 25 of the building contract stated that on the occasion of one of the specified Relevant Events, Kier was entitled to an extension of time in certain circumstances. Such an extension would extend the contract completion date and prevent City from deducting LADs (liquidated and ascertained damages) for the extended period. Clause 26 of the building contract stated that if progress of the works were disrupted or delayed by reason of one of the specified matters, Kier was entitled in certain circumstances to claim in respect of loss and expense caused by the period of disruption and/or delay.

4
On 18th January 2003 a crane on a site adjacent to the Premises carried out an operation which is said by City to have caused a water main in the highway to fracture. The crane sub-contractor was Ainscough Crane Hire Limited ("Ainsclough"), the defendant in claim HT-09-26 ("Action 26"). In Action 26 City claims against Ainscough in negligence and nuisance for the loss and damage it claims to have suffered as a result of the consequent disruption of the Works.

5
In the claim HT-09-27 ("Action 27"), City claims against the defendant insurers under a Contractor's All Risks and a Buildings Insurance policy on the grounds that they are liable to indemnify City against these losses. In addition City claims in that action an indemnity arising out of two different events:

(a)
flooding to the basement of the Premises in May 2002;

(b)
Pseudomonas infection of the water supply which is said to have been first detected on 17th May 2004.

It is not clear whether this infection resulted from the events of May 2002 or January 2003 or because of some other unrelated and unidentified cause.

6
Kier began an arbitration against City in which it claimed that the incident with the crane and a large number of other alleged "Relevant Events" had caused it delay, loss and expense and additional cost to compete the development. It claimed an extension of time and that it was excused from paying liquidated damages, and entitled to variations and damages itself. City does not accept these claims. In particular it does not accept that something such as the fracture, occurring on the highway and not

on the Premises, is capable of constituting a Relevant Event. Nor does it accept that the Relevant Events relied on were causes of delay.

7
Prior to March 2007 there had been discussions between City and Royal & Sun Alliance ("RSA") about insurance claims in respect of the three incidents. On 27th March 2007 RSA wrote to City responding to the claims. They offered the following:

(i)
£ 24,022.06 in response to a claim for £ 552,291.63 in respect of the burst water main in January 2003; on the basis that the relevant policy covered the reasonable direct cost of remedial work + preliminaries and overheads in respect thereof; but not additional costs of construction and the like;

(ii)
£ 25,000 in respect of water damage to the basement in response to a claim now presented as £ 1,197,638.89. This was the limit of cover for Loss Minimisation and Prevention under the property policy. The contention was that there was no "Damage" as required by both policies;

(iii)
Nothing in respect of the pseudomonas claim on the basis that it had not been reported promptly and that various adjudications had taken place without insurers' knowledge

8
On 16th January 2009 City issued claim forms in each action. Before then City had written no letter before action; nor had it complied with the Pre-Action Protocol for Construction and Engineering Disputes. The time for serving the claim form would expire on 17th May.

The applications

9
On 8th May City issued two ex parte applications for extensions of time for service of the claim forms until January 2010. The applications were made on the basis that the pending arbitration with Kier included claims arising out of and relevant to the claims in Actions 26 and 27 including the extent to which City was unable to deduct liquidated and ascertained damages from sums owed to Kier and of the loss and expense owed to Kier as a result of the flood and pseudomonas infestation at the Premises. It was said that it would not be possible for City:

"to establish with any certainty the proper extent of the loss and damage arising under or pursuant to the claim"

until the arbitrator's award and that it would therefore be premature to serve the claim on the Defendants at this time.

The telephone conversation of 15th May

10
Ms Starey, an associate with Clyde & Co, says in her witness statement that on Friday 15th May, with time about to expire, she telephoned the court and spoke to a member of the case administration unit of the TCC. He told her that City's application for an order to extend time for service of the claim form

"would be treated as being in time as the mid-term break would delay Mr Justice Ramsey's deliberations upon it. Mr Justice Ramsey J would return from his break on Monday 18th May and …

would grant [City] a short extension in any event to cover the period of his deliberations whether or not City received the extension requested so as not to unfairly prejudice City for the delay due to Ramsey J's absence."

In consequence she decided, after consultation with the supervising partner, not to serve the claim form.

11
On 19th May the case administrator wrote:

"Mr Justice Ramsey has seen the applications in these claims for the time for service of the Claim Form to be extended until 1 January 2010.

He is concerned that the defendants to the claim may not have been given notice of the claim and that the relevant pre-action protocols may have been completed: see para 6 to the Pre-Action Protocol for Construction and Engineering disputes. He would ask for clarification as to the position.

In addition, he considers that on the facts of the case the most appropriate procedure and would be that the claim form to be served (with any necessary short extension) and for proceedings to be stayed after the defendants have acknowledged service, while the proceedings are preserved, subject to any application by the Defendants."

12
On 20th May Ramsey J's clerk e-mailed Clyde & Co on his behalf informing them that in the light of three Court of Appeal cases that the judge had been reviewing on another matter [1] he was now of the opinion that it would not be appropriate to grant the extension, and inviting them to consider the three cases.

13
On 22nd May Clyde & Co wrote to the TCC, for the attention of Ramsey J, a long letter in which they confirmed that the defendants had not been given notice of the claim nor had the pre-action been protocol followed. They also responded to the 20th May e-mail with a discussion of the authorities. They invited the Court, if it was not minded to grant the long extension sought, to grant the extension contemplated by the letter of 19th May.

14
On 1st June Ramsey J extended time for the service of the claim form in both actions until 16th June. The draft and actual orders did not contain, as they should have done a statement of the right of the defendants to apply to set it aside: CPR 23.9 (3). The claim forms together with Particulars of Claim were served on 15th June 2008.

The Particulars of Claim

Action No 26

15
The Particulars of Claim in Action No 26 pleaded clauses 25 and 26 of the building contract. City said that Kier had claimed that the fractured water main was a Relevant Event and a matter that delayed the progress of the works, and had claimed an extension of time and loss and expense under the contract and damages and various sums as variations. I refer to these types of claim as "the Kier averments". It was said that City did not accept these claims which were live issues in the ongoing arbitration.

16
Pararaphs 18 – 22 read as follows:

“18 The First Defendant’s and/or Second Defendant’s negligence and/or

nuisance has caused the Claimant to suffer loss and damage, including

but not limited to:

(1) any additional sums due for variations and/or as part of Kier’s

Final Account and interest;

(2) loss and expense or damages payable to Kier pursuant to the

Building Contract and interest;

(3) loss of ability to deduct Liquidated and Ascertained Damages

(“LADs”) from the sums owed to Kier under the Building

Contract

.

19 Pending the outcome of the arbitral proceedings, the Claimant cannot

say how much it expects to recover from the Defendants.

20 In the event that the Arbitrator finds sums to be due to Kier by reason

of the insured events set out above, the Claimant claims damages from

the Defendants in respect of the loss and damage suffered.

21 The Claimant is also entitled to and claims damages in respect of the

following loss and damage suffered.

(1) the cost of the redesign and repair work to the Property, including architects’ surveyors’ and consulting structural and mechanical and electrical engineers’ fees necessarily incurred in the repair reinstatement or replacement of the Property;

(2) loss of rent due to delayed completion;

(3) additional finance costs for the period of delay.

22 The quantum of these losses will be particularised in due course.”

17
City’s claim was for damages and interest.

Action No 27

18
The Particulars of Claim in the second action also pleaded clauses 25 and 26 of the building contract. The insurance contracts were then pleaded. City asserted that during the works there was Damage to

the property as defined in both policies in the form of the fractured water main, the flooding to the basement and the pseudomonas infestation.

19
The pleading then set out Kier's claims in respect of the fractured water main made in the arbitration as summarised in paragraph 15 above. It went on to refer to the discovery of flooding in around May 2002 in the basement room where the boiler room for the refurbished building was to be located and the discovery on 17th May 2004 of pseudomonas in the water system. The pleading recorded that the Kier averments had been made in respect of all three incidents.

20
The pleading then recorded the arbitration between Kier and City and (in para 41) claimed that City was entitled to be indemnified under the CAR policy in respect of the following sums to the extent that they had been caused by the three insured events in the following terms:

"41. The Claimant is entitled to be indemnified by the First and Second

Defendants under the CR Contract in respect of the following sums,

to the extent that the same have been caused by the three insured

events:

(1) any additional sums due for variations and/or as part of Kier's

Final Account and interest, such sums being a recoverable cost of

repair, reinstatement and/or replacement under the terms of the

CAR Contract;

(2) any sums payable to Kier for loss and expense pursuant to the

Building Contract and interest, such sums being a recoverable

cost of repair, reinstatement and/or replacement under the terms

of the CAR Contract;

(3) loss of ability to deduct Liquidated and Ascertained Damages ("LADs") from the sums owed to Kier under the Building Contract being sums foregone or incurred in to avoid or diminish the Damage."

21
The pleading then continued in very similar terms to Action No 26 as follows:

"42. Pending the outcome of those proceedings, the Claimant cannot say

how much it expects to recover from the Defendants.

43. In the event that the Arbitrator finds sums to be due to Kier by reason of the insured events set out above, the Claimant claims an indemnity and/or damages from the Defendants in respect of the loss and damage suffered.

44. The Claimant is also entitled to and claims an indemnity or alternatively damages from the First and Second Defendants in respect of the following sums, each sum being a recoverable cost or repair, replacement and/or reinstatement under the CAR Contract:

(1) the cost of the redesign and repair work to the Property, including architects' surveyors' and consulting structural and mechanical and electrical engineers' fees necessarily incurred in the repair reinstatement or replacement of the Property Insured consequent upon Damage thereto, such sums being a recoverable cost of repair, reinstatement and/or replacement under the terms of the CAR Contract;

(2) loss of rent due to delayed completion and additional finance costs for the period of delay being sums forgone or incurred in to avoid or diminish the Damage.

45. The quantum of the losses will be particularised in due course."

22
There then followed a claim under the Buildings Insurance policy in which City claimed on much the same basis as under the CAR policy.

23
City's claim was expressed to be for a declaration of entitlement to an indemnity under the two polices and alternatively damages.

24
As is apparent from this history the applications for an extension of time were made (a) before the expiry of the time prescribed for service of the claim form; and (b) without notice to any of the defendants.

CPR 7.6.

25
CPR 7.6. provides:

"Extension of time for serving a claim form

7.6

(1) The claimant may apply for an order extending the period for compliance with rule 7.5.

(2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made –

(a) within the period specified by rule 7.5;…

(3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 …… the court may make such an order only if –

(a) the court has failed to serve the claim form; or

(b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and

(c) in either case, the claimant has acted promptly in making the application.

(4) An application for an order extending the time for compliance with rule 7.5 –

(a) must be supported by evidence; and

(b) may be made without notice.

26
The principles upon which the court acts in respect to applications to extend time have been the subject of substantial appellate consideration in Hashtroodi v Hancock[2004] 1 WLR 3206; Steele v Mooney [2005] 2 AER 256; Hoddinott v Persimmon Homes (Wessex) Ltd [2008] 1 WLR 806 and Collier v Williams[2006] EWCA Civ 20; and further summary at first instance e.g. by Ramsey J in Imperial Cancer Research Fund v Ove Arup [2009] EWHC 1453 and Gross J in F G Hawkes (Western) Ltd v Beli Shipping Co Ltd[2009] EWHC 1740 (Comm).

27
I do not propose to attempt a yet further summary of the applicable principles. It is convenient to take the summary made by Ramsey J in Imperial Cancer:

“ 9 (1) The general rule is that a claim form must be served within 4 months after date of issue: CPR 7.5(1);

(2) In relation to an application under CPR 7.6.(2), that rule does not impose any threshold condition on the right to apply for an extension of time. The discretion to extend time should be exercised in accordance with the overriding objective identified in CPR 1.1: Hashtroodi at [17], [18] and [19].

(3) In order to deal with an application under CPR 7.6(2) justly it will always be relevant for the court to determine and evaluate the reason why the claimant did not serve the claim form within the specified period: Hashtroodi at [22]

(4) The preconditions in CPR 7.6(3) do not apply to 7.6(2) but those requirements will always be relevant to the exercise of discretion on an application under CPR 7.6(2) but the fact that the conditions are not satisfied is not necessarily determinative of the outcome of a CPR 7.6(2) application: Collier at [87];

(5) The matters which the Court may take into account include the following in relation to the reason why the Claimant has not served the claim form within the specified period:

(a) Whether the claim has become statute barred since the date on which the claim form was issued is a matter of considerable importance.

Where there is doubt as to whether a claim has become time-barred since the date on which the claim form was issued, it is not appropriate to seek to resolve the issue on an application to extend the time for service or an application to set aside an extension of time for service. In such a case, the approach of the court should be to regard the fact that an extension of time might "disturb a defendant who is by now entitled to assume that his rights can no longer be disputed" as a matter of "considerable importance" when deciding whether or not to grant an extension of time for service: Hashtroodi at [18] citing Zuckerman on Civil Procedure (2003) at paragraph 4.121; Hoddinott at [52].

Where the application is made before the end of the four month period the fact that the claim is clearly not yet statute barred is a relevant consideration: Hoddinott at [52], [53].

(b) Whether before the expiry of the four month period the nature of the claim was brought to the attention of the defendant: Hoddinott at [57].

(c) Whether a party was in a position where it could not determine whether the claim had real prospects of success and could not responsibly proceed against the defendant without an expert report which was delayed awaiting a response to proper requests for information from the defendant's solicitors: Steele at [33].

(6) In considering whether to set aside an order granting an extension of time it is not a relevant consideration that the claimant has proceeded in reliance of the extension of time granted on the ex parte application: Hoddinott at [48] to [50].

(7) In relation to the reason why the claim form has not been served, then:

(a) Where the Claimant has taken all reasonable steps to serve the claim form, but has been unable to do so, the Court will have no difficulty in deciding that there is a very good reason for the failure to serve: Hashtroodi at [19].

(b) If the reason why the Claimant has not served the claim form within the specified period is that he (or his legal representative) simply overlooked the matter, that will be a strong reason for the Court refusing to grant an extension of time for service: Hashtroodi at [20].

(c) Whilst the view could be taken that justice requires a short extension of time to be granted even when the reason for the failure to serve is the incompetence of the claimant's solicitor, especially if the claim is substantial, there are limitation periods and a claimant has four months in which to serve the claim form, which does not have to contain full details but only a concise statement of the nature of the claim: Hashtroodi at [21].”

28
Mr McMullan for City submits:

(a) that there was good reason for the claim form not to be served within the prescribed period;

(b) that the authorities make a distinction between cases in which failure to serve in time is the result of incompetence or, at least, failing by a party or his solicitors, when an extension is unlikely, and those (such as, he submits, the present) where that cannot be said, where an extension is likely; and

(c) that City was entitled to rely upon what it was told about a short extension being granted in any event;

and that time for service of the claim forms should, accordingly, be extended.

The claimant’s submissions

Good reason?

29
The main hearing in the arbitration took place between 7th January and 17th March 2009. Closing submissions were exchanged on 15th May. At issue in the arbitration is who, as between Kier and City, is responsible for the delays that occurred to the project, being 80 weeks delay out of a total period of 150 weeks. City does not accept that it is responsible for any of the delay. Until the arbitration is completed City cannot say whether it is responsible for any delay and what its losses are, or whether it has any. This applies to all its losses. In those circumstances the request for an extension of time was not as a result of any failure by City or its solicitors. It was a result of the practical difficulty presented by the slow progress of the arbitration.

The distinction in the authorities

.

30
The authorities show that permission to extend the time has been refused where the claimant served the proceedings at the wrong address; where the claimant waited for the defendant to nominate solicitors (Hashtroodi) or respond to a letter of claim (Leeson v Marsden [sub nom Collier]); or where the claimant was waiting on an expert who was instructed late (Glass v Surrendran [sub nom Collier]). All these, Mr McMullan submits, are examples where the solicitors have been at fault. Here, by contrast, the position is different. It was no fault of City or its advisors that City could not say what its losses were. The present situation is more akin to Steele v Mooney in which time was extended where the claimant lacked an expert's report without which it was inappropriate for it to launch proceedings.

The message from the Court

31
It would be wrong, Mr McMullan submits, to set aside Ramsey J's order in circumstances where the court had indicated that a short extension would be granted in any event so that City was not unfairly prejudiced. If that indication had not been given service would have taken place in time.

Discussion

32
City would have had no difficulty in serving the defendants with the claim forms issued on 16th January 2009 before 17th May, just as it had no difficulty doing so afterwards. Both defendants have registered offices in England and Wales.

33
The reason put forward in the application for seeking an extension was because it would not be possible to establish with any certainty the proper extent of the loss and damage arising under the claim until the arbitration was concluded. I accept that, insofar as the claim depended upon the liability of City to Kier under the building contract, the amount of the loss could not be determined until the award. But I am far from convinced that that applies to all the loss pleaded in the Particulars of Claim in the two actions. These appear to make a distinction between losses whose resolution depends on the outcome of the arbitration (pleaded at paras 18-20 of the Particulars of Claim in Action 26 and paras 41-43 and 48 - 50 of the Particulars of Claim in Action 27); and those that do not so depend but which await further particularisation (see paras 21-22 of the Particulars of Claim in Action 26 and paras 44-45 and 50-53 in Action 27). Claims in the latter category are not expressed, like those in the former category, as arising "in the event that the Arbitrator finds sums to be due to Kier" but as sums to which City "is also entitled", the quantum of which "will be particularised in due course": see paras 43/44 and 50/51 in No 27. Mr Morris' witness statement in support of the applications for permission to extend time did not contend that the claims were wholly contingent.

34
Mr McMullan submitted that the claims in the latter category were all dependent on the outcome of the arbitration in that, if Kier lost, it would be responsible for them. In respect of the cost of the redesign and repair work to the Property incurred by City it is not evident that that must be so. Even if it is, that would not prevent a claim against Ainscough and the insurers, in respect of which there might be rights of contribution and subrogation. In relation to the claim for loss of rent and additional

finance, Mr McMullan submitted that they would be covered by the liquidated damages (at apparently the rate of £ 50,000 per week) that Kier would have to pay. I do not see why the existence of a liquidated damages claim in the building contract is a defence to a claim against the crane sub-contractors for negligence or against the insurers under the insurance policies. The Particulars of Claim do not suggest that any of these three claims are contingent on the outcome of the arbitration. Further these claims are for sums particulars of which are not dependent on the arbitrator's award. In any event, even if all the claims were contingent on the outcome of the arbitration, City could still claim a declaration of its right to be indemnified against any loss flowing from the occurrence of that contingency. A claim for an indemnity is the primary claim in the Particulars filed in respect of the insurance claims.

35
There was no difficulty in drafting Particulars of Claim in either action. They accompanied the claim form. It is not suggested that the Particulars served are defective. They were settled by Leading and Junior Counsel. It was pointed out that that would have involved cost; but even so the expense cannot have been out of the ordinary. In any event the fact that the drafting of Particulars of Claim involves cost is not, by itself, a ground for not providing them.

36
From the point of view of case management there would be something to be said for postponing the production of Particulars of Claim in both actions until the award in the arbitration was produced. This, if desirable, could have been achieved by agreement, or, if necessary by an application to the court, that the time for service of the Particulars should be postponed until then or for a stay. An alternative course, which Ainscough and the insurers and the Court might have preferred, was that there should be a pleading out of City's claims, since they had been the subject of no previous letter before action or compliance with the relevant protocol, on the basis that particulars could be given when the award was made. That was and is contemplated as being in the autumn. The arrival of the arbitrator's award would thus coincide with the sort of time at which any request for further information might have been expected to be complied with.

37
Whatever the position in relation to the Particulars of Claim there was in my judgment no good reason why the service of the claim form should have been delayed, let alone delayed until 2010: see Collier paras 148-150.The limitation period in respect of the first and second incidents had expired by 19th January 2009. The claim forms were issued very shortly before the expiry of the period in respect of the second incident. The rules require service within four months, a not ungenerous period in respect of a company registered in England and Wales.

38
The effect of extending the time for service of the claim forms will be to deprive the defendants of a limitation defence which would be available to them if permission was refused and City was compelled to issue fresh proceedings; and would "disturb a defendant who is by now entitled to assume that his rights can no longer be disputed". That is of particular significance in the present case where service of the claim forms was preceded by no letter before action or other intimation of suit. I accept that a claim had been made against the insurers to which they had responded in 2007. But there is no evidence that anything happened to move any claim forward after that.

39

Further, City is not in the position of someone who could not, or could not properly, take the step of serving proceedings as was the case in Steele. They could easily have done so. In Steele the claimant's solicitors did not know whether the claimant had a claim with real prospects of success and, if so, against which defendant, until they received an expert's report. That report was delayed because the first defendant had not responded to proper requests for his clinical notes. Dyson, LJ observed that the :

"situation was quite different from that which often arises where the claimant seeks an extension of time for service of the claim form because he or she wants further time to prepare a schedule of loss. In the present case, the outstanding information went to the very heart of the claimant's case. Without the expert's report she did not know whether she had a viable case."

The situation there appears to me to be markedly different. The solicitor could not properly file a statement of case in professional negligence, supported with a statement of truth, without a report which was delayed because of a failure of the first defendant. A similar situation applied in Imperial Cancer. The present case is more closely analogous to Hoddinott where an extension was sought because the claimants were not in a position to serve fully particularised particulars of claim.

40
Subject, therefore, to the impact of the communications from the court, I am satisfied, on the basis of the material before me and the full argument which I have heard from both parties, that it was not appropriate to give permission to extend time for service of the claim forms. City had left it until beyond the eleventh hour so far as the second incident was concerned to issue proceedings. In relation to the flooding in the basement the proceedings would have been time barred by January 2009 in any event. Whether that was so in respect of the pseudomonas infection depends on when it first arose. City had taken no steps to communicate to the defendants its intention to issue the proceedings to the defendants. It did not need to have an extension in order to justify issuing a claim form or, indeed, Particulars of Claim. The fact that it was arguably more appropriate from a case management point of view for the Particulars to be delayed does not justify not serving the claim forms themselves.

Communications from the Court

41
Do the communications from the Court make any difference?

42
Before I turn to answer that question I have some observations on what appears to have occurred. I do not wholly understand what the TCC administrator meant, or what he was understood to mean, by saying that the application would be treated as being in time as the mid term break would delay Mr Justice Ramsey's deliberations upon it. The application was in time in the sense that it was filed before the expiry of time for service of the claim forms. What appears to have been being said was that because the application had been filed before the expiry of the time for service of the claim forms City would, or could expect to, receive an extension up to the time that Ramsey J was able to consider the application (or shortly thereafter).

43
If this is what was said and understood it was inappropriate (a) for it to be said and (b) for it to have been acted on. Firstly, whatever order was to be made would depend, as the solicitors should have realised, on what the judge decided after studying the relevant material. No pre-indication should

have been given of what he would (or would not) decide; nor should it have been relied on as an assurance of what his decision would be. Secondly, the order was being sought ex parte. It was, thus, vulnerable to being set aside on an application made by the affected party. Any suggestion, therefore, that the claimant would be covered by the short extension begged the question of what might happen on any application to discharge.

44
The problem inherent in the 15th May communication manifested itself the following Tuesday 19th May after Ramsey J had considered the papers. He initially expressed the view, without deciding, that the appropriate procedure was for the claim forms to be served with any necessary short extension "subject to any application by the defendants" but on the next day, on reviewing the authorities, concluded that that would not be appropriate.

45
I do not accept that the fact that City was given to understand that there would be a short extension pending Ramsey J's consideration of the papers justifies extending the time for service. Hoddinott establishes that the fact that a claimant has forborne to serve the claim form because he has obtained an order for the extension of time for service ex parte is not a relevant consideration in deciding, inter partes, whether or not to extend time:

"Thus, if a claimant applies for and obtains an extension of time for service of the claim form without giving notice to the defendant, he does so at his peril. He should know that an order obtained in such circumstances may be set aside. He can take no comfort from the fact that the court has made the order. He cannot be heard subsequently to say that it was the court's fault that the order was made."

46
City cannot, in my judgment, be in any better position after receiving the indication which they did receive, from someone who was not a judge, as to what the judge would do, than they would have been in if a judge had, on the same day, actually made an order extending time for service of the claim form until (say) consideration of the question by another judge or some later time. Such an order would be vulnerable to discharge inter partes. The application to discharge is a rehearing of the issue, to be determined by the judge hearing it on the totality of the material before him. It is not a review of the decision made on the without notice application: Hashtroodi at para 33.

47
I am not therefore persuaded that I should reach a different view on account of what passed between Clyde & Co and the court administration. Clyde & Co must be taken to know that anything done ex parte was vulnerable to discharge inter partes. That is enough to dispose of the point.

48
I am also surprised at the absence of any satisfactory record of what is now said to be an important conversation at a pivotal time. The telephone conversation on 15th May appears from the telephone records to have lasted 3 minutes 24 seconds. Ms Starey was told that Ramsey J would be back on Monday 18th May. Her manuscript note reveals nothing more as to the content of the conversation. It was not preceded or followed by any written communication. Nor is it clear exactly what was the nature of her discussion with the supervising partner, of which no note was made. There is, thus, no record of the basis upon which it was considered appropriate not to serve the claim forms solely because of what the administrator had said.

49

In those circumstances I shall discharge the orders of Ramsey J, giving permission to extend the time for service of the claim forms in both actions, and set aside the service of the claim forms effected pursuant thereto. I invite submissions as to whether any further order than that needs to be made.

---

[1] The matter is unknown; but it is likely to have been Imperial Cancer v Ove Arup (see para 26 below) in which the argument took place on 21st May.