RWE Npower Renewables Ltd v J N Bentley Ltd
[2014] EWCA Civ 150; CA; Moore-Bick, Tomlinson, McCombe LJJ

This case concerns an appeal of the High Court decision ([2013] EWHC 978 (TCC)) reported in (2013) 24 CL 6. Pursuant to a contract dated 22 March 2010, J N Bentley Ltd (Bentley) was appointed by RWE Npower Renewables Ltd (RWE) to carry out civil engineering works on the Black Rock hydro-electricity plant in Scotland. The agreement was based on NEC3 ECC Contract including Options X5 and X7 (the contract). The contract included an order of precedence clause stating that the contract data would take precedence over the works information. After RWE attempted to levy liquidated damages in relation to s 2 of the works, a dispute arose as to what was required for s 2 to be complete. Part 1 of the contract data at Options X5 and X7 described s 2 as requiring ‘Completion … to allow Hydro Plant to be installed’. However, the works information required s 2 to include ‘Completion … to allow the hydro plant to be tested and commissioned’.

The matter was referred to adjudication, at which it was held that there was an inconsistency between the contract data and the works information. The adjudicator therefore applied the order of precedence clause and held that the less onerous requirement in the contract data applied such that the works only had to be sufficiently complete so as to allow the hydro plant to be installed rather than tested and commissioned. RWE sought a declaration pursuant to Pt 8 of the CPR that the works information defined Bentley’s obligations in relation to s 2, arguing that the contract should be considered as a whole and that doing so did not result in an ambiguity or inconsistency.

Akenhead J held that the contract should be read as a whole and construed ‘so far as possible’ to avoid inconsistencies. Doing so meant that there was not a significant inconsistency, as it was clear from the works information that for s 2 to be complete it must be possible to test and commission the hydro plant. Accordingly, there was no need to have regard to the order of precedence clause.

Held
The Court of Appeal dismissed the appeal. In the leading judgment Moore-Bick LJ explained that in construing the contract he commenced from the same position as Akenhead J; that the contract documents should be read so far as possible as complementing each other and a contractual order of precedence applied only where there is a ‘clear and irreconcilable discrepancy’.

Moore-Bick LJ considered that the contract data and the works information could be read in harmony. Both referred to the completion and testing of the pipeline work, implying that the pipeline was to be completed in full before installation of the hydro plant.

The court found three clear indications that s 2 was to be completed and tested in full before installation of the hydro plant began: (i) the key dates indicated that the parties contemplated that the pipeline work would be finished before the hydro plant was delivered; (ii) the response to a post-tender clarification and the programme reinforced the conclusion that the parties intended the pipeline work to be completed before the hydro plant was installed; and (iii) other parts of the contract distinguished between full and partial completion which indicated that if the parties had intended the pipeline to be partially complete for s 2, they would have stated as such.

Significance
This confirms an order of precedence clause will only be applied where there is ‘clear and irreconcilable
discrepancy’. The courts will first look to reconcile any ambiguity by reading the contract documents as a whole and so far as possible so as to complement each other, so that the parties’ intentions are read ‘in a consistent and coherent manner’.

This decision also confirms the need to take care when completing the works information of the NEC3 Contract and to review the contract and works information side by side before the contract is concluded. In the case of any discrepancy, notwithstanding any order of precedence clause, the more detailed provisions of the works information may override the provisions of the contract data.

Lincolnshire CC v Mouchel Business Services Ltd
[2014] EWHC 352 (TCC); TCC; Stuart-Smith J

Lincolnshire County Council (Lincolnshire) appointed Mouchel Business Services Ltd (Mouchel) around 3 April 2000 pursuant to a deed to provide architectural services, including the design of a building at Boston Grammar School, constructed in 2001–2002. In March 2003 rising damp issues were discovered.

In July 2013 Lincolnshire issued ‘protective’ proceedings and an application (without notice) for an extension of time for service of the claim form and particulars of claim for an extension of time for service of the claim form and particulars of claim so that the parties could comply with the Protocol for Construction and Engineering Disputes (the Protocol). An extension was granted until 18 January 2014 on the basis that proceedings would be served by then and the Protocol complied with. However, Lincolnshire did not issue its letter of claim until 3 December 2013 meaning that the claim form and particulars of claim were unlikely to be issued within the extension. Lincolnshire’s in-house lawyer cited various reasons for this delay, including the time taken to review the papers, the fact that he had taken two weeks’ annual leave and had to cover for other members of his team during their annual leave. As a consequence of their own delay, on 23 December 2013 Lincolnshire made an application, without notice, for a second extension (a further three months) for service of the claim form and particulars of claim, in order to allow a ‘meaningful’ meeting of the parties in accordance with the Protocol.

The order was granted. Mouchel applied under CPR 23.10 to have the order set aside and the claim struck out as a result in accordance with CPR 3.4.

Held
Stuart-Smith J set aside the order and struck out the claim. He held that although an application under CPR 7.6 for an extension of time for service of the claim form could be made without notice in some circumstances, where the parties are governed by the Protocol and the claimant has issued proceedings without complying with the Protocol for limitation reasons, the claimant must apply to the court on notice for directions in accordance with the Protocol. Paragraph 6 states:

‘a claimant who commences proceedings without complying with … this Protocol must apply to the court on notice for directions’ (emphasis added).

The TCC Court Guide similarly provides at 2.3.2 that where a claimant has not complied with the Protocol because his claim may become time-barred, the claimant ‘must … apply for directions’. Stuart-Smith J explained that requiring the application to be made on notice gives the court the opportunity to review any relevant submissions of the parties and removes the risk of parties later applying to set aside the order, incurring costs and time. The court considered both pre and post-Jackson Reform cases regarding the late issue of proceedings, including the statement in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537, that solicitors’ work pressure will not be considered a good explanation for delay. The commitments of Lincolnshire’s in-house solicitor were deemed to be an entirely unacceptable excuse for failing to prosecute the case diligently and little credence was given to Lincolnshire’s argument that it should be given special dispensation because, as a local authority, it is subject to financial constraints.

Significance
This confirms that a claimant applying for an extension of time for service of a claim form and particulars of claim without notice where the Protocol applies ‘dices with procedural death’ and ‘does so at extreme peril’. In such circumstances there is an inherent risk that the extension may be set aside, resulting in the claim being time barred. Further, this case demonstrates that the fact that a solicitor is overburdened, on annual leave or covering for colleagues will not excuse any delay. This applies to in-house solicitors as well as those in private practice, even if they are subject to financial constraints. CL