More Examples of Unusual Litigation Conduct

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Introduction. Following on from our piece earlier in the year about parties failing to copy one another into correspondence with the court, we bring you another case of parties to litigation demonstrating how not to conduct proceedings.

In *Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd* [2021] EWHC 1116 (TCC), Mr Justice Fraser took issue with a number of elements of the parties' conduct. These included:

- the inability of the parties to reach agreement on procedural matters in the lead up to trial;
- the multiple versions of the trial bundle prepared for the trial;
- the "extraordinarily light" evidence of fact upon which the Claimant companies relied; and
- correspondence sent by the Claimants' solicitors to the Court during the trial regarding points which arose in cross-examination.

Although well-advised parties would likely find no difficulty in avoiding these issues, the case does highlight the importance of cooperation and planning for litigation practitioners.

The Proceedings. The claim in *Beattie* was for alleged breach of contract and professional negligence by consulting engineers in respect of the design of foundations for a construction project. As a result of the alleged negligence in the design of the foundations, the foundations had to be demolished and rebuilding work took place. The total losses claimed were approximately £3.7 million. The consulting engineers challenged aspects of the claim, including the reasonableness of the decision to demolish the foundations and the quantum of the Claimants' losses.

The parties' conduct in this case was unusual in a number of ways. Fraser J noted that the parties struggled to agree in respect of normal procedural matters. For example, they only managed to engage a transcription service at 3.00pm on the day before the trial was due to start. Further, the parties could not *"agree a single list of issues, nor whether certain legal arguments were open to each other on the pleadings."*

There were four entirely different trial bundles produced by the parties. Fraser J noted in this regard that *"the parties seemed almost to be surprised that the trial had actually come upon them"*.

There were also significant problems with the witness statements filed on behalf of the Claimants – Fraser J noted that they were "*extraordinarily light on significant detail*". The Claimant's evidence also failed to deal with key matters in dispute, and did not make admissions which should clearly have been made by the Claimants' witnesses.

Perhaps the biggest criticism was reserved for the Claimants' solicitors. The Claimants' solicitors wrote to Fraser J directly as the trial judge during proceedings to deal with points arising out of the cross-examination of the Claimants' witnesses. Fraser J noted that the correspondence seemed to be "*part submission, part quasi-evidence, and part explanation*". He went on to write that:

"[s]uch a letter should not have been sent to the court. It was necessary to explain to the parties that I intended simply to ignore it, save and in so far as its contents may be repeated in closing submissions. There is no procedural place for sending such material directly to the trial judge during a trial itself in this way, attempting to meet or explain away evidential points made in cross-examination (which in procedural terms leads to evidence, namely the answers of witnesses to those questions) by way of a letter to the judge."

Key Takeaways. Although the circumstances and conduct in *Beattie* are extreme, there are some general messages that will assist all parties in litigation. The messages from *Beattie* are straightforward and mirror what would be considered quite obvious points of good litigation practice by most practitioners:

- Do your best to reach agreement with other parties on documents which should be agreed, including the list of issues.

- Start work early on the trial bundle, and make sure it is prepared in accordance with the relevant court guides.

- Make sure your evidential case addresses the issues to be determined in proceedings. This is particularly important in light of the new rules regarding witness statements under Practice Direction 57AC.

- Try not to bother the Court with correspondence during the trial, except where necessary. When you do correspond with the Court during trial, try where possible to do so on a joint basis with the other party or parties to the proceedings.

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