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Judgment: approved by the Court for handing down | *Delivered:* **26/06/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN:

CSS SURVEYING LTD

Plaintiff

and

ENTERPRISE MANAGED SERVICES LTD

Defendant

WEATHERUP J

[1] This is a preliminary point on the interpretation of a sub-contract for the provision of surveys of domestic water services by the defendant, as sub-contractor for the plaintiff, the main contractor, for Northern Ireland Water as employer. Mr Dunlop appeared on behalf of the defendant and Ms Simpson on behalf of the plaintiff.

[2] The Statement of Claim pleads as follows. The plaintiff carries on business providing specialist data computing services and the defendant carries on business as a utilities contractor. In the spring/summer of 2005 the plaintiff tendered as a sub-contractor for Phase 2 of the non-domestic metering contract and the tender was submitted with KPL Contracts, the main contractor who was responsible for physically installing the meters. The plaintiff was required to carry out all pre-installed surveys and provide and develop a web enabled database to manage all the necessary survey information. By May 2006 the plaintiff was invited to undertake a further 30,000 surveys and the Phase 2 contract was extended for an additional six months. In October 2006 the plaintiff became aware that Phase 3 of the contract was to be put out to tender.

[3] The plaintiff entered into discussions with the defendant whereby the plaintiff would tender as a sub-contractor and the defendant would tender as main contractor. During the course of these discussions NIW and the defendant referred to 44,000 surveys to be performed during the first year of the Phase 3 contract. It was represented to the plaintiff that it would be necessary to have adequate staff and resources committed to perform the Phase 3 contract and that they should be ready immediately to deploy to the Phase 3 contract and there would be strict performance criteria.

[4] In November 2006 the plaintiff was provided Tender No: C281. It is pleaded that the tender documents confirmed the representations referred to above and that the defendant knew that in calculating its tender and the number of personnel and the equipment required to ensure compliance with the specification the plaintiff would rely on the representations. It is said that in fixing its tender price the plaintiff relied on the figure of 44,000 surveys as providing an average number of surveys while recognising that that was not a guarantee and could fluctuate and also recognising that that figure had contractual significance in that it provided a baseline figure from which the plaintiff would calculate the tender price and determine the numbers of personnel and the equipment required. Further the plaintiff would need to have sufficient personnel and equipment to meet the 44,000 figure. In all these circumstances it said that the defendant owed a duty of care to the plaintiff to ensure that the figures provided were accurate.

[5] In January 2007 the plaintiff submitted its tender and the estimated standard price at £24.00 per survey was based on approximately 44,000 surveys and on the costs of personnel and equipment that would be required in order to meet that figure. In February 2007 the plaintiff was appointed as sub-contractor to the defendant as main contractor under the Phase 3 contract and the parties signed the form of sub-contract. The Phase 3 contract commenced in April 2007 and by August 2007 had only required 5,572 surveys. Accordingly, the plaintiff claims to have suffered significant loss and damage as the tender price was based on an anticipated 44,000 surveys and this loss was occasioned by the misrepresentations of the defendant. The plaintiff has claimed the sum of £292,000.

[6] The defendant issued the summons for the determination of a preliminary issue, namely that upon their proper construction:

> (a) Tender C281 between the plaintiff and the defendant and Northern Ireland Water did not provide any representation to the plaintiff that the plaintiff would be entitled to rely upon the figure of up to 44,000 surveys as a condition of any contract with the defendant;
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> (b) In the alternative that the plaintiff is not entitled to rely upon any reference to the figure of up to 44,000 surveys having regard to the tender issued by Northern Ireland Water with particular regard to Clause 2.1 thereof;

(c) Further, or alternatively, that the plaintiff is not entitled to pursue any claim for misrepresentation against the defendant having regard to the sub-contract between the plaintiff and the defendant with particular regard to:

(i) Clause 45.1 - the entire agreement Clause; and

(ii) Clause 46.1 - the no reliance Clause.

[7] The defendant contends that the terms of the tender are contained in the contract documents and make it clear that there was no assurance as to the extent of the work that was going to be provided to the plaintiff under the sub-contract. On the other hand the plaintiff contends that the references to 44,000 surveys are transposed into the contract documents and are of central significance such that the plaintiff is entitled to be awarded work to the extent that approximates to that level of surveys.

[8] The plaintiff filed an affidavit from Kieran Timoney, a Director of the plaintiff. He sets out that in early 2005 he was invited to submit tenders for the performance of Phase 2 contract works which were the installation, servicing and monitoring of non-domestic water meters and that the plaintiff tendered for the Phase 2 works together with KPL Contracts Ltd. During the course of the Phase 2 works the plaintiff had regular meetings with Northern Ireland Water project managers and everyone was made aware during informal discussion that NIW were going to tender out Phase 3 works for domestic premises. NIW stressed the importance of being ready to go once the contract was awarded and specific mention was made of 44,000 anticipated surveys. This was regarded as a target. The result is, Mr Timoney says, that while he understood that 44,000 was not guaranteed he understood that it had contractual significance. If he had not prepared the plaintiff's tender price, hired suitable staff and administrative resources to meet that figure the company could have incurred penalties under the contract and the figure of 44,000 therefore had clear significance. He says that if the tenderer had stated that the numbers would be between 5,000 and 44,000 then he would have calculated the tender on a totally different basis and would have increased the profit margin based on the fact that the work would have fallen short of the anticipated maximum or alternatively he says the plaintiff would not have entered into the contract at all.

[9] The tender document C281 was issued to the defendant by the employer and in turn furnished to the plaintiff for their tender.

- Paragraph 9.6 states that where possible estimates of the volume of goods required by the [Department] have been included in the tender documents. These estimates are intended as a guide only and are not to be regarded as a guarantee as to the quantity that will be required during the period of the contract:

- Paragraph 9.10 states the [Department] reserves the right to add additional goods to the contract from time to time and equally to delete goods from the contract in accordance with contract requirements.

- Paragraph 9.13 states that these instructions to tenderers form part of the contract.

- Paragraph 1.2.3 states that estimates have been made of the number of installations in each category and contractors should expect to complete up to 44,000 metre installations within year one with up to a further 32,000 installations within year two if the contract is extended.

- Paragraph 2.1 is headed Volume of Anticipated Work – "The exact number of meter installations cannot be accurately assessed at this stage as it is primarily based on customer applications. Contractors should expect to complete 44,000 installations in the first year and 32,000 in the second year if the contract is extended. No guarantee is given as the actual volume of workload, profile or makeup of that work. Contractors must make provision for this in the rates tendered."

- In the preamble to the pricing schedule paragraph 6 states that no guarantee can be given to the actual work load or the make-up of that work.

- In the conditions of contract scheduled to the tender the "contract" is stated to mean the tender, being the tender declaration and undertaking forms as completed by the accepted tenderer, the instructions to tenderers, the conditions of contract, the specification, the drawings, the schedule of prices as priced by the accepted tenderer and the letter of acceptance.

- Paragraph 48.1 of the conditions of contract states that this contract shall be made subject to these conditions of contract and if they differ in any respect from the conditions on any letter form, quotation advice note, invoice delivery ticket etc submitted by the contractor then these conditions of contract shall prevail.

[10] The sub-contract was entered into between the plaintiff and the defendant and dated 9 March 2007.

- The recitals state that the sub-contractor has been afforded the opportunity to read and note the provisions of the main contract and has agreed to execute, upon the terms appearing, the works described in the documents specified in the second schedule and which form part of the works to be executed by the contractor under the main contract.

- The 'main contract' means the agreement between the employer and the contractor, particulars of which are given in the first schedule (which includes the tender documents).

- The 'sub-contract' means the agreement together with other documents specified in the second schedule (which includes a note in bold that no guarantees or assurances can be given regarding the scope continuity and location of the sub contract works).

- Clause 14.2 states that the contractor shall be under no obligation to issue a minimum number of orders and no commitment as to the level of such contract work is to be inferred.

- Clause 45.1 - Entire Agreement – states that the sub-contract and the documents referred to in it constitute the entire agreement and understanding of the parties and supersede any previous agreement between the parties relating to the subject matter of the sub-contract

- Clause 46.1 - No Reliance – states that the sub-contractor acknowledges that in entering into the sub-contract it has not relied on any representations, warrantees or other assurances by the contractor other than those expressly set out in the terms and conditions, provided that nothing in clause 46.1 shall operate to limit or exclude any liability for fraudulent misrepresentation between the parties.

[11] The tender documents are incorporated into the main contract and the sub-contract. The representations about 44,000 surveys are carried into the tender documents and into the sub contract documents. That being so the entire agreement clause 45.1 does not add to the argument in this case. Similarly the no reliance clause 46.1 does not add to the argument.

[12] What should be the approach to the interpretation of the contract? Investor's Compensation Scheme Limited v West Bromwich Building Society (1998) 1 WLR 896 contains at page 912G the general principles set out by Lord Hoffman in relation to the interpretation of documents (*with italics added*) –

> "1. Interpretation is the *ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge* which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> 2. The *background* was famously referred to by Lord Wilberforce as the 'matrix of fact, but this phrase is, if anything, an understated description of what the

background may include. Subject to the requirement that it should have been reasonable available to the parties and to the exception to be mentioned next, it *includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

3. *The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.* They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear but this is not the occasion on which to explore them.

4. The meaning which document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; *the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.* The background may not merely enable the reasonable man to choose between the possible meanings of the words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see Mannai Investments Company Limited v Eagle Star Life Insurance Limited (1997) AC 749)."

[13] Lord Clarke in Rainey Sky SA v Kookmin Bank [2001] UKSC 50 at paragraph 21 emphasised the preference for a construction consistent with business common sense –

"The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background

> knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. *If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."*

[14] The exercise on which the Court is engaged is therefore not to examine what the parties say they intended to agree but rather to apply an objective approach to what appears in the documents representing the agreement, taking into account the relevant background, to ascertain the objective meaning. Such an exercise applied to a commercial agreement would be expected to achieve an outcome that reflected business common sense.

[15] The plaintiff contends that the application should not be dealt with solely on the pleadings and affidavit evidence. However this is an objective exercise and the affidavit evidence provides the relevant background which informs the objective interpretation. I am satisfied that the objective interpretation can be achieved in the light of the information provided. Similarly, it is said that there is no evidence as to the interpretation of the no guarantee clause. However, the meaning of the contract is not determined by what the parties intended the terms to mean but by an objective assessment of what the contract terms mean, taking into account the relevant background. Thus the Court determines the objective interpretation based on the terms and the context rather than on the subjective versions of the parties.

[16] That the figure of 44,000 surveys was an estimate is clear from paragraphs 9.6 and 1.2.3 and 2.1. That there was no guarantee or assurance of that volume is clear from paragraphs 9.6 and 2.1 and the pricing schedule and from clause 14.2 and the second schedule. To the plaintiff the absence of guarantee is but a protection for the defendant against any small shortfall in the stated volume. However that is already clear from the provisions that state clearly that the figure is an estimate and is not exact and therefore that there may be a shortfall. The repeated absence of guarantee or assurance may mean something more.

[17] Paragraph 2.1 of the tender deals specifically with the volume of anticipated work and contains four sentences.

> First, the exact number of meter installations cannot be accurately assessed at this stage as it is primarily based on customer applications. The qualifying words 'exact' number and 'accurately' assessed indicate approximation.
>
> Second, contractors should expect to complete 44,000 installations in the first year and 32,000 in the second year. That suggests a target and certainly it was

clear to the plaintiff that the company should be set up in a manner which allowed them to achieve the target, if called upon to do so.

Third, no guarantee is given as to the actual volume of workload, profile or makeup of the work. The reference is not only to volume but to profile and makeup and it is clear that there was to be no guarantee in relation to the volume.

Fourth, contractors must make provision for 'this' in the rates tendered. 'This' refers to the absence of any guarantee of workload, profile or makeup. Thus it is clear that the sub-contractor is expected to tender on the basis that there are a number of surveys they must be in a position to provide with no guarantee that they will be asked to make that provision. The sentence recognises that the stated approach will impact on the tender rates.

[18] The first two sentences indicate that, while the volume of work must involve an estimate, something equating to the 44,000 surveys is the extent of the work to be anticipated and awarded. The third sentence indicates that the stated requirement is not assured, thus adding further qualification to the estimated approach to volume. The fourth sentence indicates that the tender rates should reflect the absence of assurance on volume. This clearly anticipates that the volume of work may vary to an extent that would impact on tender rates. The tenderer is being warned that the rate should reflect not only the capacity to achieve 44,000 surveys but also a volume that would be less than that figure so as to require a variation of the rate.

[19] The plaintiff calculated the tender on the basis of 44,000 surveys and contends that the rates would have calculated differently if it had been known that many less surveys may be required. However that is how the tender documents, particularly at paragraph 2.1, directed the tenderer to approach the calculation of the rates, namely be prepared for 44,000 but provide for numbers that that may be so many less that there would be an impact on the rates.

[20] Further, the plaintiff contends that on the defendant's case the reference to 44,000 surveys is meaningless. Paragraph 2.1 provides that the tenderer should tender for and have the capacity to achieve 44,000 surveys with no guarantee that the tenderer will be required to undertake that volume of work. The figure sets the measure of the tenderer's capacity. The defendant's approach is not meaningless in that the tenderer is being required to confirm capacity to achieve the stated amount. Whether the tenderer will be asked to do so is a different issue.

[21] The plaintiff refers to the figure being stated to be a guide or an expectation. That is correct but it is only part of the provisions. A part states that there is no guarantee of the figure. A part requires the tenderer to have the capacity to meet the stated figure. A part requires the tenderer to tender accordingly.

[22] I am satisfied that the interpretation corresponds with business common sense. The employer requires the successful tenderer to have the capacity to meet the volume that may be required but cannot commit to the number of surveys that actually will be required and must warn the tenderer to tender accordingly. The tenderer so warned must develop the capacity to meet the volume that may be required while tendering to take account of the prospect that the prepared capacity may not be achieved.

[23] As to the terms of the preliminary point I find for the defendant. It is only necessary to answer question (a) and I do so as follows -

> Tender C281 between the plaintiff and the defendant and Northern Ireland Water did not provide any representation to the plaintiff that the plaintiff would be entitled to rely upon the figure of up to 44,000 surveys as a condition of any contract with the defendant;

[24] In conclusion I refer to Scott v Belfast Education and Library Board [2007] NICh 4. The case concerned an implied term of fairness in relation to mistakes or ambiguities in tender documents affecting the basis of tendering or the evaluation of tenders. It was decided that there were ambiguities that amounted to a breach of the duty of fairness in the contractual relationship between the tenderer and the party to whom the tender was submitted.

[25] The present case pleads breach of a fiduciary duty which appears to rely on the contractual relationship as sub-contractor rather than the contractual relationship as tenderer. I propose that before any decision is taken in relation to how this case is to be dealt with, subject to the exercise of the right of appeal against this decision, the plaintiff might also consider whether or not the approach taken in Scott v Belfast Education and Library Board has any bearing on the position in which the plaintiff now finds itself.