Neutral Citation No.: [2008] NIQB 141 | *Ref:* **WEAH4864**

Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **27/10/08**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRLAND

QUEEN'S BENCH DIVISION

BETWEEN:

COLERAINE SKIP HIRE LIMITED

Plaintiff;

and

ECOMESH LIMITED

Defendant.

WEATHERUP J

[1] This is a defendant's application for summary judgment under Order 14 of the Rules of the Supreme Court based on a counterclaim in the sum of £82,792.69. It has now been agreed that the sum be re-calculated at £48,234.39. Mr Denver appeared for the defendant, the moving party on this application, and Mr Singer appeared for the plaintiff in the action.

[2] The background is set out in the grounding affidavit of Mr Ivan Rowe, managing director of the defendant. On 7 April 2005 the defendant entered into a contract in writing with the plaintiff to carry out remediation works at Craigmore Landfill Site for the sum of £2,140,000, subject to the terms of the contract. Items of work are listed as A to H and of particular note, for the purposes of this application, are items B and H. Item B is described as "Capping Layer" where the contract value is stated to be £285,000. This item involves the placing of a liner over an existing landfill area. Item H is described as "Creation of new landfill cell" where the contract price is stated to be £1,510,000. This item refers to an area adjacent to the existing landfill which will now be formed into what is described as a cell, to receive new waste material.

[3] Mr Rowe describes in broad terms that the work required structures to be inserted into the ground in order to isolate infected areas. These structures were to

be constructed from clay, rock and a geosynthetic clay liner. Thereafter a treatment system was to be constructed in the ground that involved pipework and machinery to drain the leachate from the infected area towards a central treatment point, also built into the ground. The treatment process required the installation of a pump and a structure containing a biological or chemical process. In addition, the work involved the construction of an isolation wall to the perimeter of the existing landfill area to prevent leachate migrating into the adjoining lands. A new landfill cell was created to the south of the existing landfill. The current landfill regulations require the creation of the composite lining system.

[4] A dispute arose between the parties in the course of the contract works, which according to the defendant concerned the failure of the plaintiff to pay for work completed. Pursuant to the contract the defendant referred the dispute to an adjudicator. The adjudication process commenced on 7 February 2008. The adjudicator was appointed on 12 February. On 14 February the adjudicator received a referral notice and documents from the defendant. By letter of 15 February the plaintiff's solicitors disputed that the adjudicator had jurisdiction on the basis that the works did not involve 'construction operations'. By letter of 25 February the agents for the defendant contended that the adjudicator had jurisdiction as the matter fell within the definition of 'construction operations' under Article 4 of the Construction Contracts (Northern Ireland) Order 1977. By letter dated 27 February the adjudicator ruled that he had jurisdiction.

[5] The referral to the adjudicator was to address the issue of outstanding payments that the defendant claimed were owed by the plaintiff to the defendant for the work done under the contract. The adjudicator issued his findings in what Mr Rowe described as "draft form" on 15 April 2008 stating that nothing was due by the plaintiff to the defendant. However the adjudicator, further to exchanges that took place with the parties, concluded that there had been an error in computation of the monies due. He addressed this error under what has been described as 'the slip rule', with the effect that on 17 April 2008 the adjudicator ruled that there was due by the plaintiff to the defendant the sum of £82,792.69, as originally claimed on the counterclaim. That sum has now been adjusted as stated above to the sum of £48,234.49.

[6] The dispute led to the cessation of the works and they remain incomplete. By Writ of Summons of 15 April 2008 and by Statement of Claim of the same date, the plaintiff claimed that there had been an overpayment by the plaintiff to the defendant in the sum of £549,070.55. Further, the plaintiff claimed that the works carried out under the contract are not 'construction operations' within the meaning of the 1997 Order and that no adjudication could be validly commenced under the contract. Accordingly the plaintiff claimed that the adjudicator's finding was not binding and had been made without jurisdiction and that the remedies of the parties are limited to the court proceedings.

[7] The defendant filed a Defence and Counterclaim and joined issue with the plaintiff. The defendant denied the overpayment by the plaintiff and counterclaimed for the £82,792.69 found due by the adjudicator and also claimed damages for breach of contract. The defendant applies for summary judgment of the sum found due by the adjudicator, as adjusted, namely £48,234.49.

[8] The plaintiff filed an affidavit from Mr Paddy Lavery, a director of the plaintiff company, in opposition to the application for summary judgment. He raised a number of objections which were taken up by Counsel on behalf of the plaintiff in opposition to the application. First of all, on a jurisdiction point, he raised objection on the basis that some of the works undertaken on the contract are not 'construction operations' and therefore the adjudication did not have jurisdiction. More specifically, it is stated that the works involving the landfill cell, referred to as item H, and the creation of the composite lining system, referred to as item B, do not fall within the definition of construction operations in the 1997 Order. Secondly, on a time limits point, that the decision was taken outside the 28 day limit provided for under the legislation and that there was unauthorised delay by the adjudicator in the purported application of the slip rule. Thirdly, on a slip rule point, that the adjudicator's original decision did not qualify as a slip and the revised decision was a change of substance which the adjudicator was not entitled to make. Fourthly, on a remedy point, that there should in any event be a stay of execution of the finding of the adjudicator pending the outcome of the action.

[9] First of all, the jurisdiction point. The relevant legislation is the Construction Contracts (Northern Ireland) Order 1997 (italics added).

> 3. (1) *In this Order a "construction contract" means an agreement with a person for any of the following-*
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> *(a) the carrying out of construction operations;*
>
> (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
>
> (c) providing his own labour, or the labour of others, for the carrying out of construction operations.
>
> (2) References in this Order to a construction contract include an agreement-
>
> (a) to do architectural, design, or surveying work, or
>
> (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.
>
> (5) *Where an agreement relates to construction operations and other matters, this Order applies to it only so far as it relates to construction operations.*
>
> An agreement relates to construction operations so far as it makes provision of any kind within paragraph (1) or (2).

4. (1) *In this Order "construction operations" means, subject as follows, operations of any of the following descriptions-*

(a) *construction, alteration,* repair, maintenance, extension, demolition or dismantling *of* buildings, or *structures forming, or to form, part of the land* (whether permanent or not);

(b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, electronic communications apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;

(c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;

(d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;

(e) *operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this paragraph*, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;

(f) painting or decorating the internal or external surfaces of any building or structure.

(2) The following operations are not construction operations within the meaning of this Order-

(a) drilling for, or extraction of, oil or natural gas;

(b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;

(c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is-

(i) nuclear processing, power generation, or water or effluent treatment, or

(ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;

(d) manufacture or delivery to site of-

(i) building or engineering components or equipment,

(ii) materials, plant or machinery, or

(iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems,

except under a contract which also provides for their installation;

(e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.

[10] In essence a construction contract includes the carrying out of what are called construction operations and the 1997 Order only applies to 'construction operations'. Where an agreement relates to construction operations *and other matters* the Order applies to it only so far as it relates to construction operations and that an agreement relates to construction operations. The meaning of 'construction operations' in Article 4(1) includes at (a) operations of construction or alteration of structures forming or to form part of the land and at (e) operations which form an integral part of or are preparatory to or are for rendering complete such operations as have been previously described under (a).

[11] The defendant refers to the work on the landfill cell and contends that that constitutes a structure for the purposes of (a) and therefore qualifies as construction operations. The defendant refers to the capping layer and contends that that constitutes a structure under (a) and also qualifies under (e) as an integral part of the operations described under (a). The plaintiff on the other hand contends that neither of the items can be said to fall within either (a) or (e).

[12] The plaintiff refers to the nature of structures as considered in Gibson Lee Retail Interiors Limited v Makro Self-Service Wholesalers Limited [2001] BLR 407. The claimant supplied and installed shopfittings, described more particularly as involving moveable furniture, gondolas, business counter islands, corner boxing and column cladding which was attached by screw fittings to floors or walls primarily for stability. The issue arose then as to whether or not these were construction operations under the equivalent English legislation. It was held that shopfitting does not amount to construction operations unless it is construction of structures forming or to form part of the land whether permanent or not or installation in any building or structure of fittings forming part of the land. It was decided that the reference in the legislation to forming or to form part of the land, which is the same wording as the 1997 Order, imports the concepts of and the tests for and the law

relating to fixtures. It was held on the facts that the matters installed were not fixtures forming part of the land.

[13] The commentary by the editor of the Building Law Reports states that:

> "In that case a substantial amount of the shopfitting equipment was undoubtedly to be fixed to a floor or a wall. However, the primary purpose of such items being fixed was to be for stability purposes for the shopfitting units, and since it was clearly intended that the purpose was for stability the conclusion had to be drawn that these fittings did not and were not intended to form part of the land."

This report does not assist greatly in relation to the present case.

[14] In relation to the landfill cell it seems to me that that is clearly a 'structure' forming or to form part of the land within (a). It is being formed in the ground from clay and stone and is meant to form a cell to receive the landfill material. In relation the capping layer that does not seem to me to constitute a 'structure' and does not, therefore, fall under (a). It is a synthetic cover of an existing landfill area. The works involve the construction of the landfill cell, the securing of the boundaries of the landfill, the capping of the existing area and the completion of a treatment process. It seems to me that the capping layer involves operations which form an integral part of, or are preparatory to, or are for rendering complete the operations relating to the landfill cell and therefore falls under (e).

[15] My conclusion is that the works described under Item B and Item H are unquestionably 'construction operations'. The adjudicator had jurisdiction.

[16] Secondly, the time limits point. Article 7(2) of the Order specifies that the contract shall -

> (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
>
> (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

It is agreed, for the purposes of this case, that the adjudicator's decision was to issue by 15 April 2008. The defendant says that the decision was reached on 11 April 2008, referring to the adjudicator's fee schedule where he recorded that he was drafting his decision, or alternatively on 15 April 2008 where the schedule recorded that he was finalising his decision. The decision was, indeed, dated 15 April 2008 and was

communicated on 15 April 2008. The adjudicator then conducted a 'review' of his decision on 16 April 2008 and the result was communicated on 17 April 2008.

[17] The plaintiff refers to the defendant's grounding affidavit which describes the 15 April decision as being in draft form. Thus the plaintiff contends that the 15 April decision was a draft only and therefore the adjudicator's decision was made on 16 April 2008 when the review was completed and the decision was out of time.

[18] The defendant's director may describe the 15 April decision as a draft but I am satisfied that the adjudicator did not treat this as a draft. He treated it as his decision, which he stated had been finalised in written form on 15 April 2008. Thus the original decision was within time. There has been reference to the difference between a decision being made and the decision being communicated, but as the original decision was made and communicated on 15 April, which was within time, I do not need to address this distinction. This finding, of course, is subject to the further issue of the timing of the review and the substance of the decision for the purposes of the slip rule.

[19] That takes me to the next matter which is that the plaintiff contends that the further decision of 16 April 2008 was too late for a 'slip decision', assuming for the moment that it constitutes a slip decision. Reference was made to Bloor Construction (UK) Limited v Bowmer & Kirkland (London) Limited [2000] BLR 314. It was agreed by the parties that an adjudicator's decision would be published on 11 February 2000. At 3.32 pm on that day a decision was faxed to the parties to the effect that the plaintiff should receive the sum of £122,000. However, on receipt of the decision it was noted that an error had been made and that was notified to the adjudicator, who at 5.53 pm on the same day issued a revision which effectively determined that the claimant was entitled to no further payment. The adjudicator described this as an obvious slip. It was held that in the absence of any specific agreement to the contrary a term should be implied into the contract referring the dispute to adjudication that the adjudicator might correct an error arising from an accidental error or omission. This right of correction was subject to the proviso that the correction had to take place within a reasonable time and without prejudicing the other party. On the facts of the case it was found that the adjudicator had issued his corrected decision within three hours and that this was within any acceptable time limit.

[20] The issue arises in this case as to whether on the facts the review decision was made within a reasonable time. The initial decision was communicated on 15 April and there were then exchanges between the parties and a review by the adjudicator on 16 April and he communicated the outcome on 17 April. I am satisfied that this was an eminently reasonable time within which to decide and communicate the review decision.

[21] Thirdly, the slip rule point. Was the review of the 15 April decision a matter that was capable of being corrected under the slip rule or was it a matter of

substance which could not be corrected under the slip rule? The plaintiff contends that it is a matter of substance and that the adjudicator clearly intended a certain outcome to the adjudication, namely no payment to the defendant. In the event the plaintiff contends that the adjudicator purported to make a substantive change to that decision and require a payment of some £82,000 to the defendant. It is necessary to look at the error that was said to have been made to determine whether it might fall within a slip rule.

[22] The error related to Item H, the creation of the new landfill cell, where the decision of 15 April recorded the amount due in respect of that item as some £1,106,000. Factoring that item into the final account produced, taking account of previous payments that had been made by the plaintiff, an overpayment by the plaintiff of £19,258.69. On that basis no further sum was due by the plaintiff to the defendant, as the adjudicator found in his original decision. However, in the light of the exchanges, the adjudicator determined that the amount that was due in respect of item H was not £1,106,000 but £1,208,000. Factoring that item into the final account produced the balance then found to be due to the defendant of the £82,792.69, for which the defendant counterclaimed and seeks judgment.

[23] How had this mistake been made? How had the £1.208M, which the adjudicator said in his review should have been the figure for Item H, appeared in the first decision as £1.106M? In a letter from the adjudicator of 17 April 2008, being a covering letter with his revised decision, he referred to items 42, 44 and 124 of his original decision and to a 'slip' in that the word "not" had been inadvertently left out; to the application of the wrong quantity of 19,500 cubic meters when he had intended to apply the agreed bill quantity of 20,000 cubic meters and to a further entry where he should have applied 19,500 cubic meters "as per the wording under the 'Adjudicator's' column". The Adjudicator offered his explanation for what had happened –

"These slips occurred because I was working from the spreadsheet in which the items were arranged in order of the value in dispute, not in numerical order."

[24] The plaintiff refers to CIB Properties Limited v Birse Construction Limited [2004] EWHC 2365 (TCC). I respectfully adopt the following passages from Judge Toulmin's judgment –

> (i) "In the absence of any specific agreement to the contrary, a term can and should be implied into the contract referring the dispute to adjudication that the Adjudicator may, on his own initiative, or on the application of a party correct an error arising from an accidental error or omission." (paragraph 29)
>
> (ii) As to the determination of what is an accidental slip or omission –

> "It is a distinction between having second thoughts and intentions and correcting an award to give effect to first thoughts or intentions which creates the problem." (paragraph 30) – this being an application of the approach of Sir John Donaldson, Master of the Rolls, to the nature of the slip rule under the predecessor to the civil procedure rules in R v Cripps & Muldoon [1984] QB 686.

(iii) There are two questions to be asked:

> "(1) Is the Adjudicator prepared to acknowledge that he has made mistake and correct it? (2) Is the mistake a genuine slip which failed to give effect to his first thoughts? If the answer to both questions is 'Yes' then, subject to the important questions of the time within which the correction is made and questions of prejudice, the court can if the justice of the case so requires give effect to the amendment to rectify the slip."(paragraph 33)

[25] On the first question "Is the adjudicator prepared to acknowledge that he made a mistake and correct it?" Yes. He did so in the letter that I have referred to and he re-issued certain pages of his decision letter to state his corrections. On the second question "Is the mistake a genuine slip which failed to give effect to his first thoughts?" Yes. He misread the spreadsheets. He intended to apply the correct figures to the correct items, but because of his reading of the spreadsheet he picked out the wrong figures, thereby obtained the wrong total and therefore the balance was not as it should have been. The plaintiff contends that his first thoughts and intentions were to find for the plaintiff, not to find for the defendant. I do not accept that approach. His first thoughts and intentions were to apply the correct figures from the spreadsheets. A consequence of his failure to do so was to find for the plaintiff, but that was not his first intention or thought, it was a consequence of a mistaken approach to his first thoughts and intentions. The correct consequence of his first thoughts and intentions would have been to find for the defendant, had he applied the correct figures, which he meant to do. This was clearly a slip, it was corrected by the adjudicator and I have already found that it was corrected within time.

[26] It follows from what I have stated above in relation to the first three points that I am satisfied that the plaintiff's objections are unsustainable for the reasons that I have given and that the adjudicator's award, which is now to be treated as being in the sum of £48,234.39, is due to the defendant.

[27] Fourthly, the remedy point. The plaintiff's affidavit from Mr Lavery raises an issue about the liquidity of the defendant and he objects to payment being made to

the defendant because the overall outcome of this case may result in a finding that the defendant owes money to the plaintiff. If that were to be the case, says the plaintiff, there would be some doubt about whether or not the defendant could make recompense to the plaintiff.

[28] The affidavit of Mr Lavery at paragraph 14 states that he believes that the defendant will be unable to repay the amount of the counterclaim, should the plaintiff be successful in due course. He cites two matters. First the defendant has by letter of 20 May 2008 confirmed that in accordance with VAT regulations they are claiming bad debt relief in respect of £368,246.26 plus VAT of £64,443.13 worth of invoices. He also makes reference to the Accounts File in the Northern Ireland Companies Registry for the year ended 31 July 2007, which while failing to provide a profit and loss account illustrates net assets of £178,200. The accounts for the year ending 31 July 2006 detail a profit of £144,156 and net assets of £244,956.

[28] The plaintiff refers to Wimbledon Construction Company v Derek Vago [2005] EWHC 1086 (TCC). The adjudicator published a decision to award the claimant £122,000 and that was not paid so the claimant commenced enforcement proceedings. At the same time the defendant commenced arbitration proceedings against the claimant. The defendant consented to judgment in the amount of the adjudicator's award, but sought a stay of enforcement pending the outcome of the arbitration proceedings on the grounds of the claimant's uncertain financial position. The conclusion at paragraph 35 is that on the basis of the evidence the defendant had not demonstrated a probable inability on the part of the claimant to repay the judgment sum if that was to be the outcome of the arbitration process and, accordingly, the Court declined to stay execution of the judgment.

[29] In the present case the evidence filed by the plaintiff on the financial position of the defendant does not warrant a stay of execution on the basis of the probable inability to repay the judgment sum, if that should ultimately prove necessary.

[30] The present application for summary judgment relates to only one part of the claims that are in dispute between the parties. The plaintiff claims that there has been a very substantial overpayment. The defendant claims not only the sum found due by the adjudicator but also damages for breach of contract. Ultimately a determination of the proper balance between the plaintiff and the defendant will be a matter for determination of the Court in the outcome of this action.

[31] Thus the defendant has an unanswerable claim for the sum of £48,234.49 and an undetermined and unquantified claim for damages for breach of contract. The plaintiff has an undetermined claim for overpayment. It is not possible to know where or in what amount the ultimate balance will fall. In the exercise of the discretion of the Court I propose to give the defendant judgment for the unanswerable claim, with a stay on the judgment pending the outcome of the trial. In the exercise of discretion I propose to order that the sum of £48,234.49 be lodged

in the joint names of the respective solicitors for the parties. The proceeds will then be paid out to whoever is entitled at the conclusion of the action.