Neutral Citation: [2016] NIQB 55

Ref: **DEE10004**

Ex tempore Judgment: corrected and approved by the

Judge Court for handing down
Judge

Delivered: **20/6/2016**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

Commercial List

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2014 No. 84769

BETWEEN:

GLEN WATER LIMITED

Plaintiff;

-and-

NORTHERN IRELAND WATER LIMITED

Defendant.

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DEENY J

[1] The plaintiff herein is a joint venture limited company, incorporated in 2005. The defendant is a publicly owned body with statutory functions, powers and duties regarding water and sewerage services in Northern Ireland.

[2] The plaintiff on foot of a PFI agreement with the Department for Regional Development, known to the parties as Project Omega, carried out certain works of construction alongside existing facilities of the defendant with the intention of taking over and operating the old and new facilities. For these purposes they included the operation of a plant for the incineration of sewerage sludge.

[3] Various difficulties arose leading up to and after the handover from the defendant to the plaintiff of the existing facilities on 31 March 2010. On foot of that the plaintiff has brought a number of claims against the defendant. This particular action alleges that the defendant was in breach of its obligation under the contract to operate the assets to be handed over to the plaintiff as a 'Prudent Operator' during the construction period from 7 March 2007 until 31 March 2010. A hearing had been fixed for five days in April 2016. In the lead up to that, however, there was a lengthy discovery application brought by the plaintiff against the defendant. The plaintiff obtained the order of the Master for the disclosure of documents. The defendant appealed but I upheld the Master's order. In the course of reviewing the case in the light of that, it emerged that both parties were now convinced that five days would be far from sufficient for the hearing of this complex dispute. This arises from various factors. The quantum is not insignificant at £4.4m.

[4] When it became apparent that the matter could not go on those April dates the defendant then proposed that the days be used for hearing a preliminary point. Part of the case subsequently made by the plaintiff against this proposal has been its belated announcement. The plaintiff has been highly critical of the defendant in that regard and in some other regards. Similarly, at the hearing before me on 14 June, critical remarks were made by the defendant's counsel about the plaintiff's conduct of the matter. For example, it was suggested that the length of their skeleton argument, at 56 pages, indicated the weakness of their position.

[5] This tactical sparring is not likely to assist the court. The real issue is whether there is a preliminary question here which should properly be heard as such.

[6] Mr Nicholas Denys QC appeared with Mr David Dunlop for the defendant. Mr Sean Brannigan QC appeared with Mr Wayne Aitchison for the plaintiff. I heard oral argument on 14 June in addition to written skeletons or notes from both sets of counsel. I have taken their submissions into account even if all are not referred to in this short judgment.

[7] The parties have agreed the issue as follows:

> "(a) Did the plaintiff notify the claims made in these proceedings as compensation

events in compliance with Clause 32 of the amended and restated Project Agreement of 6 March 2007?

(b) If the answer is 'no' to (a), is there any other basis on which the claims in these proceedings could be maintained?"

[8] Mr Denys submitted that there was, in truth, no other such basis and Mr Brannigan, while not expressly conceding the point, did not dispute that. Part (a) is the real question, therefore, whether the plaintiff had given the necessary notification of the claims. Such notification is required under the Project Agreement the relevant clauses of which are as follows:

"33.2.2 To obtain relief and/or claim compensation the Contractor must:

33.2.2.1 As soon as practicable, and in any event within 21 days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this contract and/or the contractor to incur costs or lose revenue give to the authority a notice of its claim for an extension of time for Service Commencement, payment of compensation and/or relief from its obligations under the contract;

33.2.2.2 Within 14 days of receipt by the Authority of the notice referred to in Clause 33.2.2.1 above, give full details of the Compensation Event and the extension time and/or any estimated change in project costs claimed ….." (Emphasis added)

[9] That is sufficient quotation for these immediate purposes. It is common case that these terms amounted to conditions precedent to such a

claim. The plaintiff must meet a two stage test. It is also common case that the plaintiff must rely on a letter of 20 October 2009 as notice. The defendant says that the wording of that letter is far from the terms of the statement of claim now advanced, even when twice amended. The plaintiff lays emphasis on the words in the clause quoted above – "is likely to cause" and says that the information it was obliged to provide was the information that was known to it at that time when bringing a prospective claim. Even in the hearing before me the submissions in this regard were, obviously, much lengthier than that but they lead me to the clear conclusion, from which neither senior counsel dissented, that both sides have an arguable case to make. This is not a case where a party is putting forward a preliminary point which it is bound to win or which it is bound to lose.

[10] As the plaintiff robustly opposes this application to have the preliminary questions considered by the court it is necessary to consider the authorities applicable to the approach to such an order.

[11] The leading authority in this jurisdiction is Millar (A Minor) v Peeples and Others [1995] NI 6. This arose out of a personal injury action. It was an application by the defendant to have a split trial with liability being considered first. The judgment of Carswell LJ, (sitting with Sheil and Girvan JJ) is summarised in the headnote.

> "The terms of Order 33, Rule 3 permitted the court to order a split trial in a personal injuries action and, while the normal practice was that liability and damages should be tried together, the court should be ready to order separate trials wherever it was just and convenient to do so. In weighing up what was just and convenient the court should balance the advantages or disadvantages to each party and take into the account the public interest that unnecessary expenditure of time and money in a lengthy hearing should not be incurred. The court should not allow undue weight to the tactical advantage which might accrue to a plaintiff by refusing to order his split trial. The proper criterion was the determination of what was just and convenient in the interests of all

> parties and the public interest. In the instant case, although the strain on the plaintiff having to give evidence on two occasions should not be minimised, such factors had to be balanced against the considerable disadvantages which would accrue if the trial were not split. It was clear that the probable length of the trial on the issue of damages would be far longer and far more expensive than that in liability. Considering all the factors, the balance of justice and convenience came down very firmly in favour of splitting the trial and against the judge's decision to reverse the Master's order.
>
> While the Court of Appeal did not lightly overrule decisions of judges at first instance on matters within their discretion, the judge had been influenced by a consideration which should have received no weight and had failed to give sufficient weight to other important contrary considerations."

[12] The defendant also relied on a decision at first instance of Lord Lowry LCJ: Rodgers v Gallaher Limited [1982] NI 316. This was again a personal injury case against a former employer. Mr Denys relied on the headnote here.

> "Although the question of the limitation issue may involve considering evidence which would also be relevant at the trial, it is a different question for any of those which would be in issue at the trial; this was not an exceptional case where the trial of a preliminary point would be an undesirable duplication of effort and of evidence …."

[13] I take this into account but if one turns to the actual judgment of the Lord Chief Justice one notes the important context in which he referred to "an exceptional case". At the bottom of page 5 of the judgment one finds this.

> "The Master, and the Judge if there is an appeal, must be alert to pick out the case (I think one could safely say, the exceptional case) in which it will only be an undesirable duplication of effort and evidence to order the trial of a preliminary issue under Section 9(D). I do not believe that this is such a case, and therefore I affirm the decision of the learned registrar."

Reference to 9D is a reference to the Statute of Limitations 1958, as amended, regarding the discretionary power of the court in personal injury cases.

[14] Mohan v Graham and Others [2005] NIQB 8 is an example of a split trial being ordered in contested circumstances. I bear these authorities in mind when approaching the facts of this particular case.

[15] It is convenient to set out at this point the grounds advanced against the hearing of a preliminary question. Firstly, it was suggested that it would not be appropriate to act on assumed facts. That is absolutely right and Mr Denys immediately conceded the point. A statement of agreed facts has already been furnished by the defendant. The parties can refine this further. Any facts still in dispute can be proved in the normal way.

[16] The resolution of this preliminary issue will require oral evidence, in particular from a Mr Conlon and a Mr Crozier for the competing interests. This is relevant to the context in which the letter of 20 October 2009 was written. It is right to take into account the context, as Akenhead J found in Walter Lilly and Company Limited v McKay [2012] EWHC 1773 (TCC). However, the fact that some evidence has to be heard is not, as can be seen from the cases cited above, a bar to hearing a preliminary issue.

[17] The plaintiff argues that 6 or 7 days would be required to allow the court to reach a conclusion on the preliminary issue. I reject that submission. As stated above there are two principal witnesses. They have made written statements. They disagree only to an extent. I would have thought a day for each is likely to be more than sufficient. There was some vague reference to possible other factual witnesses but it was

acknowledged by Mr Brannigan that they would not be lengthy. The court would require some technical or scientific assistance with the process but the plaintiff, following a direction from the court, has addressed its mind to that. At pages 52 and 53 of the plaintiff's skeleton argument sections have been identified of two technical reports for the court to consider. I would hope that these could be agreed without the need to call the experts, but if not any point of difference between them would again be modest and not in my view time consuming. Three days have been set aside currently for the hearing of this matter in December of this year. I am not persuaded that 6 or 7 days will be necessary.

[18] There was discussion at the hearing with regard to an appeal. Although it is not of great weight it seems to me that the plaintiff would be the one more likely to appeal than the defendant, if unsuccessful as its claim would have failed. I doubt very much whether it would be correct of the defendant to appeal if it lost as it might still win the main action. That was the submission of Mr Denys QC although he was not in a position to give a formal undertaking not to appeal.

[19] If the plaintiff won and the case then proceeded in April 2017 as scheduled, for some three weeks, a little time might be lost by duplication. Mr Conlon and Mr Crozier would have to give evidence again on whether or not the defendant had acted as a Prudent Operator. They are not children or vulnerable individuals and it does not seem to me that it is a significant burden on them to give evidence twice. It seems to me that very little time would be "wasted" even if in fact the plaintiff did win on the preliminary point.

[20] The arguments in favour of hearing the preliminary question might be summarised as follows. Firstly, the court is going to have to decide this point sooner or later i.e. in December or next April because it is an essential proof for the plaintiff to establish its claim.

[21] Secondly, if, as the defendant maintains, it will succeed on the preliminary point then very considerable costs will be saved to the parties by not having to hear the weeks of other evidence. That is also in the public interest in that a court will not have to spend the time hearing such evidence, unnecessarily, if the defendant is right. The defendant points out that it won on the first stage of lack of notification before the adjudicator. The strength of the plaintiff's point on the second stage does not assist it if the "notice" of 20 October 2009 is found inadequate.

[22] That consideration falls fair and square within the dictum of Carswell LJ that the hearing of a preliminary issue, or split trial in the Millar case, would save a far longer and more expensive trial.

[23] A resolution of the issue one way or another would assist the parties in understanding their positions. It was stated in court that the parties were in negotiations, as the court would readily understand.

[24] The dictum of Lord Scarman in Tilling v Whiteman [1980] AC 1 in the House of Lords was referred to in argument. Counsel for the defendant took the court to the passage in the judgment of Lord Scarman which included a phrase of his which is frequently quoted. I set that out from page 25 of the judgment:

> "The case presents two disturbing features. First, the decision in the B County Court was upon a preliminary point of law. Had an extra half hour or so been used to hear the evidence, one of two consequences would have ensued. Either Mrs Tilling would have been believed when she said she required the house as a residence, or she would not. If the latter, that would have been the end of the case. If the former, Your Lordship's decision would now be finalised. As it is, the case has to go back to the County Court to be tried. Preliminary points of law are too often treacherous shortcuts. Their price can be, as here, delay, anxiety and expense."

Having set that out it can be seen that this is not a case of this kind. The hearing of the preliminary point will take a significantly shorter time than the hearing of the whole action, listed for three weeks.

[25] The burden on the parties and on the court, even if the plaintiff succeeds in proving adequate notification, will be lessened at the trial. There will be one less issue to decide. That hearing should be shortened by roughly the extent of the time taken for the preliminary issue.

[26] Having taken the competing submissions into account my clear conclusion is that this is an appropriate case for the court to resolve the preliminary question in advance, with a real prospect of avoiding a lengthy and expensive hearing, without significant disadvantages to outweigh that factor.

[27] As proof of adequate notification is part of the plaintiff's case, the plaintiff should now prepare a statement of facts which can be agreed by the defendant. The defendant should respond to that seriatim so that the oral evidence need only address those facts which are truly in dispute. I invite counsel to consider what other directions are required.