Neutral Citation No: [2013] NIQB 124 | *Ref:* **WEA9035**

Judgment: approved by the Court for handing down | *Delivered:* **24/10/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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BETWEEN

NORTHERN IRELAND HOUSING EXECUTIVE

Plaintiff

and

HEALTHY BUILDINGS LTD

Defendant

_____

WEATHERUP J

[1] The plaintiff's Writ of Summons issued 30 August 2013 seeks a declaration that the decision of an Adjudicator of 14 August 2013 was wrong as a matter of law. The matter comes before the Court for determination on the papers generated in the adjudication. There was no factual dispute that required oral evidence. Mr Singer appeared on behalf of the plaintiff and Mr Humphries QC on behalf of the defendant.

[2] The two grounds relied on by the plaintiff are first of all that the Compensation Event Notification Number 1 issued by the defendant on 21 May 2013 did not concern a valid compensation event under the contract and secondly that the Compensation Event Notification Number 1 was time barred by operation of clause 61.3 of the contract.

[3] By the adjudication decision dated 14 August 2013 the Adjudicator found in favour of the defendant on the two grounds relied on by the plaintiff. The Adjudicator found that there was a compensation event arising under the contract in that an instruction affecting the scope of the work had been issued and secondly that the matter was not time barred. In effect the plaintiff seeks to have the Adjudicator's decision set aside by a declaration of the Court.

[4] The plaintiff is a housing authority and the defendant is a risk management company that undertakes asbestos management services, including asbestos surveys and samples. A framework agreement was entered into on 19 December 2012. The defendant is under contract as 'consultant' to provide management surveys and sampling for the plaintiff as employer.

[5] The defendant contends that the initial contract arrangements provided for the defendant undertaking the surveys by testing and by presumption. By 'presumption' the defendant contends that the contract provided that where tests had shown the presence of asbestos and it was considered that there may be asbestos in an adjacent area the defendant could presume the presence of asbestos without further testing. However the defendant contends that on 10 January 2013 there was an oral instruction from the plaintiff that the presumption option was not to be used and that testing was required to be undertaken. On 24 January 2013 the instruction was said to be converted into a written instruction by the issue of the minutes of the meeting at which the oral instruction was given. On 23 May 2013 the defendant issued the notice of a compensation event, the compensation event being the instruction which the defendant contends affected the scope of the works.

[6] The plaintiff contends that the statement contained in the minutes of the meeting was not an instruction altering the scope of the work but was a clarification of the contractual obligation of the defendant. Thus, says the plaintiff, there was no compensation event in respect of which notice could be given. In any event the plaintiff contends that the defendant's notice was given outside the 8 week time limit required by the contract.

[7] The contract was NEC3 Professional Services Contract 2005 as amended.

Clause 60.1 provides for 'Compensation events' and (1) reads 'The Employer gives an instruction changing the Scope'.

Clause 11(11) defines the Scope as information which either specifies and describes the services or states any constraints on how the consultant provides the services and is either in the documents which the contract data states it is in or in an instruction given in accordance with the contract.

Clause 61 provides for 'Notifying compensation events' as follows –

> 61.1 For the compensation events that arise from the Employer giving an instruction or changing an earlier decision, the Employer notifies the Consultant of the compensation event at the time of giving the instruction or changing the earlier decision. He also instructs the Consultant to submit quotations, unless the event arises from a fault of the Consultant or quotations have already been submitted. The Consultant puts the instruction or changed decision into effect.

61.3 The Consultant notifies the Employer of an event which has happened or which he expects to happen as a compensation event if

- the Consultant believes the event is a compensation event and
- the Employer has not notified the event to the Consultant.

If the Consultant does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in Prices, the Completion Date or a Key Date, unless the Employer should have notified the event to the Consultant but did not.

61.7 A compensation event is not notified after the defects date.

Clause 13 provides for 'Communications' as follows –

13.1 Each instruction …. notification ….is communicated in a form which can be read, copied and recorded.
13.2 A communication has effect when it is received at the last address notified by the recipient for receiving communications ….
13.7 A notification which this contract requires is communicated separately from other communications.

[8] As applied to the present case the scheme of the notice provisions is –

1. Where the plaintiff issues an instruction, the plaintiff notifies the defendant of a compensation event at the time of giving the instruction (clause 61.1).
2. If the plaintiff has not given notice of the compensation event, the defendant notifies the plaintiff of the compensation event (clause 61.3 first sentence).
3. If defendant does not give notice within 8 weeks the defendant may not make a claim, unless the plaintiff should have given notice and did not (clause 61.3 second sentence).

[9] The plaintiff contends that notice was given to the defendant when the written instruction was issued. The words 'event' and 'compensation event' are used in clause 61.3. On the plaintiff's case the 'event' referred to, where that word is last used in clause 61.3, is said to be the instruction. The plaintiff did give notice of the instruction. The defendant's approach is that the 'event' referred to, where that word is last used in clause 61.3, should be read as referring to the 'compensation event'. The plaintiff gave notice of the instruction but, says the defendant, did not give notice of the compensation event.

[10] Clause 61.1 requires an employer to notify both the event, the instruction, and the compensation event. The instruction notification and the compensation event notification are separate items. Further, clause 13.7 recognises an instruction and a

notification as separate forms of communication and requires each to be communicated separately.

[11] It is my conclusion that the reference to 'event' where it last appears in clause 61.3 must mean the compensation event rather than the instruction. There can be no instruction without written notice received at the consultant's address. Under clause 61.1 the employer should notify the consultant of both the instruction and the compensation event. That being so the proviso to the time limit clause must refer to the notice of the compensation event rather than notice of the instruction. Therefore the interpretation of 'event' in the second part of clause 61.3 is the same as the interpretation of 'event' in the first part, namely that on each occasion the reference to event is a reference to the compensation event.

[12] The time limit does not apply if the employer should have notified the consultant of the compensation event but did not. When 'should' the employer notify the consultant of a compensation event? Certainly when clause 61.1(1) applies and an instruction has been issued by the employer. What if the employer does not believe that the statement in question amounts to an 'instruction' in that it is believed by the employer not to change the scope of the work? The plaintiff's approach was that in such circumstances the employer should not be required to notify the consultant of a compensation event and the consultant, if he believes the event is a compensation event, has 8 weeks to notify the employer or any claim would be time barred. However if the employer should be found to be mistaken in that belief and the statement did amount to an instruction, would it be a case where the employer 'should' have notified the compensation event to the consultant?

[13] It is my conclusion that when the statement in question amounts to an instruction changing the scope of the work the employer 'should' have notified the consultant. The obligation is placed on the employer under clause 61.1. That the employer mistakenly believed that the statement did not amount to an instruction does not alter that obligation. Nor should the mistake of the employer result in the time limit in clause 61.3 being visited on the consultant in such circumstances.

[14] If the employer has not given notice of an instruction to the consultant a compensation event cannot arise. If the employer has given notice of an instruction to the consultant the employer should give notice of a compensation event to the consultant. The plaintiff did not give notice of a compensation event. Thus the plaintiff, not having given notice of the compensation event, cannot rely on the time limit if the statement was an instruction changing the scope of the work.

[15] There is a long stop in clause 60.7 in that notice of compensation events must be given within the defects period.

[16] I have set out above my interpretation of the contract and the events that happened. Before considering whether the plaintiff issued an instruction changing the scope of the work, which the plaintiff should have notified to the defendant as a

compensation event, I refer to a number of commentaries introduced by Counsel that discuss the equivalent contractor's contract with the employer. The first is Eggleston's NEC3 Engineering and Construction Contract (2nd edition) at page 248 which refers to the concluding words of clause 61.3 and states that the words do much to diminish the overall impact of the time barring effect of the clause. There is said to be no time bar in NEC3, other than that found in clause 61.7 stating that compensation events are not notified after the defects date, in respect of claims for additional works and variations and other classes of events which should have been notified and were not. The author comments on the wording '…. notifies the compensation event' that since there is no express obligation in NEC3 to notify 'events', other than 'compensation events' it is probably intended that the notification referred to in clause 61.3 is that referred to in Clause 61.1.

[17] The next item referred to was the NEC3 Guidance Notes (3rd ed.) at page 73 where a commentary on clause 61.1 states that this procedure will normally apply to specified compensation events, including compensation event (1) dealing with an instruction. It is stated to be important that the notice of such compensation events is given without waiting for the contractor to do so. If not this may leave the employer open to late claims because the time bar in clause 61.3 does not apply to those types of events. The commentary on clause 61.3 states that the procedure would normally apply to compensation events not covered by clause 61.1 and would also apply to an event which should have been notified under clause 61.1 but was not.

[18] A commentary on clause 61.3 in Keating on ECC3 (1st ed) at page 261 refers to the concluding words of the clause that dis-apply the barring effect of not notifying within time. The author states that clause 61.3 does not identify in what circumstances there should be notification of a "compensation event". The commentary assumes that the 'event' being referred to is the compensation event. One situation where it is stated to be certain that there is an obligation to notify is under clause 61.1. This would apply to the compensation events defined in clause 60.1 (1) relating to instructions. The author expresses the opinion that the existence of the express obligation in clause 61.1 and the fact that it is the only express obligation suggests that the obligation referred to in clause 61.3 is limited to clause 61.1 situations alone and this view is said to be expressed in the guidance notes. The text goes on to suggest that it may be that the obligation to notify applies more broadly such as to cover all compensation events, this for various reasons then outlined, which it is not necessary to consider.

[19] I find nothing in the commentaries that runs contrary to the interpretation of the contract I have set out above. I move to the second issue as to whether there was an instruction that changed the scope of the contract. Under clause 13.1 the relevant instruction was the written minutes of the meeting recording the oral instruction given at the meeting. The scope of the contract under clause 11.2.11 refers to services being provided by the consultant. The services are the management surveys and samples for asbestos. Those management surveys and samples for asbestos are required to be in accordance with a quality submission according to clause 21.3 and

also in accordance with Health and Safety guidance HSG264. The clauses of the guidance at 37-46 discuss the obligations in relation to the conduct of management surveys and samples for asbestos and these define the scope of the work. There are surveys undertaken under the contract by sampling and or by presumption. In respect of a particular structure the consultant may take a sample and if there is reason to believe that there may be asbestos in similar locations within a building it may be presumed that the asbestos is present and not required to undertake a sample in every room.

[20] The change that is said to have been initiated by the instruction is the requirement to undertake the sampling in all cases and not to proceed in any instance by presumption. The difference is said to be between providing a sample where it is judged to be appropriate and presuming the existence of asbestos where it is considered there may be asbestos, as was the initial arrangement, and the requirement for samples in all instances where there may be asbestos, being the result of the instruction.

[21] The consultant is paid for the survey and is paid for every sample. Thus if there are more samples there will be the requisite payment. However added samples are said to involve additional work generally. Initially, there was a fee for the survey of a property and payment for each sample and the entitlement to presume the presence of asbestos. Under the change there is a fee for the survey of the property and payment for the samples taken but according to the defendant the fixed fee for the survey does not cover the extra work in taking the extra sample now required.

[22] In the referral to adjudication at paragraph 81 and following the position was summarised as follows -

> "The instruction has a significant detrimental effect on productivity by reducing the amount of surveys undertaken by an ACS in one day….
> The difference in the time taken to undertake the surveys with presumptions as opposed to sampling every instance of an ACM has been to increase the surveying and administration time by approximately one third and sampling has doubled.
> Not only is there a significant effect on productivity but also due to the substantial increase in samples, the time taken by the testing laboratories to complete the tests has increased which has two detrimental effects on HBL.
> The first effect is ….delaying Completion of the Task Order which could result in penalties …. The second effect is on HBL's payments and cashflow…."

[23] As far as the plaintiff is concerned there were issues about the use of the presumption approach. Mr Steven Burns, Principal Officer in the plaintiff's Asbestos Management Unit, stated that there were several disadvantages to the presumption approach. The presumption approach involved additional work or costs for NIHE where it might be presumed there was asbestos even though, as evidenced through the sampling, there were places where no asbestos was detected. Mr Burns stated that although the presumption approach was permitted under HSG264 it was not considered the appropriate method for conducting surveys in a cost effective manner. Thus the defendant made it clear at the meeting that sampling and not presumption was the preferred method.

[24] The Adjudicator's conclusion was that the statement may have been intended as a clarification but it nevertheless constituted an instruction to change the scope of the work. I agree with the Adjudicator's conclusion. This was an instruction that concerned the scope of the work and changed the scope of the work. The financial impact, if any, has yet to be determined.

[25] There were a number of other points raised by the plaintiff. Some went to credibility and do not bear on the issue of interpretation of the contract. Some went to the amount payable and may be valid points in relation to the calculation of actual loss but that is a separate issue to whether this was an instruction that changed the scope of the work.

[26] It is important that all litigation proceeds with expedition. That is particularly the case with Adjudicator's decisions. The underlying scheme seeks to secure the flow of payments in the construction industry by a 28 day process for a temporary decision that is put into effect pending final resolution of the dispute by arbitration or litigation or agreement. When the Adjudicator awards a payment the enforcement of the award is by litigation. The Court also seeks to complete any application for summary judgment within 28 days of the service of the Writ. The circumstances in which a party can resist summary judgment on an Adjudicator's award are limited. See for example Rodgers Contracts (Ballynahinch) Ltd v Merex Construction Ltd [2012] NIQB 94. This case did not involve an award, although the consequence of the Adjudicator's decision was that an assessment of compensation would follow. The general approach to Adjudicator's awards might suggest that the plaintiff, as the disappointed party, should not, at this stage, be entitled to a rehearing by the Court of the Adjudicator's decision until the conclusion of the contract and final determination of disputes. However the decision affects the manner of operation of the contract and the implementation of the Adjudicator's decision is irreversible, unlike a monetary award where repayment can be ordered and the payment protected if repayment is considered to be at risk. It was appropriate that this dispute should have been dealt with by the Court at this stage in the manner that it was.

[27] I find that there was an instruction that changed the scope of the work, that the plaintiff should have notified the defendant of a compensation event and that the

notice of the instruction did not amount to a notice of the compensation event. As the plaintiff should have notified the defendant of the compensation event and did not do so, the defendant's notice is not time barred. Accordingly, I agree with the Adjudicator on both grounds. The plaintiff is not entitled to the declarations sought.