Neutral Citation No. [2014] NICA 27 | *Ref:* **GIR9150**

Judgment: approved by the Court for handing down | *Delivered:* **13/02/2014**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL FOR NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (COMMERCIAL)

_____

BETWEEN

NORTHERN IRELAND HOUSING EXECUTIVE

Plaintiff;

-and-

HEALTHY BUILDINGS (IRELAND) LIMITED

Defendant.

_____

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

_____

GIRVAN LJ (delivering the judgment of the court

Introduction

[1] This is an appeal brought by the plaintiff/appellant ("the Executive") against the judgment of Weatherup J who dismissed the Executive's claim for a declaration that the decision of an adjudicator on 14 August 2003 was wrong in law. The proceedings relate to a dispute arising out of a contract made between the Executive and the defendant/respondent ("HBL") relating to the provision of asbestos surveying services in relation to certain properties belonging to the Executive.

[2] Mr Darling QC appeared with Mr Singer on behalf of the Executive. Mr Humphreys QC appeared with Mr Atchison on behalf of HBL. The court is indebted to counsel for their helpful written and oral submissions.

[3] Essentially two questions arise for consideration. Firstly, did the Executive as employer under the contract issue an instruction changing the scope of the services to be provided under the contract giving rise to a compensation event? Secondly, if so, is HBL time barred in relation to its claim for compensation arising out of that instruction? The first question requires a careful analysis of the contractual documentation to ascertain the scope of the services. The second question necessitates a construction of the contractual terms.

The contractual context

[4] The Executive is a housing authority with a large number of tenants in domestic dwellings. As a landowner and employer it is obliged to manage the risks posed by the presence or potential presence of asbestos bearing material in its properties. HBL is a risk management company which provides asbestos management services including asbestos surveys and sampling services to check for the presence of asbestos in premises.

[5] Following the submission of tenders in relation to asbestos management schemes involving different regions, on 20 December 2012 the Executive wrote to HBL indicating that the Executive accepted HBL's tenderers as contained in their pricing schedules. These related to two areas. The first related to Belfast where the contract sum was specified as £590,457.50 and the other was the north east region where the contract price was £530,712.50. The date of commencement of the contracts was expressed to be the date of the letter and the letter stated that there was now a binding contract between the parties. Until the execution of the formal contractual agreement a contract existed between the parties and was subject to the tender documentation, the Specification, HBL's schedule of prices and its Quality Submission. The formal contract document was signed by HBL on 16 January 2013 but was not signed by the Executive until 6 March 2013. It is common case that the parties were in contract at all relevant times and that the standard form of New Engineering Contract, 3rd Edition (Professional Services Contract) ('NEC3') constituted the contractual terms. Since the issues raised in the present appeal require a consideration of the terms of the contractual arrangements between the parties we set out below some of the key provisions.

The Specification

[6] Under Clause ACC.101 of the Specification entitled "Management Survey with Sampling" it was provided that the asbestos consultant surveyor ("ACS") was to complete the survey generally in accordance with Health and Safety Guidance. This was a reference to the guide HSG264 ("HSG264"). Under Clauses ACC.101.1 of the Specification the Employer's Officer was to commission surveys and provide information such as the address of relevant properties and data relating to, for example, the year of construction of the premises and the number of bedrooms. Under Clause ACC.101.2 the ACS was to visit "each property and carry out management surveys with samples as described in Task Order (Commission)". All

internal parts were to be surveyed (including roofspaces, hot presses and the like), external elements and other fixed items within the boundaries of the property such as boiler houses. In relation to the sampling methodology strategy Clause ACC.101(8) provided:

> "(a) Sampling strategy to be in strict compliance with HSG 264 and other pertinent guidance to ensure compliance all legislation, regulations, industry practice and guidelines (including without limitation, all Control of Asbestos Regulations in force in Northern Ireland) relating to control of asbestos applicable in Northern Ireland.
>
> (b) ACS is to sample using a quantity of samples commensurate with the material being sampled.
>
> (c) Associated sampling in management surveys with samples is only permitted within the same property (unless a management survey without samples) where the ACS can visually match the materials where association has been assumed. Comment must be made in AIMS rooms page to clearly identify location of associated samples (not just sample number).
>
> (d) No associated samples can be used for non-homogenous materials where fibres could have been added as part of the site process, EG Textured Coating (Artex)."

The term "associated sampling" in paragraph (c) is not defined. AIMS refers to the Employer's Electronic Database (the Asset Information Management System).

[7] Clause AAC.102 (entitled "Management Survey Without Sampling") by way of introduction states:

> "**Generally: to be completed by asbestos consultant surveyor in accordance with health and safety guidance (The Survey Guide HSG 264).**"

It goes on to state:

> "(1) Generally all in accordance with Clause AAC.101 unless stated.

(2) The management Presumptive or visual survey is based on the same house type where a management survey with samples has been completed and the property surveyed must have the following similarities:

(a) Same house type.

(b) Same year of construction.

(c) Same construction type.

(d) No changes to original design ie. extension etc.

3. For uploading data to AIMS please refer to Clause (ACC.155).

4. ACS to include address of similar property where management survey with samples was carried in comments box on page 2 in AIMS.

5. Limited sampling may be required in a presumptive survey where the ACS discovers an unknown material and it is prudent to sample. In all situations where non- homogenous materials are discovered a sample should be taken to ascertain if this material is an ACM."

The Quality Submission

[8] The foreword to this document stated that the purpose of the questions set out in the document was to give tenderers an opportunity to demonstrate a clear understanding of how they would deliver the required Service. In Section 3(2) dealing with payment and quality assurance in paragraph (b) the consultant was asked to explain its quality assurance systems procedures to ensure compliance with HSG 264. In response HBL stated:

> "Healthy Buildings (Ireland) complies with the methods and procedures for inspection as defined in the requirements of ISO17020:2012, HSG264, RG8 and L143 (Procedure Asbestos Surveying and Bulk Sampling SOP001, available on request).
>
> **Compliance with HSG264**
>
> Healthy Buildings (Ireland) has and use documented instructions on inspection planning and on standard sampling and inspection techniques, where the absence of such instructions could jeopardise the efficiency of the inspection process.

> A proportion of surveys are re-inspected while the survey is still in progress. In line with HSG264 guidance, 5% of all surveys are re-inspected …
>
> In some situations it may not be practical to re-inspect the whole site. In these circumstances a representative part of the site is re-examined.
>
> The survey re-inspection will involve checking all aspects of the site work using the recorded data, samples and photographs to ensure:
> ….
>
> "where suspect ACMs have been 'presumed' or 'strongly presumed; the presumption of asbestos type is valid."

ACMs refer to asbestos containing materials.

HSG264

[9] This guidance prepared by the Health and Safety Executive was designed to help people carrying out asbestos surveys. It includes providing guidance on situations where surveys may be carried out for managing asbestos and domestic property to meet the requirements of the Construction (Design and Management) Regulations 2007 and under wider health and safety legislation. The guidance is expressed to be aimed at surveyors who carry out asbestos surveys and those who commission surveys. In relation to surveyors paragraph 4 of the introduction specifies the methodology to use in carrying out surveys and gives advice on how to recognise and sample suspected ACMs. It contains a specific section which outlines the survey strategy to use when surveying a large number of similar properties (eg. domestic property). In relation to those commissioning surveys it sets out what type of survey is appropriate, what the client should expect from a survey and what the client should provide to the surveyor.

[10] In Section 3 dealing with asbestos surveys paragraph 36 points out that in most cases the survey will have three main aims. It must (a) as far as reasonably practicable locate and record the location, extent and product type of any presumed or known ACMs; (b) inspect and record relevant information; and (c) determine and record the type of asbestos concerned. Paragraph 37 states:

> "37. The duty to manage requirement in CAR 2006 regulation 4 allows materials to be 'presumed' to contain asbestos. Therefore in the asbestos survey, materials can be presumed to contain asbestos. There are two levels of presumption:

(1) **Strong presumption**: in this case the material looks as if it is an ACM or that it might contain asbestos. This conclusion can be reached through visual inspection alone by an experienced well-trained surveyor familiar with the range of asbestos products. Examples of strong presumption would be:

- where laboratory analysis has confirmed the presence of asbestos in a similar construction material.

- materials in which asbestos is known to have been commonly used in the manufacture product at the time of installation (eg corrugated cement roof and wall sheeting, cement gutters and drainpipes, cement water tanks, ceiling tiles, insulating boards).

- materials which have the appearance of asbestos but no sample has been taken eg. thermal insulation on a pipe where fibres are clearly visible.

(2) A **default situation** where a material is **presumed** to contain asbestos because there is insufficient evidence (eg no analysis) to confirm that it is asbestos free or where a duty holder/surveyor decides that it is easier under the planned management arrangements to presume certain materials contain asbestos. Many non-asbestos materials will also be presumed to contain asbestos using this system. There is a further default situation where materials must be presumed to contain asbestos. The default applies to areas which cannot be accessed or inspected. **In this situation any area not accessed or inspected must be presumed to contain asbestos, unless there is strong evidence that it does not.**"

Paragraph [38] provides that materials cannot be presumed to be asbestos free unless there is strong evidence to conclude that they are highly unlikely to contain asbestos. There are obvious materials which are not asbestos such as wood, glass, metal, stone and so forth. There are also examples of asbestos being present inside materials on the hidden side of items such as wood panelling or ceiling tiles. The

guide goes on to point out that it is not always straightforward that ACMs are absent. The Regulations require that reasonable steps are taken. While original specifications may not have included ACMs in certain building locations, workers may have used them for their own convenience. There are many examples of poor removal practice leaving asbestos containing debris and residues. Areas where asbestos has been removed previously would need to be re-inspected.

[11] HGS264 distinguishes between *management surveys* and *demolition surveys*. In the present instant we are concerned with management surveys. Their purpose being to locate as far as reasonably practicable the presence and extent and any suspect ACMs. Clause 45 provides that the survey will usually involve sampling and analysis to confirm the presence or absence of ACMs, but a management survey can also involve presuming the presence or absence of asbestos. A management survey can be completed using a combination of sampling and presuming or indeed just presuming. It states in bold terms:

> "Management surveys can involve a combination of sampling to confirm asbestos is present or presuming asbestos to be present."

Paragraphs 46 and 47 are also relevant. It is recognised that the presumption approach has several disadvantages. It is less rigorous. It can lead to constant obstructions and delays before work can start. It is more difficult to control. Default presumptions may also lead to unnecessary removal of non-ACMs and their disposal as asbestos waste. Default presumptions may be suitable in some instances as part of a client's management arrangement. Paragraph 47 states:

> "Surveyors should also endeavour to positively identify ACMs. A sufficient number of samples should be taken to confirm the location and extent of ACMs. It is legitimate to reduce sample numbers where materials can be strongly presumed to be ACMs. However the default presumption option should be avoided where possible as it can make managing asbestos more difficult for the duty holder. Default presumption should only be used in circumstances where it is requested by the client and/or where access genuinely cannot be obtained."

[12] Section 5 of the guide deals with the carrying out of the survey. Paragraph 101 et seq deal with bulk sampling strategy. Each area and room should have a thorough visual examination to identify the materials and locations to be selected for sampling. The sampling strategy will be based on several factors including the size and number of premises/rooms and the extent, types and variations in materials present. Visual inspection and checking (eg. tapping and prodding) of each material will allow the sample numbers and locations to be specified. In general for

homogenous manufactured products containing asbestos it can be assumed that the asbestos is uniformly distributed throughout the material and one or two samples will suffice. In paragraph 104 it is stated that for homogenous material, often a single sample may be all that is required to confirm the suspicion that it is asbestos and to make a presumption that it applies to other material of same type. However for non-homogenous materials and for some presumed non-asbestos materials additional sampling may often be needed to reduce the possibility of false negatives which may lead to incorrect conclusions. It then sets out suggested sample numbers for each room which may be adapted depending on the site and circumstances prevailing. The guide thus provides fairly detailed guidance as to the number and location of samples dealing with materials such as spray coating, pipes – thermal insulation, insulating boards and asbestos cement materials. It contains guidance on bulk sampling procedures and methodology.

NEC3

[13] NEC3 professional services contract is one of the standard form contracts produced by NEC which is owned and developed by the Institution of Civil Engineers. The introductory section of NEC3 records that NEC standard contracts are designed to stimulate good management of the relationship between the parties to the contract and hence the work included in the contract. It claims to be "a clear and simple document – using language and a structure which are straightforward and easily understood".

[14] Relevant provisions in NEC3 are as follows:

"(a) Clause 10.1 provides:

> 'The *Employer* and the *Consultant* shall act as stated in this contract and in a spirit of mutual trust and co-operation.'

(b) Clause 11.2(9) provides:

> 'To Provide the Services means to do the work necessary to complete the services in accordance with this contract and all incidental work, services and actions which this contract requires.'

(c) The Scope is defined in Clause 11.2(11) thus:

> 'The Scope is 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 this contract.'

(d) Clause 13.1 provides:

'Each instruction, certificate, submission, proposal, record, acceptance, notification, reply and other communication which this contract requires is communicated in a form which can be read, copied and recorded, writing is in *the language of this contract*.'

(e) Clause 13.7 provides:

'A notification which this contract requires is communicated separately from other communications.'

(f) Clause 20.2 provides:

'The *Employer* may give an instruction to the *Consultant* which changes the Scope or a Key Date. After completion, an instruction is given only if it is necessary to provide the *services*.'

(g) Clause 21.1 provides:

'The *Consultant* Provides the Services in accordance with the Scope.'

(h) Clause 21.3 provides:

'The *Consultant* Provides a Service in accordance with the Quality Submission a copy of which is appended to the contract.'

(i) Clause 60.1 provides:

'The following are compensation events:

(1) The *Employer* gives an instruction changing the Scope.

(2) The *Employer* does not provide access to a person, place or thing the consultant has stated in this contract.

(3) The *Employer* does not provide something which he is to provide by the date for providing it shown on the accepted programme.

(4) The *Employer* gives an instruction to stop or not to start any work or to change a Key Date.

(5) The *Employer* or Others do not work within the times shown on the Accepted Programme or within the conditions stated in the Scope.

(6) The *Employer* does not reply to a communication from the *Consultant* within the period required by this contract.

(7) The *Employer* changes a decision which he has previously communicated to the *Consultant*.

(8) The *Employer* withholds an acceptance (other than acceptance of a quotation for acceleration) for a reason not stated in this contract.

(9) The *Employer* notifies a correction to an assumption which he has stated about a compensation event.

(10) A breach of contract by the *Employer* which is not one of the other compensation events in this contract.

(11) An event which:

- stops *Consultant* completing the services; or
- stops the *Consultant* completing the *services* by the dates shown on the Accepted Programme;

and which:

- neither Party could prevent;
- an experienced consultant would have judged as the Contract Date to have such a small

chance of occurring that it would have been unreasonable for him to have allowed for it; and

- it is not one of the other compensation events stated in this contract.

(12) The consultant corrects a defect for which he is not liable under this contract.

(j) Clause 61 provides so far as material as follows:

61.1 For compensation events which 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.

61.2 The *Employer* may instruct the *Consultant* to submit quotations for a proposed instruction or a proposed changed decision. The *Consultant* does not put a proposed instruction or proposed 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 that 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**.

61.4 If the *Employer* decides an event notified by the *Consultant*:

- arises from a fault of the *Consultant*;
- has not happened and is not expected to happen;
- has no effect upon the *Consultant's* costs, Completion or meeting a key date; or
- is not one of the compensation events stated in this contract

he notifies the *Consultant* of his decision that the Prices, the Completion Date and the Key Date are not to be changed.

If the *Employer* decides otherwise, he notifies the *Consultant* accordingly and instructs him to submit quotation.

If the *Employer* does not notify his decision to the consultant within either:

- one week of the *Consultant's* notification; or
- a longer period to which the consultant has agreed

the *Consultant* may notify the *Employer* to this effect. A failure by the *Employer* to reply within two weeks of this notification is treated as acceptance by the *Employer* that the event is a compensation event and an instruction to submit quotations.

….

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

The Description of the Service

[15] Paragraph B1 of this document (Document B in the Contract Documents) provides that:

> "The purpose of this contract and the service delivered by the consultant under this contract is to ensure that the *Employer* meets its statutory obligations as a Building owner, to meet his

> requirements under the Control of Asbestos Regulations."
>
> The Service required under the contract will comprise the following work:
>
> "The completion of asbestos surveys for unplanned/emergency works in accordance with specification.
>
> …
>
> Uploading data to NIHE web based Asset Information Management System."

[16] Under Clause B2 it is stated:

> "Under this service the Consultant ensures that the asbestos surveys covered by this contract are compliant with health and safety guidance (HSG264), checked and quality assurances carried out in accordance with best practice and health and safety guidelines and the Service Information of this contract and also that any inaccurate surveys are resurveyed (at no additional expense to the employer) by the Consultant in a timely manner (also at no additional expense to the Employer).
>
> The service also requires the Consultant to ensure that survey sampling is carried out in accordance with HSG264 by suitably qualified and experienced surveyors and damage to NIHE property is kept to a minimum …"

The Price List

[17] Under the general rules and conditions set out in the Price List document the prices tendered relate to management surveys with sampling "in accordance with HSG264 and the NIHE project spec (ACC.101)."

The meeting of 10 January 2013

[18] A meeting in relation to the Belfast area contract took place on 10 January 2013 between representatives of the Executive and HBL. Although described as a pre-contract meeting, as already noted, the parties were in contract. The minutes of the meeting subsequently distributed on 28 January 2013 at paragraph 4.11 stated:

> "4.11 S Burns advised that a briefing meeting would be held for each Scheme, and priorities will be established at these meetings.
>
> S Burns stated that the main type of survey required is likely to be **Management Surveys with Sampling**, and that samples should be taken for analysis from **every** room where asbestos material may be present – e.g. if a ceiling is sampled in one room, this should not be assumed to be representative of similar ceilings in other rooms, rather a sample should be taken from each ceiling where it is considered that asbestos may be present.
>
> S Burns advised/reminded attendees that communal areas must have surveys carried out.
>
> S Burns also advised that all items within the curtilage of dwellings both internally and externally should be surveyed, including verges, soffits, garages, external stores and the like."

[19] It is HBL's contention that the Executive had effectively given an instruction changing the scope of the contract service. On 23 May 2013 HBL sent a document described as a compensation event notification. After citing the contents of paragraph 4.11 of the minutes the document cited Clause 45 of HSG264 and stated:

> "**The effects of this compensation event has been**:
>
> - More time in each property by physically taking the sample and recording the information.
> - A greater volume of samples to be analysed by the labs that due to the lack of capacity within local asbestos laboratories has forced us to send samples to England for analysis. This has brought about an increase in the cost of analysis.
> - The additional sampling means additional AIMS entry time thus increasing the time spent on data entry per property.
> - Increased time spent by administration labelling schematics."

[20] HBL asserts that in accordance with the instruction HBL commenced surveying on 21 January 2013 ensuring a sample of every suspected ACM in every room or area. It claims that this greatly increased the workload for the ABS and laboratory testing. HBL maintains that in real practical terms this meant that it effectively took around twice as many men, twice as long to carry out the work. It claims that following HSG264 using the sampling presumption method one man could survey 10-12 premises in one day whereas following the instruction it claims that two men could survey 6-7 premises per day. Without a corresponding increase in the cost HBL contends that there is difference between the contract being economically viable or unviable. It maintains that the instructed variations to the performance of the contract generated additional works in respect of having no choice but to take the samples as instructed instead of being able to presume. This is not compensated by the fixed fee for conducting the survey. In short it alleges that the instructed variation had a significant detrimental effect on productivity by significantly increasing the amount of time to undertake each survey. It claims that while the Executive is entitled under the contract to change the scope to insist on sampling as opposed to applying a presumption as its preferred method in doing so the Executive must accept that there was an associated consequence in cost.

Was there a variation varying the scope of the services?

[21] Mr Humphreys contended that the Executive had decided that presuming the presence of asbestos under the contract was not an adequate approach. In the adjudication proceedings the Executive stated that sampling was its preferred method rather than applying presumptions because presumptions had a negative commercial effect and the costs paid to maintenance contracts through being unnecessarily required to remove material in which there might or might be asbestos. The Executive in instructing HBL to sample every material where it considered asbestos might be present rather than assuming that the sample taken from another room might be representative departed from the Industry Code of Practice and HSG264. The communication that every room must be sampled was imposing an instruction changing the scope of the works and not mere clarification.

[22] Mr Darling and Mr Singer in their written submissions stated that:

> "Whilst therefore Mr Burns' words were notified to the respondent <u>both as an instruction</u> at the meeting and in writing thereafter, they were not notified as an instruction <u>changing the scope of the works</u> i.e. as a compensation event." (underlining added)

Mr Darling contended that all Mr Burns was doing was indicating which of the possible methods of complying with HSG264 was to be applied for the purpose of the contract. This was consistent with the description in the price list and the specification. HBL had priced for the cost of taking samples and having them analysed and that issue was the subject of pre-contract tender clarification. HBL had

failed to demonstrate that it intended to carry out the works in a particular way so far as concerned the number of samples which it priced to take in each of the Executive properties.

[23] Weatherup J accepted as correct the adjudicator's conclusion on the first issue. He considered that the 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 HSG264. The consultant might take a sample and if there was reason to believe that there may be asbestos in similar locations within a building it might be presumed that the asbestos was present and not required to take a sample in every room. Added samples would be generated by the approach indicated by Mr Burns. Under Mr Burns requirement the fixed fee for the survey did not cover the extra work in taking extra samples which were now required. The judge accepted the adjudicator's conclusion that Mr Burns statement may have been intended by the Executive as clarification but nevertheless it did constitute an instruction and one which changed the scope of the work.

[24] We agree with the judge's conclusion. At paragraphs [3]-[17] above we have taken a little time to set out the key provisions of the contractual documents. What emerges clearly from those documents is that the methodology adumbrated in HSG264 was clearly understood to be the contractual methodology to be followed by HBL. As B1 of the Description of the Service shows the purpose of the contract and the service to be delivered was to ensure that the employer met the statutory obligations under the relevant Control of Asbestos Rules. The Price List document showed that the prices were tendered having regard of the need to act in accordance with HSG264. HSG264 sets out in some particularity the appropriate methodology to be followed to ensure compliance with the proper norms of asbestos management. The Quality Submission document shows that HBL was contracting on the basis that it understood that it was expected to do what HSG264 expected of a contractor. Anyone fairly reading the documentation must have understood that HBL was tendering on the basis that it understood that it was to act in accordance with the methods and procedures for inspection as defined in HSG264. For example the reference in relation to re-inspections to "presumed or strongly presumed" presumptions of the presence of asbestos indicates clearly that HBL was tendering in the context of procedures complying with HSG264 expectations.

[25] As shown by the cited portion of the Executive's skeleton argument (particularly the words underlined) it is accepted by the Executive that paragraph 4.11 of the minutes fell to be considered as an instruction. The dispute between the parties is whether it was an instruction which changed the scope of the works. Accepted that this is an instruction, it is an instruction which in effect calls upon HBL to go beyond the mechanisms set out in HSG264 which permit the application of a strong presumption in cases in which a strong presumption under HSG264 could be legitimately used by the consultant to conclude that asbestos was present. It must follow that it was an instruction which imposed a greater sampling obligation on HBL as compared to what was envisaged under HSG264. Inevitably

this must result in the admitted instruction being considered to be an instruction which changed the scope of the works.

Was HBL's claim out of time?

[26] Weatherup J, upholding the adjudicator's conclusion, decided that HBL's notice served under Clause 61.3 was not time barred. He considered that the scheme of the notice provisions was such that where the employer issues an instruction changing the scope of the work it must notify the consultant of a compensation event at the time of giving the instruction. If the employer did not give notice of the compensation event the consultant can notify the employer of the compensation event (Clause 61.3 first sentence). If the consultant fails to give its notice within eight weeks it may not make a claim unless the employer should have given notice and did not do so (Clause 61.3 second sentence). He concluded that when the employer gave what amounted to an instruction changing the scope of the work he should have notified the consultant that it was a compensation event. That obligation is not altered by the employer's mistaken belief that he was not giving an instruction changing the scope. The fact was that the Executive had not given notice of a compensation event as it should have done. This could not rely on the time limit.

[27] Mr Darling submitted that the judge's construction and that of the adjudicator and respondent did not give sufficient or any weight to the clear commercial purposes behind the contractual provisions. The contract contained procedures for early notification of events and events should be dealt with as they arise. It could not have been the intention of the draftsman that the procedure for dealing with matters at the time would not apply to a change in the scope of the works. A contractor should not be permitted to keep "in his back pocket" an argument about whether a compensation event had occurred. He posed the question what was wrong with requiring a contractor to notify within an eight week time period when it must know that the employer does not consider that the instruction is a compensation event because the employer has not given notification. He argued that it would be absurd to suggest that an employer who does not consider that an instruction constitutes a compensation event is nevertheless obliged to notify the consultant that the event is a compensation event. The reference to the time bar not applying where the employer "should have" notified the event can only refer to an event where the employer knows about it but the consultant does not. The time bar cannot apply where a consultant has no way of knowing the time was running at all. Counsel argued that the guidance notes and the relevant textbook authorities did not take the matter any further.

[28] Lord Clarke pointed out in Rainy Sky SA v Kookmin Bank [2011] UKSC 50 the language used by parties in a commercial contract will often have more than one potential meaning. The court must consider the language used and ascertain what a reasonable person with the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of

contract would have understood the parties to have meant. 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. However, where the parties have used unambiguous language the court must apply it. Even if an improbable result flows from unambiguous language the unambiguous interpretation applies. These principles must also be read in the light of what Lord Bingham stated in Dairy Containers Limited v Tasman Orient Limited [2005] 1 WLR 215:

> "The general rule should be applied that if a party, otherwise liable, is to exclude or limit his liability or to rely on an exception, he must do so in clear words: unclear words do not suffice. Any ambiguity or lack of clarity must be resolved against that party."

[29] Applying Clause 10.1 to the language of Clause 61.1 the employer, at the time of giving what is admitted to be an instruction, was bound to give a written notification of the compensation event which arose from the fact that that was an instruction which in fact changed the scope of the works. The instruction under Clause 13.1 was required to be in writing. The notification of it being a compensation event was required to be communicated separately under Clause 13.7. The consultant was obliged to put the instruction into effect. In fact, the Executive did not give notification of a compensation event although, having regard to its obligation to do so, it should have done so.

[30] Under Clause 61.3 the consultant must notify the employer of an event which has happened as a compensation event if he believes that the event is a compensation event and the employer has not notified the event to the consultant. As stated above the Executive has not, in fact notified the event as a compensation event to HBL which did in fact believe that the event was a compensation event. HBL was thus entitled to give the notification which it did give. HBL, however, would be time barred unless it can rely on the words "unless the Employer should have notified the event to the Consultant but did not". The overall time bar provision in Clause 61.3 is an exclusion clause in favour of the Executive and falls to be construed contra proferentem. As already noted, under Clause 61.1 the Executive "should have notified" the compensatable event. This it had failed to do. Applying the clear wording of Clause 61.3 the Executive cannot argue that the consultant's claim is time barred.

[31] Mr Darling's argument would necessitate introducing a qualification into the wording of Clause 61. For his argument to succeed it is necessary to imply words under Clause 61.1 and 61.3 which are not there. In effect he argues that the obligation to give notification of a compensation event does not arise if the employer does not believe his action gives rise to a compensation event. Alternatively it does not arise if the employer reasonably believes that no compensation event has arisen. The introduction of an implied subjective test whether or not qualified by reasonableness is not warranted by the overall wording of Clause 61. Mr Darling's

suggested implied term is not one which arises by necessary implication to give business efficacy to the contract. Clause 61.3 does introduce an express element of subjective belief on the part of the consultant giving a notice under that provision. Clause 61.1 clearly does not adopt the same approach. The question whether an event is a compensatable event must be an objective one in the absence of clear wording to the contrary. If one were to depart from the clear wording used and seek to imply a qualification there would be no reason to favour the implication of an entirely subjective test as opposed to implying a test of whether the employer reasonably believes that no compensation event has occurred. In the circumstances of this case, the Executive, if acting reasonably, should have concluded that it was demanding of the consultant a sampling methodology going beyond that specified in HSG264 and the other contract documents. The interpretation of Clause 61.3 adopted by the judge and the adjudicator produces an entirely workable outcome and it does not produce such an absurd or irrational outcome as to compel a different construction. There is no ambiguity in the wording which in any event fall to be construed *contra proferentem*, that is to say against the Executive.

[32] In the result we dismiss the appeal.