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Ref: **WEA8118**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **3/3/2011**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN:

STOTHERS (M&E) LIMITED

Plaintiff;

-and-

LEEWAY STOTHERS LIMITED

Defendant.

WEATHERUP J

The Preliminary Issues

[1] This is a preliminary ruling in relation to two matters that have arisen during the hearing of this action. The first matter concerns the meaning of the expression "qualified electrician" in the contractual documents. The second matter concerns the nature of the contractual arrangements for work undertaken by an apprentice electrician. Mr Horner QC and Mr Humphries appeared for the plaintiff and Ms Anyadike Daynes QC and Ms Simpson appeared for the defendant.

The Contractual Arrangements

[2] The plaintiff is a mechanical and electrical contractor and the defendant is a building contractor. A Teaming Agreement was entered into between the plaintiff and the defendant in 2003 whereby they agreed to work together as a consortium in submitting a tender to the Northern Ireland Housing Executive (NIHE) for a maintenance contract for Belfast District 5.

They were successful in their joint venture with the result that the defendant entered into the maintenance contract with NIHE for a period of 5 years and the plaintiff became the mechanical and electrical sub contractor.

[3] Differences arose between the plaintiff and the defendant and the plaintiff claims that the defendant failed to pay for certain mechanical and electrical work that had been carried out under the contract. By the present proceedings the plaintiff claims some £60,000 as due for work done under the sub contract. By its defence the defendant denied liability to the plaintiff and counterclaimed against the plaintiff for damages for breach of contract.

The Qualifications of the Electricians

[4] In 2007 an audit of the sub contractors resulted in a query about the qualifications of certain of the plaintiff's employees who had been engaged under the M&E contract in relation to the NIHE work. The defendant formed the view that the plaintiff was in breach of the terms of the M&E contract in that the plaintiff had failed to use qualified electricians as required by the contract. Eventually the defendant terminated the plaintiff's sub contract. Hence the defendant's counterclaim against the plaintiff for extra costs that are alleged to have arisen as a result of the actions of the plaintiff.

[5] The "Standard Specification for Construction Contracts" dated January 1999 issued by NIHE included a specification in respect of "Electrical Supply, Power and Lighting Systems". Paragraph V90.110 "Installation Generally" stated as follows -

- Install, test and commission the electrical work in accordance with the IEE requirements for electrical installation BS7671 ensuring compliance with design and performance requirements to provide a safe well insulated earth protected system capable of supplying the anticipated maximum demand.
- Installation work shall be carried out by *qualified electricians* fully conversant with IIE requirements for electrical installations BS7671.
- The number of apprentices (instructed persons) on site should not exceed the number of qualified electricians.

[6] The "Response Maintenance Repair Service" included items of electrical work that were to be carried out under the contract. For example item N13BG "Replace electrical shower" set out the work and included in bold and underlined the words "**Where plumbing items require associated electrical works to be carried out this work is to be executed by an NICEIC approved electrician. The cost of this work is included in the plumbing**

work item concerned. The same words in bold and underlined appeared in relation to a number of other items of electrical work such as replacing showers units.

[7] The plaintiff was an NICEIC approved electrician and therefore the plaintiff, as a firm of electrical contractors, was regarded as being capable of complying with the obligation referred to above, to the extent that the work was completed by employees on behalf of the company. NICEIC approves the contracting firm rather than the individual employee. The requirements for approval include examination of the firm and establishing that proper supervision of the workforce has been undertaken by the firm but that does not extend to NICEIC examining the qualifications of the individual workmen.

[8] The contract included a number of provisions that are of particular relevance to the present dispute. There were provisions for test reports and NICEIC certification "as and when required by the Contract Administrator". The plaintiff was also required to complete a Skills Register containing the identities and the skills of the operators to be used in the maintenance work. The plaintiff's Skills Register included the names Harry Johnston and Ken Espie who were each described on the register as electricians. The form that was returned stated that they were graded and registered with the Joint Industry Board (JIB) for the electrical contracting industry.

[9] In 2007 the defendant undertook the audit of the employees and that of course extended to Mr Johnston and Mr Espie. When the audit commenced in October 2007 the plaintiff stated that their employees were registered with their relevant trade bodies and with the JIB as 'electricians'. A table included the names of Mr Espie and Mr Johnston who were each described as a 'graded electrical improver' and their periods of service with the plaintiff were stated.

[10] The JIB definition of a graded electrical improver indicates that they are not deemed competent to carry out final connections, isolation of supplies or any form of inspection or testing of electrical equipment. JIB literature states that the grade had been introduced for apprentices who did not achieve NVQ Level 3 and were unable to keep their apprenticeship but the improver grade was to encourage them to remain in the industry.

[11] A response from the plaintiffs in November 2007 indicated that Messrs Espie and Johnston had been with the plaintiff for some 12 to 16 years and that taking into account their experience they complied with the Electricity at Work Regulations. Further enquiries in relation to this issue resulted in December 2007 in references to their job certificates having been completed and each and every test result being checked and supervised by a plaintiff's representative who was said to be a qualified supervisor.

[12] On 8 February 2008 the defendant's solicitors indicated to the plaintiff's solicitors that the plaintiff's M&S sub contract would be terminated. This drew a response from the plaintiff's solicitors to the effect that Messrs Espie and Johnston were listed as graded electrical approvers and that they could be properly classified as electricians and that they were paid accordingly.

[13] What is not in dispute is that Mr Johnston and Mr Espie did not have formal electrical qualifications. Each had been regarded by the plaintiff as an electrician by long experience. Each had undertaken electrical work for the plaintiff for many years and the plaintiff is an NICEIC approved electrical contractor. Mr Johnston and Mr Espie acquired what were described as 'grandfather rights' which were said to be recognised within the industry as entitling them to be treated as electricians.

The Opinions of the Experts

[14] Two expert witnesses gave evidence on behalf of the plaintiff, namely Mark Taylor and Derek Thompson. Each expressed the opinion that the two workmen in question were qualified electricians for the purposes of the requirement in the contract. Mr Taylor is a Chartered Electrical Engineer and a Director of Caldwell Consulting Engineers, which firm provides electrical services engineering consultancy services. Mr Thompson has worked in the electrical contracting industry for 35 years and became Managing Director of the firm where he completed his apprenticeship. He has served as Chief Executive of the Electrical Training Trust and Chairman of the NI Electrical Standards and Lobby Group. Two expert witnesses gave evidence on behalf of the defendant, namely Anthony Anderson and Mark O' Doherty. Each expressed the opinion that the two workmen were not qualified as they had not obtained any form of objective qualification as electricians. Dr Anderson is an Independent Electrical Engineering Consultant whose speciality is electrical engineering failure investigations. Mr O'Doherty is a Chartered Electrical Engineer and an Associate Director of Delap and Waller, Consulting Engineers.

Concurrent Evidence

[15] The four experts gave their evidence concurrently. The discrete nature of the issue lent itself to such an approach. Even then it was appropriate to identify the particular aspects of the evidence that would be addressed. Each witness had produced a written report. Each made a statement about their own position on the issue and the shortcomings of the opposing position. Each had the opportunity to question another. Each was questioned by the

Court. Counsel cross examined on particular aspects. It was of great assistance to have such quality of experts from different parts of the industry. The concurrent evidence may be judged a success in the focus it brought to the differences between the witnesses, the considerable reduction in the time required to complete the exercise compared to that which might otherwise have been required, the consequential saving in costs and the extent to which it contributed to a conclusion on the dispute.

The Electrical Trade Organisations

[16] There is no definition of qualified electrician in the contract. There is no definition of electrician in primary legislation or in secondary legislation. The IIE Wiring Requirements are not legislation but a British Standard. They refer to the “competence” of the employee for particular work. There are a number of trade organisations for electricians that specify a qualification level. The defendant’s experts relied on the need for some objective standard being applied before the workman could be described as “qualified”. The plaintiff’s experts relied on there being two tracks for electricians, one being by formal qualification and the other being by experience – the grandfather rights route. In the latter situation the workman would be employed by a firm and would receive internal approval by that firm, being a recognised electrical contractor. In the present case the plaintiff is a NICEIC registered electrical contractor and the two workmen in question are employed by that NICEIC contractor and have been approved by that NICEIC contractor as electricians and are treated as “qualified” electricians according to the plaintiff.

[17] There are a number of electrical trade organisations that are operating within this jurisdiction. First of all I have already referred to the Joint Industry Board (JIB). This is a voluntary partnership between the Electrical Contractors Association and the Unite Union and it operates a grading system for those who are its members. The relevant grades are technician, approved electrician, electrician, electrical improver and labourer. The JIB does not have a grade known as qualified electrician.

[18] In relation to the grade of “approved electrician” this requires that the operative possess NVQ Level 3 or equivalent and have a specific qualification such as City and Guilds in Inspection and Testing of Installations. The grade of “electrician” requires that the operative possess NVQ Level 3 or equivalent and have a specific qualification such as City and Guilds in Electrical Installation Theory. The grade of “electrical improver” requires that the operative possess NVQ Level 2 and have undertaken further training associated with the appropriate training scheme.

[19] The plaintiff was registered with the JIB and the two workmen in question were registered as labourers. After these events unfolded Mr Johnston and Mr Espie became approved electricians for the purposes of this grading system by securing the requisite qualifications. The Electro Technical Certification Scheme is a UK wide skills accreditation service and a similar scheme is administered by the JIB throughout England and Wales and Northern Ireland. Registered members are provided with a skills card which defines their grade in accordance with the JIB grading system and contains the holder's qualifications and their particular competence level and qualifications.

[20] The Electrical Contractors Association (ECA), of which the plaintiff is also a member, is a trade association. Its literature states that an electro technical NVQ Level 3 is the only qualification in the industry which leads to the status of fully qualified electrician. Thus it too recognises the JIB standard although it does not specify the additional requirements that there are under the JIB system.

[21] The Electrical Training Trust (ETT) is a training provider within Northern Ireland and it has been appointed by the Department of Education and Learning as the provider for the NVQ Level 3 installation training which has been referred to by the JIB and the ECA. This body recognises that there is a career path for electricians and for those undertaking apprenticeships there are stated to be different career paths and that there are important variations in the suitability of qualifications that are necessary for different occupational areas. The ETT deals with specialist electrical apprenticeship training that is allied with the construction industry and emphasises that the apprentice must be careful to select the correct NVQ qualification route and this should be done within apprenticeships NI framework leading towards JIB grading as an electrician. The target qualification is an NVQ Level 3 in electrical and achieving that standard is said to entitle the apprentice to be graded as a JIB Electrician.

[22] The Northern Ireland Electrical Standards Lobbying Group (NIESLG) is an organisation established by the ETT, the ECA and the JIB. It seeks to introduce and improve the regulation of the electrical industry in Northern Ireland. It has clearly been doing sterling work in recent times to try to achieve the introduction of a standard. It has sought to achieve that standard through Northern Ireland legislation but the Assembly and the Executive appear to prefer that the industry should set the standard and regulate the standard rather than it being done through legislative provision. In Northern Ireland there is a Gas Safe Register, which sets the standard of qualification for operatives in the gas industry. It is apparent that NIESLG would seek to achieve a similar standard for the electrical industry.

[23] The other group to which I should refer is NICEIC, another voluntary trade body. The plaintiff was approved by the NICEIC scheme, that is the firm was registered rather than the individual operative. NICEIC considers a representative sample of the contractor's work, their premises, documentation, equipment and the competence of their key supervising staff. Once contractors are registered they are re-assessed on a regular basis to ensure high standards.

Developments in the Electrical Industry

[24] Mr Taylor concluded that the plaintiffs workmen were "competent" to undertake domestic electrical installation works and that they should be accorded grandfather rights that would entitle them to refer to themselves as qualified electricians through experience and prior learning. A comparison was made with the Part P qualification at the domestic installer course under the Building Regulations in England. The workmen were also considered as satisfying the competency requirement under the Electricity at Work Regulations(NI) 1991. Mr Thompson supported Mr Taylor's position and from his perspective as Chairman of NIESLG pointed to the peculiar position of Northern Ireland in the electrical industry. While NIESLG seeks to improve quality and raise standards throughout the industry through government supported regulation and mandatory licensing, the government has declined direct involvement. Mr Thompson stated that NIESLG had not considered the JIB scheme to be appropriate for the development of a central and approved register for approved electricians. The JIB role is limited in Northern Ireland where there are about 5000 electricians and 2626 ECS cardholders comprising 1331 apprentices in all categories, the majority being installation electricians.

[25] The plaintiff's concern has been for the impact on the industry of a finding that electricians by experience, that is those who are recognised as having grandfather rights, will be excluded from employment if the expression "qualified electrician" is interpreted as meaning those who have formal objective qualifications. The emphasis on behalf of the plaintiff has been that the qualification system for electricians is in transition. It is developing from an experience only system into a more formal qualification system and it has not yet arrived at the structure which has been put in place for the gas industry, although NIESLG is hoping to reach that goal eventually. Qualifications, it is said, in the electrical industry are presently achieved by one of two routes, one being the experience route and the second, and becoming the more prominent route nowadays, is the formal qualification route. However, the plaintiffs are keen to emphasise that the industry has not yet reached the stage where there is an established and recognised qualification and indeed it was stated that those operatives within the industry who are linked to the JIB represent a small proportion of the overall workforce within the industry.

[26] On the other hand the defendant's position is that in 2006, the grandfather rights route was in effect closed. The plaintiff's experts raised a query as to the extent to which this closure applied in Northern Ireland, as it may not have been advertised in Northern Ireland as fully as it was in England and Wales. The reason may have been that the developments in England and Wales were in response to new Building Regulations being introduced there that were not introduced in Northern Ireland and therefore the context in Northern Ireland is seen as different to that in England and Wales. Also, in England and Wales at that time, Part P of the Building Regulations was introduced to provide for a short five-day course of competence for domestic installers of electrical equipment. It is said that this could cover the type of work undertaken under this contract. The plaintiff considered that those completing this course would have been entitled to be regarded as qualified electricians.

[27] This is not an issue about competence to do the particular work, although, of course, it is important that those who do the work are competent. It is an issue about whether or not those engaged can be described as "qualified" electricians. The NIHE contract required that those involved in the work be qualified electricians and the plaintiff and the defendant in undertaking the contract to do the maintenance work, agreed that the workmen who would be engaged in the work would be qualified electricians. Accordingly, it is necessary to give that expression a meaning for the purposes of this particular contract.

Interpretation of the Contract

[28] In relation to the interpretation of documents and the meaning of words Investor's Compensation Scheme Limited v West Bromwich Building Society (1998) 1 WLR 896 contains at page 912G the general principles set out by Lord Hoffman -

“1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

2. The background was famously referred to by Lord Wilberforce as the 'matrix of fact, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it

includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

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

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

5. The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguist mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Cia Naviera v Salen Rederierna (1985) AC 191 at 201 when he said:

‘... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense’.”

[29] The present case is not concerned with mistaken words in the contractual documents. It is concerned with the meaning to be accorded to the particular word “qualified” in the contractual documents. To repeat the words of Lord Hoffman, interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. Thus this is an objective approach based on the view of the reasonable person and not the parties concerned, it must take account of the background setting in which the contract was made and it must be based at the time of the contract and not on later developments.

[30] While the meaning to be accorded to the word ‘qualified’ at the time this particular contract was entered into is not simply a matter for dictionaries, the Concise Oxford Dictionary includes in the definitions of ‘qualified’ - “a condition that must be fulfilled before a right can be acquired or an office held, a document attesting such fulfilment”.

[31] The context includes the background information about the nature of the industry and of the contract. There are many interest groups engaged in the electrical construction industry as indicated above and the evolving character of the qualifications of those engaged in the industry is apparent. The contract clearly had regard to the health and safety component in relation to the conduct of electrical work. Tests and standards were specified that included the introduction of the requirement that the “electricians” should be “qualified”, thus recognising that there would be those regarded as “electricians” who would not be regarded as “qualified”.

[32] Applying the standard of the reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract I am satisfied that the requirement introduced into the contract that an electrical operative should be “qualified” must involve some objective standard. I conclude that Mr Johnston and Mr Espie were not entitled to be described as “qualified electricians” for the purposes of this contract.

[33] I recognise the concerns that have been expressed for the impact on the industry that certain operatives may not be regarded as “qualified electricians”. They may be described as “electricians” but if a requirement in

a contract is for “qualified” electricians then that introduces an additional element to those who are recognised as electricians within the industry. It is clearly time, in the light of the evidence of the experts, that an industry standard should be adopted and it is to be hoped that a body will emerge and a standard will emerge that will be recognised formally. That Mr Thompson, is working towards that objective is apparent and welcome.

[34] That it is not unduly burdensome to require those who would be regarded as electricians in the boarder sense to become and to be recognised as “qualified” electricians, is apparent from the experiences of Mr Johnston and Mr Espie who have now “qualified” by completing a formal objective course of qualification.

[35] I have resisted stating what the standard should be for an electrician to be “qualified” beyond stating that it is apparent that the contract, in specifying the requirement for “qualified” electricians, did require an objective standard to be achieved. In the absence of government intervention it falls to the industry to set a common standard that will secure recognition. In essence I find for the defendant on the issue concerning the requirement for the use of a “qualified electrician”.

Working Arrangements for Apprentices

[36] The second issue relates to apprenticeships. It arose because one of the operatives who was engaged by the plaintiff, Peter Thompson, was a fourth-year apprentice. He undertook certain of the electrical work under the contract and an issue arose as a result of the enquiry into the qualifications of those who were doing the electrical work, the nature of the work he was entitled to undertake and the nature of the supervision required.

[37] The Standard Specification, under the heading “Installation Generally”, as set out at paragraph 5 above, stated that the number of apprentices on “site” should not exceed the number of qualified electricians. In other words there was to be supervision by a qualified electrician of each apprentice. A dispute arose in relation to the extent of the “site”. District 5 comprised 3,700 houses within a large geographical area of Belfast. On the plaintiff’s approach the site in question was the whole District 5. The defendant considered that the site must be each individual house to which the operative was called to carry out whatever work was required. In the defendant’s terms this would have required the presence of a qualified electrician at each house where an apprentice was working.

[38] A further dispute arose in relation to the requirement in the “Response to the Maintenance Repair Service”, referred to at paragraph 6 above, concerning supervision of apprentices. In addition to the constant

management and supervision of the contract works by the contractor's representative "... all significant types of work should be under close control of competent trade supervisors to ensure maintenance of satisfactory quality and progress". The operative words are "significant types of work" and "close control". The contract requirements also included test reports and NICEIC certificates "as when required" by the Contract Administrator.

[39] The defendant contended that certain work was not work that a fourth-year apprentice could undertake. As an example, the defendant referred to the work required to be undertaken by an NICEIC electrician. The defendant also referred, by way of example, to the external lighting, where it was said that the work was of such complexity that it could not be undertaken by an apprentice, in other words, this was such a 'significant type of work' that it fell under the 'close control' provision and not just the general supervision requirement.

[40] On the other hand the plaintiff contended that the apprentice may work alone but must be subject to supervision within the site, which must be given a broader meaning that simply the individual house at which the work was being done. According to the plaintiff the nature of the supervision depended upon the type of work and the plaintiff's electrical staff would determine what types of work could be undertaken and would determine what checks would be made on the apprentice engaged .

[41] The contract provided a structure for the work and that structure contemplated that there would be apprentices on site. It also contemplated that there would be qualified electricians in place for every apprentice. It also contemplated supervision of the apprentices that would be carried out by the qualified electricians. In practical terms, this cannot apply so as to require the presence of a qualified electrician in every house at which a fourth-year apprentice had to undertake any work. The nature of the work that may be entrusted to the apprentice must, in the first place, depend on the judgment of the qualified electrician. Similarly the nature of the supervision must, in the first place, also depend upon the judgment of the electrician who is in charge of the apprentice. Thus, whether the apprentice is permitted to undertake a particular item of work must depend upon the nature of the work itself and that is initially a matter of judgement for the electrician. The electrician also decides upon the degree of supervision that is required, depending upon the nature of the work and perhaps depending upon the apprentice, because one apprentice may be better able to do certain work than others. The electrician will also determine when his presence is required on a particular job. He will have to decide on the nature of the checks on the work undertaken by the apprentice. This may require spot checks or examination of the paper work or other measures. A rigid rule cannot be laid down in respect of all employees for all work in all circumstances. This is a working arrangement based on the judgment of the qualified electrician who is supervising the apprentice to the

extent that he considers it appropriate. As noted above the plaintiff, as an electrical contracting firm, is NICEIC certified and the working structures are subject to assessment from time to time.

[42] Beyond the internal structures referred to above, the contract provides for a Contract Administrator with oversight of the contract works. He can call for test reports and he can call for NICEIC certificates and he can call for supervision of particular aspects of the work. Again, rigid rules cannot be established. This is a matter for the judgement of the Contract Administrator in the course of his work as to the way in which the qualified electrician is managing his role and the way in which the apprentice electrician is being managed and the manner in which the work is being completed.

[43] Against that background, I conclude, first of all, that it is not necessary to have a qualified electrician in every house where a fourth-year apprentice is working. Secondly, that the work to be done by the fourth-year apprentice, alone or with someone else, or in the presence of or under the supervision of a qualified electrician, is for the qualified electrician to decide in the first place. Thirdly, the oversight of the arrangements for the work and supervision is a matter for the Contract Administrator to determine. Fourthly, the Contract Administrator may call for test reports to be provided and NICEIC certificates to be provided. Fifthly, the Contract Administrator has general oversight of the work in any event and if an issue arises about the extent of supervision that is being afforded by the qualified electrician to a particular apprentice, it would be for the Contract Administrator to determine the appropriate steps that should be taken. If there is an issue between the Contract Administrator and a contractor as to the nature of "a significant type of work" for the purposes of the contract or as to what constitutes "close control" of a significant type of work, it would be for the Contract Administrator to make a determination, subject to the provisions of the contract. Ultimately there are structures in place for the resolution of differences. Sixthly, the requirements for the NICEIC approved electrician applied to the firm and not to the apprentice. It was not a breach of the agreement that a fourth-year apprentice with an NICEIC firm worked on a specified fitting if that was approved by a qualified electrician and was supervised in the appropriate manner and accepted by the Contract Administrator and any required test reports and certificates were produced.

[44] Overall I am satisfied that the position in relation to the work of the apprentice electrician depended upon the nature of the work and the manner in which the employers and in turn the Contact Administrator decided that the work should be undertaken and supervised. In essence I find for the plaintiff on the issue of the working arrangements for the fourth year apprentice.