

Legal Briefing

Had a PFI Project Co given proper notice of a claim for compensation?

Glen Water Limited v Northern Ireland Water Ltd [2017]

NIQB 20

Ted Lowery
June 2017

Before the Honourable Mrs Justice Keegan
In the High Court of Justice in Northern Ireland
Judgment delivered 3 February 2017

The facts

During 2007 Glen Water entered into a PFI project agreement with Northern Ireland Water to upgrade sludge treatment services in Northern Ireland, providing for an initial construction phase followed by a 25 year operation and maintenance period. The project agreement required that during the construction phase, Northern Ireland Water should, acting as a prudent operator, maintain its existing sludge treatment assets. Clause 32.2 in the project agreement required claims for compensation to be submitted by Glen Water within 21 days of the occurrence of the event that had caused or was likely to cause delay and additional cost.

During the construction phase Glen Water issued several compensation event notifications including in relation to the new build cooling water system. Glen Water also notified concerns about Northern Ireland Water's maintenance of the existing assets.

In a letter dated 20 October 2009 Glen Water alleged that Northern Ireland Water was not maintaining the existing assets. The second half of the letter rejected Northern Ireland Water's criticism of the new cooling water system design and asserted that a compensation event had occurred. In a letter dated 28 October 2009 Northern Ireland Water denied any failure to maintain the existing assets and, in response to the second half of Glen Water's letter, said there was no compensation event. In a further letter dated 10 December 2009 Glen Water re-iterated its concern over the state of the existing assets, contending that any defects in the assets would constitute compensation events. At a meeting on 14 December 2009 Glen Water mentioned a claim for £3-9m in relation to Northern Ireland Water's maintenance of an incinerator within the existing assets. An internal Northern Ireland Water document dated 15 December 2009 referred to the possibility of a claim arising out of Northern Ireland Water's failure to maintain the existing assets.

In 2014 Glen Water commenced adjudication claiming that Northern Ireland Water's failure to prudently operate the pressure steam system within the existing assets was a compensation event but Glen Water's claims, which were rejected by the adjudicator, did not mention the 20 October 2009 letter.

Glen Water subsequently commenced the present proceedings claiming some £4.4m in compensation for defects in the pressure steam system. The question of whether or not effective notice of a compensation event had been given was addressed as a preliminary issue.

Relying primarily upon certain paragraphs in Walter Lilly & Co v Mackay [2012] EWHC 1773, Glen Water argued that its letter of 20 October 2009 and the meeting on 14 December 2009 were sufficient to satisfy clause 32.2 when looked at in proper context with all of the background taken into account, in particular that in advance of 20 October 2009, Glen Water had frequently expressed concern about Northern Ireland Water's maintenance of the existing assets. In reply, Northern Ireland Water said that on an objective construction the letter was concerned with the cooling water claim, as was clear from Northern Ireland Water's response dated 28 October 2009. Northern Ireland Water also submitted that in contrast, all other compensation event notifications from Glen Water had been clearly marked as such and had reflected claims raised by Glen Water's sub-contractors.

The issue

Did Glen Water's letter of 20 October 2009 amount to a proper notice for the purposes of clause 32.2?

The decision

The judge concluded that the 20 October letter could not be interpreted as a clause 32.2 compensation event notice in relation to the pressure steam system. She found that this meaning was not apparent from the wording of the letter nor from the context where the letter formed part of a chain of correspondence concerning Glen Water's cooling water system claims and had not been described as compensation event notification nor referenced any pass through claims by sub-contractors. Whilst Northern Ireland Water had apparently anticipated and possibly obstructed a claim by ignoring Glen Water's requests to inspect the existing assets, this was not sufficient to override a failure to give proper notice. The judge also thought it significant that in the 2014 adjudication, Glen Water had not based a claim for the same compensation upon the letter of 20 October 2009 or the meeting on 14 December 2009.



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Commentary

The courts will be prepared to consider a doubtful notice in its factual context but it will probably take an unusual set of background circumstances to make good a defective or ambiguous notice, particularly where, as in this case, there was an effective condition precedent provision. Here, Glen Water's arguments were undermined by its own failure to attach any significance to the 20 October letter in the preceding adjudication. Thus any contractor seeking to perfect a notice by reference to retrospective context will need to show consistency of approach to the document it relies upon.

