

Neutral Citation No. [2010] NIQB 59

Ref: **WEA7848**

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

Delivered: **11/05/2010**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (COMMERCIAL)**

F B McKEE & COMPANY LIMITED

Plaintiff;

v.

**NORTH WEST REGIONAL COLLEGE
(formerly Limavady College of Further & Higher Education)**

Defendant.

WEATHERUP I

[1] This is the determination of a preliminary issue. The plaintiff claims £42,320 and value added tax and interest as monies due and owing by the defendant to the plaintiff on foot of a standard form JCT building contract whereby the plaintiff, as main contractor, agreed with the defendant, as employer, to construct a new teaching block at the defendant's premises in Limavady for the sum of some £2.4 million. Mr Shaw QC and Mr Dunford appeared for the Plaintiff and Mr Singer for the Defendant.

[2] The Architect under the contract was McAdam Design. The contract works to be carried out by the plaintiff included the installation of windows that were to be compatible with a Kingspan cladding system which was applied to the premises under the contract. The contract specified in relation to the windows that the fixing had to be integral with the Kingspan cladding system and in accordance with the recommendations of the suppliers of the windows, namely Kawneer. According to the defendant a domestic sub contractor, Northern Windows Manufacturing Limited, was engaged by the plaintiff to install the Kawneer windows.

[3] The windows were installed by Northern Windows and were defective. The window adapters did not suit the cladding system and resulted in the substantial penetration of rainwater. The result is that the cladding system needs to be replaced at a cost of some £ ½ million. By Defence and Counterclaim the defendant denied liability for the payment of any further sums to the plaintiff and counterclaimed for the cost of the remedial work.

[4] By Reply and Defence to Counterclaim the plaintiff at paragraph 6 admitted that the work was carried out by Northern Windows but denied that Northern Windows was a sub contractor of the plaintiff. The plaintiff pleaded that in point of law Northern Windows had been engaged under a contract with the defendant.

[5] The plaintiff's pleading led to the formulation of a preliminary issue, namely -

As a matter of law, was Northern Windows engaged by and on behalf of the defendant as alleged in paragraph 6 of the Reply and Defence to Counterclaim and if so does that bar the counterclaim from succeeding?

[6] According to the plaintiff the contract for the installation of the windows was between the defendant and Northern Windows. According to the defendant the contract was between the plaintiff and Northern Windows as a domestic sub contractor under the standard form JCT contract between the plaintiff and the defendant.

[7] Clause 19.3 of the JCT Standard Form of Building Contract 1988 Edition with amendments, Private with Quantities, provides for 'Sub letting - list in Contract Bills'. Where the Contract Bills provide that certain work measured or otherwise described in the Bills and priced by the contractor must be carried out by persons named in a list in or annexed to the Contract Bills and selected therefrom by and at the sole discretion of the contractor, the provisions of 19.3 shall apply. A person selected by the contractor under clause 19.3 is stated to be a domestic sub contractor. There were such lists in the present case in respect of different parts of the contract works and in respect of the windows there were seven names listed as potential domestic sub contractors, from which list the plaintiff was to make the selection under clause 19.3. One of those in the list of potential domestic sub contractors for the installation of the windows was Northern Windows.

[8] The contract provided in relation to the windows that they were to be manufactured by Kawneer, they were to be installed by an approved

Kawneer installer and they were to be integral with the Kingspan cladding system.

[9] The plaintiff as main contractor sought quotations from the names on the list of potential domestic window sub contractors and on 17 June 2003 received the most competitive quotation for the installation of the windows from Northern Windows in the sum of some £228,000. That sum was then written into the plaintiffs tender for the contract works. The plaintiff's tender at some £2.4 million for the contract works was accepted by the defendant on 28 July 2003 and the JCT contract was entered into between the plaintiff and the defendant.

[10] On 5 September 2003, after the contract had been entered into between the plaintiff and the defendant but before any sub contract had been entered into between the plaintiff and Northern Windows, the plaintiff received from Northern Windows a proposed amendment to the window system. Northern Windows recommended an alternative window known as Wicono which was said to be compatible with the Kingspan cladding. There was to be no extra cost of installing this alternative window. The plaintiff referred the matter to McAdam Design, the contract Architect, to seek approval for any alteration. On 9 October 2003 McAdam Design confirmed that the contract works were to proceed in accordance with the proposal made by Northern Windows. Thus the Wicono windows were to be installed.

[11] On the same date the plaintiff confirmed to Northern Windows that they had instructions to proceed with the window installation and the letter of confirmation also stated that sub contract documentation would follow in due course. Sub contract documents between the plaintiff and Northern Windows were exchanged in October 2003. The documents were described by Counsel for the plaintiff as representing a 'management arrangement' further to a contract said to have been entered into between the defendant and Northern Windows from 9 October 2003 when McAdam Design, as agent for the defendant, confirmed the fitting of the Wicono windows as a replacement for the Kawneer windows.

[12] Clause 13 of the JCT contract defines a variation as including the alteration of the kind of materials or goods to be used in the contract works, the right of the Architect to issue instructions requiring a variation and the valuation of variations. The Architect issued a written confirmation of the change of window on 9 October 2003 in reply to the plaintiff's inquiry but did not issue any other formal instruction requiring a variation in respect of the change of window type. The plaintiff contends that the alteration of the window type was not a variation under the contract. It is contended that there are two reasons for this. First of all the plaintiff refers to the difference in character and quality of the products. This is a reference to the compatibility of the Kawneer windows with the Kingspan cladding being

replaced by the Wicono windows which were incompatible with the Kingspan cladding. Secondly, the plaintiff relies on the sequence in which events occurred, namely that on 9 October 2003, when there was the Architect's confirmation of the replacement of the Kawneer windows with the Wicono windows, there was then in place no sub contract between the plaintiff and Northern Windows. Therefore it is contended that the contract for the windows was between the defendant, through the agency of the Architect, and Northern Windows.

[13] I am unable to accept that either of the factors relied on by the plaintiff, or both of them in combination, would alter the contractual scheme that involved the specified types of changes to the contract works being made by the Architect and amounting to variations of the contract works. The contract works, including such variations, were to be completed by the plaintiff, subject to the arrangements with sub contractors as provided for under the contract. This was the position up to 9 October 2003 in respect of the installation of the windows and as I am satisfied it remained the position thereafter.

[14] Equally I am unable to accept that the Architect's approval of the change from the Kawneer windows to the Wicono windows amounted to the creation of a secondary or a collateral or an incidental contract between the defendant and Northern Windows. The Architect was acting as the Architect appointed under the contract with power to issue instructions and to approve a change to the contract works to be undertaken by the plaintiff. I have not been satisfied that there is any evidence that the Architect was acting outside the JCT contract as agent for the defendant in relation to the establishment of new contractual arrangements between the defendant and Northern Windows. There were no contract documents between the defendant and Northern Windows, although the absence of such documents is not conclusive of the arrangements between the parties.

[15] I am further unable to accept that the arrangements between the plaintiff and Northern Windows were merely what might be described as 'management arrangements'. The documents exchanged by the plaintiff and Northern Windows in October 2003 are evidence of the sub contract arrangements between the plaintiff and Northern Windows. I am satisfied, as seems to be common case, that Northern Windows were the potential domestic sub contractor for the installation of the windows prior to 9 October 2003, I am satisfied that thereafter Northern Windows became the domestic sub contractor, the contract works having been varied to the Wincona windows.

[16] Further I cannot accept the plaintiff's argument that an estoppel arose by reason of the Architect approving the change to the windows, such as prevents the defendant from denying a contract with Northern Windows.

The Architect was giving effect to a variation of the contract works and the plaintiff was then obliged by the contract to carry out that varied work and did so through Northern Windows as a domestic sub contractor. No issue of estoppel arises.

[17] In relation to the preliminary issue, namely whether as a matter of law Northern Windows was engaged by and on behalf of the defendant as alleged in paragraph 6 of the Reply and Defence to Counterclaim and if so whether that bars the counterclaim from succeeding, the answer is no. Accordingly paragraph 6 of the Reply and Defence to Counterclaim will be struck out in so far as it alleges a contract between the defendant and Northern Windows.