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*(subject to editorial corrections)**

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2014 No 84769

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

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BETWEEN:

GLEN WATER LTD

Plaintiff;

and

NORTHERN IRELAND WATER LTD

Defendant.

____

KEEGAN J

Introduction

[1] This hearing was convened to determine a preliminary point in ongoing commercial litigation. On 20 June 2016, after contested submissions, Deeny J ruled that the case should proceed in this way. At paragraph 7 of his judgment the issue is defined as follows:

(a) Did the plaintiff notify the claims made in these proceedings as compensation events in compliance with Clause 33 of the amended and restated project agreement of 6 March 2007?

(b) If the answer is no to (a) is there any other basis on which the claims in these proceedings could be maintained?

[2] During the proceedings before me counsel accepted that there was no other basis upon which proceedings could be maintained if the question at (a) was answered in the negative. This preliminary point therefore involved a net issue as to the notification under the contract. Both parties accepted that this was a condition precedent to recovery of compensation. The amount at issue is £4.4m.

[3] Mr Brannigan QC and Mr Atchison BL appeared for the plaintiff. Mr Dennys QC and Mr David Dunlop BL appeared for the defendant. I am grateful to all counsel for their oral and written submissions in this matter. I have taken into

account the bundles prepared for this hearing, the written and oral arguments of the parties and the oral evidence of Mr Conlon and Mr Crozier who were the witnesses called by the respective parties.

Factual Background

[4] I am grateful to the parties for their preparation of a statement of facts. This is an agreed document running to 85 pages. Whilst helpful, I am not convinced that such detail was necessary for determination of the preliminary point. I refer to the following interchangeably in abbreviated terms throughout this judgment:

Glen Water- GW
Northern Ireland Water- NIW
Department for Regional Development in Northern Ireland, Water Service -DRD

Effective date-construction phase – ED - 6 March 2007
Service Commencement date - SCD - 31 March 2010
Post Service Commencement Date - PSCD

Compensation event-CE
Prudent operator-PO

Operation and Maintenance Contract- O&M

Veolia Water Outsourcing Limited - VWOL
An unincorporated joint venture between Laing O'Rourke Utilities Limited and VWOL - EPC

[5] In 2003 the Department of Regional Development for Northern Ireland, Water Service (DRD) sought to contract with a private company to undertake a project for the upgrade of sludge treatment services in Northern Ireland. This was a substantial project to take place over 25 years. It was called Project Omega. Glen Water the plaintiff (GW) was selected after a bidding process. On 6 March 2007 Glen Water entered into a PFI project agreement with the DRD. The DRD became Northern Ireland Water (NIW) subsequent to this. NIW is a Government owned company, created in April 2007 with statutory obligations to provide all water and sewage services in Northern Ireland. Glen Water is a joint venture limited company, formed in 2005.

[6] Part of Project Omega involved the upgrade of sewage services at the Duncrue Street facility. That is the relevant part of the project for this case. This project had two phases i.e. the construction phase and the service commencement phase. The timeframes for these were 6 March 2007 which was the effective date for the construction phase. The service commencement date was 31 March 2010. In terms of the construction phase it was essentially to build a new incinerator (line 2) and to undertake modifications to the existing incinerator (line 1) cooling system to

enable connection and operations of the new incinerator's cooling system. Following service commencement the operating contractor was to provide sludge treatment and sludge disposal services. During the construction phase the existing assets were to be maintained by the defendant NIW as a prudent operator (PO).

[7] GW entered into two sub-contracts namely (1) the construction contract and (2) the operation and maintenance (O& M) contract. The parties to the construction contract are GW and an incorporated joint venture between Laing O'Rourke Utilities Ltd and VWOL. Together these entities are referred to as the EPC. The parties to the O & M contract are GW and VWOL.

[8] The relevant part of the project agreement reads as follows:

> "33.2.2 To obtain relief and/or claim compensation the contractor must:
>
> 33.2.2.1 As soon as practicable, and in any event within 21 days after it became aware that the compensation event has caused or is likely to cause delay, breach of an obligation under this contract and/or the contractor to incur costs or lose revenue, give to the authority a notice of its claim for an extension of time for service commencement, payment of compensation and/or relief from its obligations under the contract.
>
> 33.2.2.2 Within 14 days of receipt by the authority of the notice referred to in Clause 33.2.2.1 above, give full details of the compensation event and the extension of time and/or any estimated change in project costs claimed; and
>
> 33.2.2.3 Demonstrate to the reasonable satisfaction of the authority that:
>
>> 33.2.2.3.1 the compensation event was the direct cause of the estimated change in project costs and/or any delay in the achievement of the planned service commencement date; and
>>
>> 33.2.2.3.2 the estimated change in project costs, time lost, and/or relief from the obligations under the contract claim, could not reasonably be expected to be

mitigated or recovered by the contractor acting in accordance with good industry practice.

33.2.3 In the event that the contractor has complied with its obligations under Clause 33.2.2 above, then:

33.2.3.1 The planned service commencement date, the planned final acceptance date and the long stop date for that facility shall be postponed by such time as shall be reasonable for such a compensation event, taking into account the likely effect of delay;

33.2.3.2 In the case of an additional cost being incurred by the contractor:

33.2.3.2.1 on or before the service commencement date; or

33.2.3.2.2 as a result of capital expenditure being incurred by the contractor at any time, the authorities shall compensate the contractor for the actual estimated change in project costs as adjusted to reflect the actual costs reasonably incurred within 30 days of its receipt of a written demand by the contractor supported by all relevant information;

33.2.3.3 In the case of payment of compensation for the actual estimated change in project costs that does not result in capital expenditure being incurred by the contractor as referred to in Clause 33.2.2 above but which reflects a change in the costs being incurred by the contractor after the service commencement date, the authority shall compensate the contractor in accordance with Clause 33.2.6 below by an adjustment to the unitary charge; and/or

33.2.3.4 The authority shall give the contractor such relief from its obligations

under the contract as is reasonable for such a compensation event.

33.2.4 In the event that information is provided after the dates referred to in Clause 33.2.2 above, then the contractor shall not be entitled to any extension of time, compensation, or relief from its obligations under the contract in respect of the period for which the information is delayed."

[9] A compensation event (CE) is defined at Clause 1.1 of the contract as follows:

"Compensation event means a breach by the authority of any of its obligations under the contract."

[10] Various other specific parts of the contract schedules have been highlighted as follows:

Schedule 2 Part 1 at paragraph 1 defines prudent operator

Schedule 2 Part 4 at paragraph 6 states that the Line 1 incinerator was one of the 'existing assets.'

Schedule 4 states that the defendant was obligated to operate as a prudent operator of the existing assets as set out in paragraph 8.1 during the construction period.

[11] The plaintiff alleges that a compensation event has occurred in that the defendant has breached the prudent operator obligations in the contract during the construction phase. The defendant denies this fact and the defendant also denies that the plaintiff has complied with the contractual obligation to give notice of a compensation event pursuant to Clause 33.2. The plaintiff states that notification is provided in a letter of 20 October 2009 and that the detail of the claim was provided in a meeting of 14 December 2009. The defendant disputes this and in particular the defendant states that the letter of 20 October 2009 relates to an entirely different claim known as the 'cooling water' claim.

[12] The claims have been described in various ways which has been confusing of itself. However, the claim at issue is in relation to the pressure steam system and is a 'line 1 ' claim as it relates to the condition of the incinerator to be handed over to GW at service commencement. The cooling water claim is a 'line 2' claim as it relates to delays to the construction and commissioning of the new incinerator by way of the provision of cooling water. Any claims were to be pursued by GW on an indemnity basis. However, the subcontractors were obviously part and parcel of the claims at the various stages.

[13] At the outset of the project, a data pack was sent to the bidders which set out the various categories of the plant such as existing assets, operational issues and conditions of the plant. The statement of facts refers in detail to the characteristics of the line 1 incinerator. I will not repeat this save to note that the line 1 incinerator had historic maintenance issues prior to the construction period.

[14] During the construction period GW was not responsible for operation or management of the existing assets. This included the line 1 incinerator. It is clear that that was an obligation upon NIW as a prudent operator. Further detail is given in the statement of facts about issues arising during this phase such as annual shutdowns, and health and safety issues. Suffice to say that it is clear that there were frequent discussions and correspondence in relation to these matters. That in itself appears to be uncontroversial.

[15] What is material is that on 13 February 2009 GW wrote to NIW giving notice of a compensation event entitled `Compensation Event Request for Final Effluent Cooling Water'. The parties have designated this as 'the cooling water compensation event.' By this timeframe it is also common-case that other compensation events had been notified to NIW.

[16] An expert report was prepared by Mott MacDonald dated 22 May 2009 which is entitled `Overview of Health and Safety Arrangements at Existing Duncrue Street Incinerator Belfast'. This report highlighted some issues. It led to the preparation of an NIW document entitled 'Omega Sludge Disposal Services – Current Position Paper: 25 June 2009'. This is an internal document. It was only provided in these proceedings after a discovery application. It is material to quote from the document as follows:

> "Glen Water Stream 2 design relies on drawing Belfast WWTW final effluent for cooling purposes. Their final solution design is to draw the FE `in series' through the existing stream 1 coolant water system and into the new build stream 2 condenser. This will result in an increased flow in pressure through the stream 1 coolant condenser unit.
>
> The condition of this condenser unit is such that the impact of such increases is unknown and unquantifiable. In any case the condenser is currently deteriorating for the level of service NIW requires alone and several of the heat exchanger tubes have already been welded up and put beyond use.
>
> If a failure were to occur, either through normal operation or through increased demand from the Glen Water requirements, it is likely to be

> catastrophic and will result in stream 1 being out of service until a replacement condenser is installed. Lead in times for such units is in the order of 4-6 months. "

[17] The context of this is that NIW issued an authority change in respect of the replacement of the condenser on 2 June 2009. GW replied to the authority change by letter dated 9 June 2009 indicating that it was not GW that identified the necessity for the replacement of a condenser in the existing incinerator. There is further correspondence from this period between GW and NIW regarding the cooling water compensation event. There were also meetings and emails in the period after this memo. It is clear that the line 1 incinerator was part and parcel of that. In particular GW requested an inspection of the line 1 incinerator and it appears common case that this was refused by NIW. At this stage the annual shutdown was imminent. GW also raised the fact that it considered that the inspection report that had been undertaken by Bureau Veritas did not cover all areas and was not comprehensive enough.

[18] Paragraph 4.7.48 of the statement of facts reads as follows:

> "In October 2009, Jim Conlon of Glen Water and Ciaran Crozier of NIW discussed the overall condition of the line 1 incinerator and the condenser in particular. Mr Conlon mentioned to Mr Crozier that he was worried about Glen Water not being given access to the line 1 incinerator and about what Glen Water would be faced with at service commencement. During the discussions between Mr Conlon and Mr Crozier, Mr Crozier stated he believed that Glen Water should resolve the problems and notify NIW of any compensation events they believed had occurred. Mr Conlon stated he had a difficulty with this approach as EPC would not contemplate upgrading the existing assets and the operator was not responsible for the works prior to service commencement."

[19] The content of meetings in and around this time (October 2009) highlights a dispute. In summary it appears that GW was proposing various works which NIW did not consider necessary. One issue raised was the potential effect upon the business of conducting works. NIW were also stating that the majority of the items identified by the Mott MacDonald report had been addressed.

[20] On 20 October 2009 GW wrote to NIW in terms which GW say comprise a formal notification of the claims i.e. a compensation event in relation to the line 1 assets. This is the core document at issue in this case and so I will set it out in full.

"20 October 2009

For the attention of Mr Ciaran Crozier

Dear Sirs

Project Omega Duncrue Street Incinerator-Final Effluent Connection

We refer to the contract between Glen Water Limited and The Department for Regional Development dated 6 March 2007 for the provision of wastewater treatment and sludge disposal services (the 'Project Agreement') as transferred to Northern Ireland Water Limited (the "Authority"). Unless otherwise defined, capitalised terms used in this letter shall have the meaning given to them in the Project Agreement.

We also refer to your letter of 12 August 2009 and our letter to you of 20 July 2009.

Breach by the Authority

You state in your letter that the obligation of the Authority to operate the Existing Facilities (including the existing incinerator) under the Contract, as set out at Paragraph 8.1 of Schedule 4, is simply to operate as a Prudent Operator.

Contrary to your statement that there is no obligation upon the Authority to maintain the Existing Facilities, we would refer you to IPPC Permit: P0081/05A for the Sewage Sludge Incineration Facility at Duncrue Street, Belfast. Section 2.3.5 of this permit states: 'All plant and equipment used in operating the Permitted Installation shall be maintained in good operating condition.'

It is abundantly clear from the persistent shutdowns resulting from the poor reliability, condition and performance of the existing facility (including the stream 1 condenser) that the Authority has failed to meet its obligation as a Prudent Operator to comply with its IPPC licence conditions.

Further, as inspection and rectification of excluded assets is outside the scope of the Interface Protocol it reasonable for Glen Water to rely on the Authority to properly exercise its obligation as a Prudent Operator, and for the Authority to ensure that all excluded assets that are the subject of the IPPC permit are demonstrated to have been maintained in good operating condition and are handed over as such to Sludge Service Commencement.

Glen Water alleged breaches

Contrary to your apparent reliance on Clause 16 of the Agreement, we believe that the change from air cooled solution to a water cooled solution is clearly agreed under the contract as set out specifically in Schedule 30 of the Agreement and the Addendum to the Contractors Proposals. Glen Water has developed the design in accordance with Clause 15 of the Agreement, and we therefore do not consider the Glen Water has breached any of its obligations under the Contract.

Compensation Event claim and Extension to PSCD

We therefore consider that a Compensation Event has occurred, the Compensation Event remains the direct cause of the delay and losses suffered by Glen Water, and we will be quantifying the delay and losses with supporting evidence in full compliance with the procedure set out in Clause 33.2 as soon as the full extent of the delay and losses is known.

As the Authority continues to refuse to allow the abstraction of cooling water at any of the agreed termination points as set out in the agreed and Amended Contractors Proposals until and only during the proposed annual maintenance shutdown of stream 1, we consider that in accordance with our contractual obligations we have and are taking all reasonable steps available to us to mitigate the consequences of the ongoing delay to the Construction Programme and/or Key Dates.

Yours faithfully

Jim Conlon
General Manager
Glen Water Ltd"

[21] The reply to this document is material. It is comprised in a long letter of 28 October 2009. This correspondence underlines the dispute between the parties in relation to alleged authority breaches, the Glen Water alleged breaches, and compensation event claim and extension to PSCD. Under the heading 'authority alleged breaches' the following paragraph appears:

> "You also now claim that the existing stream 1 incinerator lies outside of the obligations placed on both parties by the Interface Protocol and that, somehow, as a result the Authority is obligated to ensure that those assets which fall under the Permit are demonstrated to have been maintained in good operating condition and are handed over as such. Once again, no such obligation is contained within the Contract and as such this argument is similarly misconceived."

[22] This part of the letter is significant in emphasising the fact that there was a disagreement between the parties about their respective obligations. However, this paragraph does not refer to acceptance of a new compensation event. In relation to the issue of compensation events the letter states "The Authority's position remains that there is no Compensation Event". The letter continues by referring to the cooling water claim.

[23] This letter does not result in a response from Glen Water by way of correcting a misunderstanding and stating that in fact the letter of 20 October gave notice of another compensation event. The response letter is 25 November 2009 and it is clear in stating that 'we maintain our position that the authority is in breach of certain of its obligations.' In terms of 'compensation event and extension to PSCD' the letter does say that a compensation event has occurred. In relation to health and safety breaches reference is made to the fact that 'if all or some of those breaches remain outstanding at service commencement, or if further breaches are evident at our inspection at service commencement, we shall have no option but to shut down the facility immediately to remedy all such breaches. That will have various consequences, including a reduction in the rate at which we would be able to deal with sludge deliveries, a need for you to utilise your own storage facilities, and a loss of revenue to us, in respect of all of which we reserve our position fully'. The last phrase is significant as is the context of this paragraph in that it relates to issues at service commencement. This sets the context for when a compensation event should be notified in relation to these issues.

[24] There is further correspondence from Glen Water of 27 November 2009 dealing with replacement of the Incinerator 1 condenser. There is a reply of 2 December 2009 which has not been examined in any great detail. The letter of 10 December 2009 from Glen Water is relevant and has been given some consideration. In it, under the heading compensation event claim and extension to PSCD, reference is made to the cooling water claim only. The section 'current position' is highly material as it contains the following inter alia:

> "1. The condition of Stream 1 you will recall that we had to write to NIW in the summer to record our concern at the condition of the plant from a Health and Safety point of view. Whilst we acknowledge that some work has been undertaken we have not received any report from you to confirm that the issues raised have been fully resolved. Because of this and the history of this plant the Directors of Glen Water are not persuaded to take over the existing plant because of the risk to health and safety of their personnel and to third parties without having conducted their own thorough survey of its condition such surveys being intrusive if necessary. We understand that this could well have implications for the operation of the plant and are prepared to discuss with you.
>
> 2. Any defects in this plant are revealed by that survey and can be attributed to your breaches of contract as discussed above would constitute Compensation Events.
>
> 4. The outstanding compensation event claim in respect of delays to Stream 2."

[25] On 14 December 2009 at a liaison meeting, GW says that it provided details of a 'line 1' pressure systems claim such as was available to it thereby GW submits that having notified a compensation event, reasonable detail was provided. Reliance is placed upon paragraph 3.1.5 and 3.1.5.4 of the minutes. GW asserts that this meeting fulfils the requirement for second stage notice. Paragraph 3.1.5.1 states:

> "GW stated that their main heads of claim where they would be seeking compensation and PSC extensions from NIW with respect to NIW's Existing Incinerator are:
>
> - PPC Permit Improvement Conditions
> - H &S Compliance Related Matters

- Maintenance /Prudent Operator Issues

> Currently GW believes that these three claims amount to approximately 3-9m which are all direct costs issues."

[26] Paragraph 3.1.5.4 of the minutes refers to three headings namely PPC Improvement Conditions, H &S Related Matters and Maintenance.

[27] An internal document of 15 December 2009 has also been drawn to my attention. This was also only provided after discovery and it refers to issues of potential liability on the part of NIW. It is instructive to set out the wording of this document.

> "The areas on which the operation sub-contractor is likely to raise claims on service commencement (or claim that service commencement cannot be requested include well established discussions … on the following matters;
>
> (a) Alleged NIW failure to operate and maintain stream 1 as a prudent operator to acceptable standards, specifically in respect of a failure to address the odour improvement conditions of the NIEAA's PPC operating permit resulting in up to £5M liability to comply with the permit on transfer to Glen Water.
>
> (b) Alleged NIW failure to operate and maintain stream 1 as a prudent operator to acceptable health and safety standards, with an alleged liability of £1.5M to upgrade immediately on service commencement, as well as the consequential costs of Glen Water having to dispose of stream 1 sludges to landfill during any such imposed downtime for such statutory upgrades …
>
> (c) Alleged NIW failure to operate stream 1 cooling water system as a prudent operator with direct costs of upgrading the stream 1 condensing unit to a value of £450,000 already incurred during the construction period to mitigate the construction sub-contractor losses arises from 8c above."

[28] This internal document is obviously an assessment of potential future risks which is not unusual in the commercial world. It must also be borne in mind that meetings take place on a regular basis in this environment. There are references in meetings which have been drawn to my attention which do not assist GW in addition to the references which have been called in aid by Mr Brannigan. For instance, on 22 July 2010 at the meeting at paragraph 5.03 under the heading "stream 1 refurbishment" reference is made to '5m GW est value-Glen Water have yet to notify a compensation event in accordance with the contract'. The same theme appears in the 11 November 2010 meeting. I pause to observe that both Mr Conlon and Mr Crozier were present at these meetings.

[29] It seems to me that the claim at issue is highlighted by the O&M sub-contractor in correspondence beginning 16 November 2010. In their letter of 13 November 2010 VWOL refers to a breach of contract. A letter of 17 December 2010 is material because VWOL writes to GW in relation to 'Compensation Event - Duncrue Street Sludge Facility (the Existing Facilities)'. This is a notice of their claim for compensation. The compensation event is described as 'the Project Co's failure to comply with its obligations in clause 9 of the O&M contract to procure that the authority complied with its obligations under clause 9.4 of the Project Agreement and clause 8.1 of Schedule 4 to operate the Existing Facility as a Prudent Operator'.

[30] This intervention leads to further correspondence and vouching of costs and ultimately a letter is sent from GW to NIW dated 14 November 2012 which is entitled:

> "Project Omega: Draft Written Statement in respect of a Compensation Event relating to the failure by the Authority to operate the Pressure Steam System as a Prudent Operator."

This letter refers to the fact that adjudication will take place if a resolution cannot be achieved. A draft written statement is provided.

[31] GW commenced adjudication proceedings against NIW on 3 April 2014. This related to exactly the same compensation event as formed the subject matter of this action. In that adjudication, reliance was placed on correspondence at various dates to establish that a compensation event had been notified. However, neither the correspondence of 20 October 2009 nor the liaison minutes of 14 December 2009 were relied upon. The adjudication was made by Mr Simon Mc Kenny. In dealing with the second primary issue (did Glen Water comply with the condition precedent) Mr McKenny refers at paragraph 30 of his adjudication to the fact that three letters are relied upon as notification namely those of 9 December 2008, 21 May 2009 and 20 July 2009. In terms of the provision of details of the claim reliance was placed on liaison meetings of 11 June 2009, 23 July 2009 and 31 July 2009. It is clear that the adjudicator had access to 14 December 2009 meeting minutes as he refers to those at paragraph 35 of his ruling. He says at paragraph 38:

> "I consider the meeting minutes relied upon by Glen Water demonstrate that Glen Water were advising NIW that they were intending to submit a claim and that this was eventually done on 14 November 2012… In the circumstances I do not consider that Glen Water discharged their obligation pursuant to clause 33.2.2.3 any earlier than the 14 November 2012."

[32] At paragraph 41 of his ruling the adjudicator also states:

> "41.2 Glen Water ought to have given notice of claim in relation to the Compensation Events claimed in this adjudication by the Service Commencement date namely 31 March 2010."

He also decided that the costs incurred were after Service Commencement. It was only subsequent to that that the correspondence of 20 October 2009 was raised.

[33] This is a summary of the salient facts in this case. The issue requires to be determined having considered the evidence of the two witnesses in this case and it is that to which I now turn.

The Evidence

[34] Mr Conlon gave evidence on behalf of the plaintiff. He adopted two comprehensive witness statements. He has a long career in dealing with waste water. Mr Conlon said that he has a BSc in Environmental Studies and an MSc in Public Health Engineering. He said that he came to Northern Ireland on 26 January 2006 and that he was general manager of GW Ltd from January 2006 to September 2011. Since leaving GW he has worked extensively overseas and is currently a project manager in Vietnam.

[35] At paragraph 3.23 of his first statement Mr Conlon says that the period between September and November 2009 was a busy one. He goes on to say:

> "Various aspects of GW's preparations for service commencement were underway and issues which had been building from late 2008 onwards began to come to a head. Many of these issues are being considered in parallel with others and that makes it difficult to isolate and explain the chain of events in respect of each of the various themes."

[36] Mr Conlon then explained various issues that were relevant. Mr Conlon's statement of evidence is clear in referring to the fact that he drafted the letter of

20 October 2009. It is instructive to look at paragraph 5.1 of his first statement where he says this. At paragraph 5.5 of this statement it is stated that the purpose of the 20 October 2009 letter included (a) an attempt to find the way around the impasse that had developed between NIW and GW on the project and (b) formal notification to NIW that a compensation event had occurred specifically in relation to the line 1 incinerator at Duncrue Street and that GW intended to pursue a substantial compensation event claim in respect of NIW's failure to comply with its obligation in relation to prudent operation of the existing assets including the line 1 incinerator.

[37] Mr Conlon's second statement disputes NIW's version of events. What is striking about both of these statements is the level of detail they contain. This contrasted with Mr Conlon's evidence as (understandably in my view) he could not remember with any real clarity the specific details surrounding the core issue of notification. This became particularly apparent when he was cross-examined.

[38] In his evidence Mr Conlon dilated upon the purpose and intention of the letter. He said that there was clearly a reference to the cooling water claim which was a delay claim but that the "most important aspect was a new compensation event regarding prudent operator". He said in his evidence that in the run-up to the 14 December 2009 meeting that he had discussions with Mr Crozier about quantifying the line 1 claims. He said that it was impossible to be exact but he said that estimates were provided. Mr Conlon said that at no stage did NIW say that no compensation event was notified.

[39] Mr Conlon was asked about the adjudication. He was questioned about an e-mail from Jeff Bishop asking him to assist in the adjudication. Mr Conlon could not answer questions about this with any exactitude. He said that the email was not directly on the point of whether a notification had taken place to his recollection and that he could not find the e-mail chain due to a change of computer. Under cross-examination he said that the e-mail referred to asking for an opinion about the strengths and weaknesses of the case and was not about notification.

[40] Mr Conlon said that he did not know anything about the conditions of the assets prior to the contract being taken on. He said that he had no knowledge of due diligence. Mr Conlon accepted that he was well aware of notification requirements regarding compensation events. He agreed that he had filed previous compensation events such as the cooling water claim. He accepted that the letter initiating the cooling water claim was clearly entitled. Mr Conlon accepted that the compensation event at issue was really about sub-contractor costs being incurred for rectifying the pressure steam system. It was not a delay claim. He said that there were no other examples of a hybrid letter throughout his time with GW.

[41] When under cross-examination, Mr Conlon accepted that the letter of 20 October 2009 was not volunteered by him. He accepted that it was put to him by GW and then identified by him. Mr Conlon accepted that he recalled the letter only

after being shown it. Mr Conlon did not dispute the assertion by Mr Dennys that what is happening is a recreating of recollection.

[42] Mr Conlon also had a difficulty in commenting on the response letter from NIW to the 20 October 2009 letter. I gave the witness some time to consider that letter. In it it is clear that there is no reference to the compensation event regarding pressure steam systems. Mr Conlon accepted that there was no response to this saying that something had been missed. At this point I must say that the evidence of Mr Conlon veered off the issue and became largely unintelligible.

[43] There was no challenge to the content of the minutes of 14 December 2009 that the only event outstanding was the cooling water. Mr Conlon accepted reluctantly that the term pressure steam system relates to stream 1 refurbishment.

[44] Having listened carefully to Mr Conlon and observed him in the witness box my overall impression is that he is a well-meaning man. However, he was placed in a very difficult position as he did not have the detail of events which occurred some time ago close at hand. He was being asked to confirm a case which did not originate with him and which was drafted by lawyers. His evidence was not strong or convincing as to whether the letter of 20 October 2009 was a formal notification of a new compensation event. Mr Conlon was clearly uncomfortable when answering questions on this issue and whilst he did his best for GW I do not consider that his evidence was persuasive on this core issue.

[45] I then heard evidence from Mr Crozier on behalf of the defendant. He adopted his statement of evidence. He explained his qualifications in that he has a B.Eng (Hons) in Civil Engineering. He is a Chartered Civil Engineer and a member of the Institute of Civil Engineers. Mr Crozier said that he was employed by the DRD Northern Ireland Water Service and later NIW since entering as a graduate engineer in 1990. Mr Crozier said that in July 2007 he assumed the role of authority representative in Project Omega. He said that he remains employed by NIW.

[46] At paragraph 5.24 of his statement Mr Crozier states as follows:

> "I do not accept that the letter dated 20 October 2009 referred to by Mr Conlon at paragraph 3.28 formally notified NIW that a compensation event had occurred. This letter is simply one letter in a chain of correspondence relating to the cooling water claim which was purportedly notified in February 2009 from the EPC. The current claim being pleaded is one being promoted by the operator VWOL and only has its origins post service commencement. I have discussed this correspondence in more detail at paragraph 7.1 below."

[47] At 7.1 in the same statement Mr Crozier reiterates the point made and he says in that paragraph:

> "This letter is in fact a further engagement on the EPC cooling water claim and not the pressure steam system claim as pleaded which was only launched in November 2012 and is a separate claim from VWOL (facilitated by GW as it is contractually obliged to do so under equivalent project relief terms of the operating sub-contract. The cooling water claim originally cited Clause 74 – hindrance and prudent operators solely in respect of NIW not facilitating the testing and commissioning plans of the EPC and thereby allegedly causing delays and costs. The cooling water claim was purportedly notified in February 2009 and the issue of liability was and remains in dispute."

[48] Mr Crozier then gave evidence in relation to the inspection of the line 1 assets. He was cross examined at length on this issue. Ultimately, he accepted that inspection was refused but there was a lack of clarity as to what GW wanted to do. He referred to the fact that he thought they wanted to undertake destructive testing. Mr Crozier referred to health and safety issues which he accepted included hydrogen sulphide in the press room. He referred to the Mott MacDonald and the health and safety report prepared and also to the fact that VWOL had to put in a replacement condenser.

[49] Mr Crozier was clear that there was no notification given of a new compensation event. He explained that the purpose of the internal document that had been provided on discovery was to highlight prospective claims visibly. This was for accounting purposes. He said there was a particular concern that GW would not take over the PCC permit. Mr Crozier did recollect the September/October 2009 discussions with Mr Conlon. He said the discussions were about preliminary acceptance tests, replacement condenser unit, operating contract, concerns regarding the PPC permit, issues regarding log jam and avoiding the long stop in funding. In essence Mr Crozier said that there was a mixture of issues discussed but these were primarily about the service commencement date. In answer to Mr Brannigan, Mr Crozier said that Mr Conlon was an honest, straightforward and decent man not prone to untruths. He confirmed that by December 2009 there had been 34 compensation events notified.

[50] A focus of cross-examination was the position paper of Mr Conlon which referred to the potential catastrophic failure of the line 1 assets. Mr Crozier referenced his belief that there could be a failure. He also referred to the fact that he did not understand that there would be an instruction to staff regarding prudent operator obligations. Mr Crozier accepted that it was a fair summary that GW's concerns were being raised from in and around June 2009. He said that he foresaw a

PCC odour issue and health and safety issues. He also accepted that there were concerns regarding line 1. He accepted that GW would assert prudent operator obligation issues. In essence this witness said that "he had a reasonable inkling of the issues based on the discussions with Mr Conlon and the health and safety report".

[51] This witness did accept that NIW refused access during the shutdown. I note that it took considerable questioning to get that answer. I consider that Mr Crozier was defensive when being questioned on this issue. Mr Crozier could accept when questioned that one view was that NIW were worried about what GW might have uncovered. Mr Crozier also reluctantly accepted that the pressure steam system issue may have been mentioned during discussions. It was put to this witness that he never said "look Jim these claims are not notified". He accepted that and he also accepted that he would have been aware of these issues but they were not notified under the contract. The witness referred to issues of health and safety, the PPC issues, cooling water and the claim for inspection after the service commencement. It was not entirely clear that he specifically accepted that the pressure steam system issue was referred to him but he said that it might have been.

[52] Mr Crozier was much clearer than Mr Conlon on the issue of the 20 October letter. He was defensive in his evidence in relation to other issues such as inspection but overall I consider that he gave more coherent evidence on the core issue. This witness did effectively accept that he could foresee a claim coming however it was not formally notified unlike the many other claims he received.

Submissions of the Parties

[53] I summarise the written and oral submissions of Mr Brannigan QC on behalf of the plaintiff as follows:

(i) On 20 October 2009 GW sent a letter which dealt with a claim for a compensation event and thereafter in December 2009 it provided various details of the precise compensation event pursued in this action.

(ii) In assessing whether the details of 20 October 2009 and December 2009 meeting are sufficient to comply with the contractual obligations under the project agreement, the court must look at context. In this respect Mr Brannigan referred me to two authorities of Walter Lilly & Company v Mackay 2012 EWHC 1773 and Obrascon Huarte Lain SA v HM Attorney's General for Gibraltar 2014 EWHC 1028. He said that these cases make clear that the background must be taken into account.

(iii) Essentially Mr Brannigan said that NIW was aware in the run-up to receiving the 20 October 2009 letter that GW had increasingly serious concerns regarding NIW's operation of the existing assets, including the line 1 pressure system and whether it was complying with its obligation to act as a prudent

operator. GW had made several requests for maintenance and health and safety documentation. GW had also made several requests to inspect the existing assets. NIW was aware that it operated the existing assets so to do the bare minimum. NIW had positively asserted on no less than three occasions that its obligation as prudent operator specifically did not include an obligation to maintain the existing assets contrary to the express wording of the definition of prudent operator.

(iv) Mr Brannigan said that the 20 October letter specifically notifies in the context of the express reference to the line 1 condenser as part of the pressure system's assets a breach of the prudent operator obligation at paragraph 8.1 of Schedule 4 to the project agreement which he says is different to the cooling water claim.

(v) Reference was also made to the sub-heading "Compensation Event Claim and Extension to PSCD". Mr Brannigan said that after notifying a breach of that, paragraph 8.1 expressly says under that heading "we therefore consider that a compensation event has occurred". He says that it would be inconsistent to refer that to a previously notified compensation event.

(vi) Mr Brannigan submitted that there does not appear to be any dispute that the details of the compensation event provided by it on 14 December were the best details available at that time in relation to what had happened.

(vii) At the conclusion of the case Mr Brannigan said that the issue was in the eye of the beholder. He said that context was everything. He said that the notification could have been better but that was not fatal.

(viii) Reference was made to the fact that the test was whether the recipient had enough knowledge to know that this was a notification of a compensation event and that that did not conflict with the issue of commercial certainty. Mr Brannigan said that this was not an arbitrary game.

(ix) Mr Brannigan said that Mr Dennys had steered clear of the September/October 2009 timeframe. Mr Brannigan relied on the internal documents which he described as smoking guns. He stressed that these had not been provided voluntarily and were extracted during a discovery process.

(x) In relation to the issue of the adjudication all Mr Brannigan could say that it was a mess. He could give no further explanation for why the 20 October 2009 letter was not provided other than to say that it was not found on the file and that there was an issue with the files. Mr Brannigan also accepted that he did not have any evidence regarding the request made to Mr Conlon at the time of the adjudication.

[54] The case made by Mr Dennys on behalf of the defendant can be encapsulated in the following points:

(i) In relation to the 20 October 2009 letter, it is not headed as a specific CE claim concerning the pressure steam system assets in line 1 despite that being the position in the other antecedent CE claims.

(ii) It was not compiled and prepared by the plaintiff in light of any communications by VWOL under the O&M contract.

(iii) The process of CE claims by the plaintiff is as a conduit passing on claims arising under the EPC contract or the O&M contract.

(iv) There appear to be no letters from O&M (VWOL) contemporaneous to 20 October 2009. In fact the only prior letter in the entire trial bundle appears to be a letter dated 7 May 2009 terminating the secondment of a member of staff on health and safety grounds.

(v) The letter of 20 October 2009 rests consistently with the prior correspondence over the previous 9-10 months concerning the cooling water claim.

(vi) Any purpose of an objective construction of the letter dated 20 October 2009 (in the relevant context) makes clear it relates to the delay in costs by the plaintiff relating to the cooling water claim and not a future anticipated and prospective claim related to the pressure steam systems assets.

(vii) The plaintiff did not originally believe that the letter of 20 October 2009 provided contractual notice under 33.2.2 of the project agreement. Instead the plaintiff relied on three earlier letters in the context of an adjudication conducted by professional lawyers in which it was never suggested that notification was by the letter dated 20 October 2009.

(viii) The plaintiff did not take issue with the defendant's response to the 20 October 2009 letter which clearly was responding to the cooling water claims.

(ix) The chain of subsequent correspondence sees repeated discussions concerning the outstanding CE but there is no mention or discussion of a CE claim concerning the pressure steam assets.

(x) The project meeting on 21 October 2010 proceeded without demur from the plaintiff on the basis that no CE had been lodged concerning the existing assets.

(xi) If a prior CE had been filed, it does not rest consistently with the VWOL letters to the plaintiff of 13 and 17 December 2011.

(xii) Mr Dennys submitted that the meeting of 14 December 2009 does not render any further assistance to the plaintiff or rescue the claim given the issue with prior notice. It is fair to say that Mr Dennys raised other issues about the certainty of that meeting but this was his prime submission.

(xiii) Mr Dennys also said that the evidence of Mr Conlon was flawed in that he did not have a real recollection of this state of affairs and he was being asked to piece together something on the insistence of the plaintiff rather than from his own true recollection of events.

(xiv) Mr Dennys also referred me to some authorities. He said that the Walter Lilly and Obrascon cases were distinguishable. In particular he said that in Walter Lilly the notification had been to the architect who had on site knowledge. Mr Dennys referred me to an important authority of Education 4 Ayrshire Ltd v South Ayrshire Council [2009] CSOH 146. Mr Dennys said that this case was more on all fours with the case at hand as in that case the notification was found to have been defective.

Consideration

[55] I begin by looking at the contract itself. It seems to me that the arguments in relation to that are not particularly controversial. In broad terms, it was agreed that the notification is a condition precedent. That follows because the relevant clause contains mandatory language. There is no saving provision from that. That is the first stage under the contract. The second stage is regarding the provision of details. It does appear that there is a saving provision if this is not strictly complied with. In other words, as Mr Dennys puts it in his argument 'some latitude may be allowed to a contractor claimant who is genuinely not in a position to give detail required by a notice but he will still be required to give the best information available to him'.

[56] The plaintiff stakes its claim on the letter of 20 October 2009. The burden is on the plaintiff to establish that this is a proper notification. The core issue is how that letter should be interpreted. That involves an objective assessment. A notification should be clear and unambiguous. If I turn to the natural meaning of the words it is significant to me that the letter of 20 October 2009 is entitled in the matter of the cooling water claim. That was a historic claim which had nothing to do with the claim at issue in relation to the pressure service system. The issue is whether the pressure steam system claim can be inferred and whether the letter is hybrid as Mr Brannigan suggests.

[57] I am not convinced by that argument for a number of reasons. Firstly, that meaning is not apparent by looking closely at the wording and reading the letter in full. Secondly, there is a context in terms of the previous letters referred to namely those of 20 July 2009 and 12 August 2009. The 20 October 2009 letter is clearly in a chain of correspondence in relation to cooling water and a request that the planned

service commencement date be postponed. The correspondence illustrates a dispute between the parties as to prudent operator obligations. In the letter of 12 August 2009 NIW state that no compensation event has occurred in its opinion. It seems to me that that is why the reply is framed as it is in the last paragraph of the 20 October letter.

[58] However, that is not the end of the matter and I must also consider the evidence of the witnesses at the time. In giving evidence, Mr Conlon was clearly well meaning as I have said however he was placed in a difficult position. He was asked to speak to detailed witnesses statements which were prepared by lawyers and understandably he faltered in that exercise. He was also asked to remember events long ago and to remember a letter that he had not volunteered himself. It is significant in my view that no other compensation event had slipped through the net in this way or been notified in this way. That is in the context of something in the region of 34 notified compensation events. Mr Conlon was well aware of how compensation events should be notified. It was also significant in my view that Mr Conlon gave no evidence about the inter-relationship between himself and the sub-contractor in terms of notifying this compensation event. That contrasts with the clear documentary evidence that when the cooling water claim was being notified the process began by the contractor sending correspondence to Mr Conlon who was then the conduit for notification of the compensation event.

[59] I have said that Mr Crozier was somewhat defensive in giving evidence. I glean from that that he knew that there was an issue about what I will call the line 1 assets and that includes the pressure steam system. In other words it was within his contemplation that a compensation event may be lodged. He had a reasonable inkling in my view that this was coming. But he was not on site and in a position to know this for sure. In my view the fact that Mr Crozier may anticipate a claim in the future does not equate to notification of an actual compensation event. It is also clear that the approach taken by NIW in relation to GW's request for inspection was not helpful and may amount to obstruction but it was not argued that this could override a failure to notify in law.

[60] In my view, it is highly significant that the adjudication was not in favour of the plaintiff. This adjudication was conducted by lawyers. The correspondence of 20 October 2009 which is viewed as so pivotal in these proceedings was not relied on or referred to in the adjudication. Three other letters were relied upon which did not find favour with the adjudicator. The minutes of 12 December 2009 were not relied on either as determinative evidence although they were clearly before the adjudicator. This is critical evidence in this case in relation to the intentions of the parties. It seems to me that the strength of the argument regarding the 20 October 2009 letter does reduce with time and is further diluted by these events. The longer it takes to raise the letter the less persuasive it becomes.

[61] The Walter Lilly case is a recent authority which is important in a commercial context. This was a case in relation to the building of luxury homes in London and

the issue of loss and expenses claims. The facts are different and the main issue which can be read across seems to me to be in relation to provision of the details of claims. There was a broad interpretation of that issue. However, the point remains that notification has to have a certainty to it. One other distinguishing feature of the case is that it was the architect on site who was receiving the notification. In terms of certainty Akenhead J states as follows:

> "122. In commercial and practical terms, it is important in my judgement under this construction contract for the notification to be clear and unambiguous. The main reasons are that everybody involved in the project, particularly the Architect and other professional consultants as well as the Contractor, need to know who has the ultimate or any particular design responsibility for any given work. If the Contractor has it, then the Architect knows to call for design documentation for approval. If the Architect or other of the Employer's professionals retains responsibility, the Contractor knows from whom to call for information. Either way, each can protect itself by securing appropriate warranties or other protection from, say, sub-contractors who are to be retained. Another not unimportant reason for clarity is that, given that all works were the subject matter of provisional sums, it is more than arguable that the Contractor would be entitled to some additional compensation for design coordination as well as for the cost of procuring appropriate professional indemnity insurance as called for in the tender letter of 28 March 2004."

[62] Mr Brannigan relies on paragraphs 463-468 of the Walter Lilly decision and in particular I note paragraph 466 which states that 'There is no need to construe Clause 26.1.3 in a peculiarly strict way or in a way which is in some way penal as against the Contractor, particularly bearing in mind that all the Clause 26.2 grounds which give rise to the loss and expense entitlements are the fault and risk of the Employer'.

[63] In my view the case of Education 4 Ayrshire v South Ayrshire Council [2009] CSOH 146 is actually most applicable to the facts of this case and I quote in particular from paragraph 19 of that case:

> "Where parties have laid down in clear terms what has to be done by one of them if he is to claim certain relief, the court should be slow to seek to relieve that party from the consequence of failure. In some cases there is scope for

> the application of the principles of waiver or personal bar to operate so as to prevent a party, who has proceeded on the basis of a defective notice without taking the point, from subsequently raising it as a technical defence to the claim. No such argument is raised here, no doubt for good reason. Instead, the pursuers seek to advance a construction of the clause which would if successful only introduce uncertainty."

[64] I do have some sympathy for the plaintiff's position because the failure to notify prevents a claim being made. That may seem harsh when commercial parties anticipated that a claim might come to pass. I should say that Mr Brannigan did leave no stone unturned in arguing this case. However, I have to decide the case within the parameters of commercial and contract law. The contractual terms are clear and commercial certainty is an overarching consideration. The evidence as to the commercial context and surrounding circumstances has not remedied the defect in the letter. It seems to me likely that the notification requirement was overlooked amid a mass of claims and in the midst of an ongoing process of discussions. In weighing up the evidence, the plaintiff has not convinced me that there was a valid notification and, on the balance of probabilities, I favour the defendant's arguments, for the following reasons:

(i) It is agreed that notification is a condition precedent.

(ii) There must be clarity to notification and that is absent in this case. The plaintiffs rely on the 20 October 2009 document but it is not entitled as a compensation event unlike the many other compensation event claims. I consider that the letter does not relate to a new claim and must be seen in the context of a chain of correspondence about cooling water.

(iii) The notification is not a claim substantiated by the O&M contractor as it should be on the facts of this case. That is in contrast to the cooling water claim which was notified to GW by the sub-contractor during the construction phase. In this context I consider that the timing of a claim in October 2009 is also problematic.

(iv) Mr Conlon was not convincing in relation to the intention behind this letter. I prefer Mr Crozier's evidence on this issue.

(v) There were clearly discussions between the two witnesses about a variety of issues during the relevant time period however that does not equate to contractual notification of a specific compensation event. To say otherwise would lead to total uncertainty in the commercial world.

(vi) The plaintiff did not correct the defendant when the response to the 20 October 2009 letter did not refer to a line 1 claim.

(vii) It is not correct in my view to shift the obligations to the defendant to say to the plaintiff that a compensation event has not been notified.

(viii) Mr Conlon was placed in an invidious position of substantiating the claim after the event. This ex post facto reasoning was an attempt by GW to make something fit the facts which in my view was forced and bound to fail.

(ix) The adjudication makes no mention of the correspondence now relied on. A totally unsatisfactory reason was given for this. I found the explanation to be implausible given that lawyers were involved in the adjudication and it seems to me entirely contrived. It beggars belief that when all other relevant letters and minutes were provided to the adjudicator that the 20 October 2009 letter was omitted yet it is purported that it is the key document. Further, the email correspondence to Mr Conlon about his recollections could not be produced and in my view that cannot also be coincidental.

(x) The internal correspondence which was produced by the defendant by virtue of the discovery order is relevant as to forward planning and an awareness of risks but it is not determinative that there was a specific notification regarding the pressure steam system.

(xi) The meetings after the 20 October 2009 letter do refer to various claims but there is no clear and consistent thread that a line 1 claim in relation to the pressure steam system was formally notified and vouched.

(xii) There was no argument as to how this type of procedural defect could be overlooked or corrected applying the law of waiver, estoppel or any other relevant legal principle. The evidence as to context did not remedy the defective notification.

Conclusion

[65] Accordingly, I answer the preliminary point as follows:

(a) The plaintiff did not notify the claims made in these proceedings in compliance with Clause 33 of the amended and restated agreement of 6 March 2007.

(b) It was not argued that there was any other basis on which the claims in these proceedings could be maintained.

I will hear counsel as to costs and any other matters that occur. This is my decision on the preliminary point.