

# CONSTRUCTION : BULLETIN

## NEC3: Compensation Events and the Time Bar

It is widely known that the NEC3 compensation event process includes a requirement for compensation events to be notified within a specific timescale, failing which, entitlement to the compensation event in question is lost. However, the important exception to this rule is that the time bar does not apply in cases where the compensation event should have been notified by the Employer.

The recent case of *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited* considered this exception to the time bar. This case was heard in the Northern Ireland Court of Appeal, so it is not binding on the courts of England and Wales, but can certainly be taken into consideration.

### Background

Healthy Buildings (“HB”) was engaged by the Northern Ireland Housing Executive (“NIHE”) under an NEC3 Professional Services Contract (“PSC”) to provide asbestos management services at housing association properties owned by NIHE.

The scope of services to be provided by HB (known as the “Scope” under the PSC) was the carrying out of asbestos surveys, sampling and analysis in accordance with Health and Safety Executive (“HSE”) guidance. This guidance allowed HB to presume that asbestos was present in certain circumstances, thereby avoiding the need to carry out asbestos sampling in every case.

Clause 61.1 of the NEC3 PSC states: *“For compensation events which arise from the Employer giving an instruction or changing an earlier decision, the Employer notifies the Consultant of the compensation event at the time of giving the instruction or changing the earlier decision”.*

Clause 61.3 states: *“The Consultant notifies the Employer of an event which has happened or which he expects to happen as a compensation event... If the Consultant does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in Prices, the Completion Date or a Key Date unless the Employer should have notified the event to the Consultant but did not”* (emphasis added).

The NEC3 Engineering & Construction Contract and Subcontract both contain similar wording.

At a meeting on 10 January 2013, NIHE outlined its requirements for the level of inspection to be carried out at each property. NIHE required HB to undertake sampling in every room where asbestos might be present. This meant that HB was required to carry out significantly more sampling work than was required by the HSE guidance. It also resulted in increased costs, as the increased volume of asbestos samples resulted in some samples having to be sent to England for testing.

More than 4 months later, on 23 May 2013, HB served notice of a compensation event on NIHE, stating that the instructions regarding asbestos sampling given at the



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meeting of 10 January 2013 constituted a change to the Scope, which was a compensation event.

A dispute arose between the parties as to whether the instruction given at the meeting in January 2013 constituted a change to the Scope (i.e. a compensation event), and if so, whether HB's claim for a compensation event failed because it was notified more than 8 weeks after the instruction was given.

The dispute was referred to adjudication and HB's claim for a compensation event was successful.

NIHE commenced court proceedings seeking a declaration that the adjudicator's decision was wrong. NIHE's claim failed in the High Court and NIHE appealed to the Northern Ireland Court of Appeal.

### Decision

NIHE accepted that an instruction was given at the January meeting, but disagreed that it was an instruction changing the Scope. NIHE argued that the instruction was simply to clarify how NIHE would prefer the services to be carried out.

HB argued that the instruction changed the Scope, thereby giving rise to a compensation event, because it represented a departure from the HSE guidance and the original agreed fees did not cover all of the extra sampling work that NIHE now required.

The Court of Appeal rejected NIHE's argument, finding that by imposing a more onerous sampling obligation on HB, NIHE had changed the Scope. This was a compensation event pursuant to clause 60.1(1) of the PSC.

NIHE then went on to argue that HB's claim for a compensation event was time barred because it was made more than 8 weeks after the instruction was given. NIHE's case was that the "unless the Employer should have given notice and did not" exception in clause 61.3 should not apply in circumstances where the Consultant was aware that a compensation event had occurred, on the basis that it would be unreasonable for the Consultant to

keep the claim "in its back pocket" when the NEC3 PSC generally encourages the early notification of events.

The Court of Appeal disagreed and found that HB's claim for a compensation event was valid and did not fall foul of the 8 week time bar because the time bar did not apply to this compensation event.

The language of the PSC is clear and unambiguous; under clause 61.1 NIHE was obliged to notify an instruction changing the Scope as a compensation event. NIHE should have notified the instruction given at the January meeting as a compensation event, but did not do so. Under clause 61.3, the 8 week time bar does not apply in cases where NIHE should have notified a compensation event but did not. HB was entitled to give a compensation event notification under clause 61.3 but, crucially, was not required to give that notification within a specific time limit.

NIHE's argument involved implying additional wording into clause 61.3 to the effect that the 8 week time bar would apply where the Consultant knew about the compensation event but the Employer did not. The Court of Appeal found that it was not necessary to imply such a term into the contract when the existing wording was already clear. Furthermore, since the time bar in clause 61.3 operated in favour of NIHE, the law of contract interpretation required the wording of clause 61.3 to be construed against NIHE and in HB's favour.

### Analysis

This case provides a useful example of the circumstances when the NEC3 compensation event time bar does not apply under clause 61.3. It also illustrates the importance for all parties of complying fully with the NEC3 compensation event procedure. NIHE should have been aware that its instruction given at the January meeting amounted to an instruction changing the Scope which it was required to notify as a compensation event.

Although HB was able to claim successfully for a compensation event, the whole dispute could have been avoided if HB had notified the compensation event within 8 weeks in the first place. Whilst HB was not contractually obliged to do this, it would have saved both parties a lot of time and money fighting this case. With this in mind, Contractors and Consultants working under NEC3 should aim to notify all compensation events which are not notified by the Employer as a matter of best practice.

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