



Case Note – Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited [2017] NIQB 43

“...why should I shut my eyes and grope in the dark when the material is available to show what work they actually did and how much it cost them?”

Leading construction lawyers in Cleaver Fulton Rankin were recently involved in a High Court case which confirmed that actual costs are relevant to the assessment of the quantum of a compensation event in a NEC3 PSC. This landmark Judgment will be of interest to many construction professionals and commentators alike.

In this case Deeny J was asked to decide preliminary issues as to the construction of 2 New Engineering Contract 3 (“NEC3”), Professional Services Contracts between the parties. The Contracts are in identical terms and relate to the provision by the Defendant of asbestos surveying of the Plaintiff’s housing stock in 2 areas in Northern Ireland.

There have been proceedings between the parties consequent on earlier adjudications which determined whether there had been a Compensation Event instructed by the Plaintiff at a meeting in January 2013 and whether the Defendant’s notification in May 2013 was out of time. The adjudicator and the Courts decided that there was a Compensation Event and the notification was in time – see [2013] NIQB 124 and [2014] NICA 27.

These proceedings are the challenge by both parties to the quantum of the Compensation Event as assessed by the adjudicator in the second round of adjudications. The relevance of actual costs to the assessment process was hotly disputed by the parties during the contract and in the proceedings.

The agreed questions for determination by the court were:

- (1) On the true construction of the contract, and in particular Clauses 60 to 65 of the contract, is the assessment of the effect of the compensation event calculated by reference to the forecast Time Charge or the actual cost incurred by the consultant?
- (2) Are actual costs relevant to the assessment process in Clauses 60 to 65 of the contract?

There was little debate about the first question.

The Judge noted the Court’s role at paragraph [34].

“If these parties do not resolve their dispute it will fall to the court to assess the fair and reasonable “compensation” due under the contract to the consultant for the effect on it of the employer’s change of instruction on 10 January 2013. This change of instructions caused the

consultant, it says, increased expenditure in the period between then and the quotations it provided to the employer claiming compensation in August and October 2013 with regard to the two contracts.”

As to the relevance of actual cost documentation,

“[35] Evidence, from time sheets and other material, of what the consultant actually did in that period, particularly with reference to the change in instructions, is not only relevant evidence but clearly the best evidence to assist the court in calculating the “compensation” to which the consultant is entitled. Therefore the answer to the second question posed by the parties is yes unless the court as Tribunal is precluded from looking at the actual time charges by reason of the contract. “

The Judge rejected the argument that the Consultant’s (Defendant) assessment had been implemented under clause 65 at paragraph [41].

The Judge regarded a refusal to “hand over actual time sheets” as [43] “entirely antipathetic to a spirit of mutual trust and co-operation. Further clauses in the contract such as Clause 15 reinforce that spirit. I find that the overall sense of the contract with its emphasis also on the assessment of compensation events is strongly against the defendant here.”

On its proper construction therefore the Judge found:-

[48] a quotation which arises in those circumstances, rather than as a genuine forecast, ought to be informed by the best information available as to the actual cost and time incurred by the consultant as a result of the instruction. At [50] “I consider it a strained and unnatural interpretation of the contract to rely on the use of the word “forecast” in Clause 63 to prevent access to the best evidence in a situation such as this, where the “forecast” is in reality a claim for work that has been done by the time of the quotation on behalf of the consultant. “

The Judge concluded:-

[54] “Faced with seeking to award compensation to the consultant here for any cost to it as a result of the instruction of 10 January 2013 why should I shut my eyes and grope in the dark when the material is available to show what work they actually did and how much it cost them?”

The Judge preferred the commentary in Keating on NEC 3 to that in Eggleston, *The NEC3 Contract, A Commentary*. The point determined by the Judge was free of any previous direct authority.

The Judge therefore answered both questions in the affirmative and ordered discovery from the Defendant of its actual cost records. At the time of this Note it is understood that the Defendant is considering an Appeal.

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