

Assessing Compensation Events under NEC3: *A grope in the dark?*

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

Court decisions regarding contracts from the NEC suite are rare. This recent court decision involved a consideration of the correct approach to the assessment of compensation events under the NEC3 Professional Services Contract.

Background

Northern Ireland Housing Executive (“Employer”) engaged Healthy Buildings (Ireland) Limited (“Consultant”) under the NEC3 Professional Services Contract. The Employer instructed a change to the Consultant’s scope of services but failed to notify this as a compensation event in accordance with the contract. Months later, the Consultant notified the instruction as a compensation event and provided quotations to assess the effects of the event. The Employer rejected the quotations and assessed the effect of the compensation event as zero.

An issue for the Court was whether the Employer was entitled to discover the Consultant’s actual records and costs arising from the change instruction. The Court was asked to determine two questions:

1. 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 for compensation events?

Decision

The Court held that the answer to both questions was yes and that the Consultant had to disclose all relevant documents relating to the actual costs of the Employer’s instruction. Key parts of the Court’s reasoning can be summarised as follows:

- If the parties could not resolve their dispute it would ultimately fall to the Court to assess the fair and reasonable “compensation” due to the Consultant. **Evidence of the actual cost such as time sheets, “is not only relevant evidence but clearly the best evidence to assist the court in calculating the “compensation” to which the consultant is entitled”.**

- It is **“a cardinal principle of contractual interpretation that one should look at the agreement overall”**. The NEC3 contract requires the parties to act in the spirit of mutual trust and co-operation. **“A refusal by the consultant to hand over his actual time sheets and records for work he did during the contract is entirely antipathetic to a spirit of mutual trust and co-operation”**.
- The Employer had not notified the instruction as a compensation event in accordance with the contract and the Consultant’s quotation was provided many months after the instruction. While the wording of the Contract referred to a “forecast”, the Consultant’s quotation had been provided after the effect of the compensation event was known. In reality, the consultant was making a claim for work done. Deeny J considered that **“to give an efficacious and business-like interpretation of the contract 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”**. Deeny J considered it a *“strained and unnatural”* interpretation of the contract to rely on the use of the word “forecast” to prevent access to the best evidence in a situation where the “forecast” was actually a claim for the work that has already been done by the time of the quotation. When faced with seeking to award compensation to the Consultant, Deeny J asked the rhetorical question **“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?”**

Comment

A fundamental objective of the NEC suite of contracts is to promote a proactive, prospective approach to contract management. The preparation of quotations for the valuation of compensation events that are based upon a forecast of the impact which the change will have, as forecast by the Consultant at the time the event is assessed, is a key part of this prospective approach. Forecasting becomes difficult when the contract mechanism is not operated properly, for example, when the assessment takes place well after the timescales provided for in the contract and the effect of the compensation event is known. This decision may give support to an argument that a retrospective assessment should be permitted where the contract provisions are not operated properly or if the assessment is disputed.

Further, this decision may encourage Employers to delay notification or assessment of compensation events with a view to saving costs (assuming that the Employer takes the view that the actual costs are likely to be less than the forecast costs). To allow the Employer to benefit from its own failure to operate the compensation event provisions seems unfair and contrary to the ethos of NEC. The remedy in this situation would be for the Consultant to give notice of the compensation event if the Employer



does not do so. If the compensation is not agreed and paid then the Consultant may look to the contractual dispute resolution mechanism.

This decision of the Northern Ireland High Court is not binding in England and Wales but is of persuasive value and we will need to wait to see if a similar approach is followed by the English Courts. The impact of this case will remain relevant notwithstanding the release of the new NEC4 contracts (due in June 2017) as NEC4 does not appear to alter the compensation event provisions relating to these issues.

Get in touch with Slater Heelis' Construction, Engineering & Project Experts:



Kenneth Salmon
Consultant Solicitor

Get in touch:

✉ kenneth.salmon@slaterheelis.co.uk

☎ 0161 672 1436



Matthew Grellier
Associate Solicitor

Get in touch:

✉ matthew.grellier@slaterheelis.co.uk

☎ 0161 672 1427

Get in touch with our team

intouch@slaterheelis.co.uk

0161 969 3131

slaterheelis.co.uk

🐦 @SlaterHeelisLaw

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