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

Delivered: 27/04/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

2014 No. 25250

BETWEEN:

NORTHERN IRELAND HOUSING EXECUTIVE

Plaintiff;

-and-

HEALTHY BUILDINGS (IRELAND) LIMITED

Defendant.

DEENY J

[1] This judgment is concerned with the proper interpretation of New Engineering Contract 3 ("NEC3"), Professional Services Contract, in the context of two such contracts entered into by the parties to this action. They disagree as to the proper interpretation of the contracts but did agree on two preliminary issues for the court to adjudicate on in advance of a substantive trial of the action.

[2] Mrs Monye Anyadike-Danes QC appeared with Mr Andrew Singer for the plaintiff. Mr Michael Humphreys QC appeared with Mr Wayne Aitchison for the defendant. The court has had the assistance of helpful written and oral arguments from counsel. These have all been taken into consideration even if not expressly adverted to in this judgment.

Factual background

[3] The plaintiff is a substantial landlord of publicly owned housing in Northern Ireland. The defendant provides consultancy services which include the assessment of the presence of and risks of asbestos in buildings. In accordance with good

practice and to their credit the parties agreed the facts on which the court was to determine the two preliminary issues. The facts agreed are as follows.

“1. The plaintiff (‘the employer’) awarded the defendant (‘the consultant’) two Asbestos Surveying Services Contracts in December 2012 for its Belfast and North East areas. The Contracts were in the form of the NEC3 Professional Services Contract (June 2005) as amended.

2. An instruction changing the scope of the works was communicated by the employer to the consultant at a meeting on 10 January 2013. The employer did not notify this instruction as a compensation event under the terms of the Contract but ought to have done so.

3. In accordance with Clause 61.1 of the contract, the employer ought to have instructed the consultant to submit a quotation on 10 January 2013 in relation to the assessment of the effects of that compensation event on the contracts for Belfast and North East.

4. The consultant notified that instruction as a compensation event to the employer on 21 May 2013.

5. Quotations were sought by the employer on 19 August 2013 (Belfast) and 22 October 2013 (North East) and provided by the consultant on 29 August 2013 (Belfast) and 31 October 2013 (North East). In accordance with Clause 63 those quotations were to assess the effects of the compensation event in each contract.

6. Clause 62.3 of the contract entitles the employer to reject a consultant’s quotations and Clause 64.1 permits the employer to make its own assessment.

7. The employer rejected the consultant’s quotations and assessed the effect of the compensation event as being zero on 14 November 2013 (Belfast) and 21 November 2013 (North East).

8. The dispute as to the effect of the compensation event was referred to Adjudication and

the Adjudicator issued his temporarily binding Decisions on 24 January 2014. The employer has paid the consultant in accordance with those Decisions.

9. The employer has issued proceedings challenging those Decisions and claims re-payment of sums paid. The consultant has also challenged those Decisions and counterclaims for further monies in addition to those awarded by the Adjudicator and paid by the employer.”

[4] The issues regarding the change of instructions which was found to be a compensation event were considered by an adjudicator and, on appeal by the plaintiff seeking to overturn that decision, by Weatherup J, as he then was, in Northern Ireland Housing Executive v Healthy Buildings Limited [2013] NIQB 124. He upheld the adjudicator’s decision and the plaintiff then appealed again. It failed on that appeal: Northern Ireland Housing Executive v Healthy Buildings Limited [2014] NICA 27.

[5] Both parties are entitled by the contract to challenge the adjudicator’s decision although the plaintiff was obliged to pay the defendant on foot of it pending such a challenge. The challenge is made to “the Tribunal” under the NEC3 which in this context means the High Court. Initially the plaintiff pressed for discovery of the defendant’s actual records and costs relating to the period after the change of instruction of 10 January 2013. This was resisted by the defendant on the ground of relevance. At the hearing of the discovery summons the parties agreed that the matter was more appropriately dealt with by way of preliminary issues.

[6] The questions for determination by the court have been agreed as follows:

- (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?

[7] As set out in the agreed facts there are actually two contracts for Belfast and for the north east of Northern Ireland which the defendant won. It is agreed that they are identical for these purposes. My references are to the Belfast contract. I shall set out the relevant provisions of that contract.

[8] The document is entitled Housing Executive – Asbestos Surveying Services Contract. As indicated above it is in the format of NEC3 Professional Services

Contract - June 2005 (with amendments of June 2006). I am told that this standard contract is in widespread use since its development and introduction in 2005.

[9] The first Core Clause, with the rubric Actions, is at 10.1.

“The employer and the consultant shall act as stated in this contract and in a spirit of mutual trust and co-operation.”

[10] The plaintiff is the employer and the defendant is the consultant within the meaning of the contract (11.2(8)).

[11] “The time charge is the sum of the products of each of the staff rates multiplied by the total staff time appropriate to that rate properly spent on work on this contract” (11.2(14)).

[12] Clause 13 deals with communications. 13.7 provides that “a notification which this contract requires is communicated separately from other communications”. Clause 15 provides that the employer and the consultant “give an early warning by notifying the other as soon as either becomes aware of any matter which could increase the total of the prices, delay completion, change the accepted programme, delay meeting a key date, impair the usefulness of the services to the employer or affect the work of the employer, an employer’s contractor or another consultant”. Mrs Danes points to this as emphasising the co-operative nature of an NEC contract.

[13] She points also to the availability of “a risk reduction meeting” provided for at Clause 15.3. Clause 16.1 provides as follows:

“The employer or the consultant notifies the other as soon as either becomes aware of an ambiguity or inconsistency in or between the documents which are part of this contract. The employer gives an instruction resolving the ambiguity or inconsistency.”

Mr Humphreys points out that the wording of the contract is largely in the present tense but that it begins with the imperative “shall” at Clause 10.1 and should be interpreted, in his submission, in that way.

[14] Of particular relevance to the questions before the court is Section 6 of the contract which deals with compensation events. It is agreed that the relevant compensation event here is to be found at Clause 60.1(1):

“The employer gives an instruction changing the scope.”

[15] The courts have already ruled that that, in effect, was what the employer was doing in January 2013. The parties therefore proceed on the basis of what the employer, the plaintiff, ought to have done.

[16] Clause 61.1 reads as follows:

“For compensation events which arise from the employer giving an instruction ... the employer notifies the consultant of the compensation event at the time of giving the instruction ... He also instructs a consultant to submit quotations, unless the event arises from a fault of the consultant or quotations have already been submitted. The consultant puts the instruction or change decision into effect.”

As the employer neglected to make this an instruction the consultant notified it on 21 May 2015 and subsequently the employer sought quotations from the consultant as provided for by this clause. On the facts here Clauses 61.2, 3 and 4, 5, 6 and 7 are of only background relevance.

[17] Clause 62 deals with quotations for compensation events:

“62.1 After discussion with the consultant of different ways of dealing with the compensation event which are practical, the employer may instruct the consultant to submit alternative quotations. The consultant submits the required quotations to the employer and may submit quotations for other methods of dealing with the compensation event which he considered practicable.”

[18] Pausing there it can be seen that that language contemplates looking to the effects of a compensation event, such as a change of instructions, at that point in time. That is not in fact what happened here.

[19] 62.2 reads:

“Q. Quotations for compensation events comprise proposed changes to the prices and any delay to the completion date and key dates assessed by the consultant. The consultant submits details of his assessment with each quotation. If the programme for remaining work is altered by the compensation event, the consultant includes the alterations to the accepted programme in this quotation.”

In fact in this case there is no issue of delay or alteration of programme. The contention of the defendant is that by removing a presumption in the original contract terms the employer required far more samples to be taken and thus more work to be done by the consultant and therefore greater cost to be incurred by it.

[20] Paragraph 62.3 reads as follows:

“The consultant submits quotations within two weeks of being instructed to do so by the employer. The employer replies within two weeks of the submission. His reply is:

- An instruction to submit a revised quotation.
- An acceptance of the quotation.
- A notification that a proposed instruction will not be given or a proposed changed decision will not be made.
- A notification that he will be making his own assessment.”

[21] While it is not what actually happened in this case it is illustrative of the intention of the parties with regard to the outworking of the contract. An employer who has created a compensation event, as here, by changing an instruction should ask the consultant to give him a quotation as to how much it will cost to implement that instruction. Having done so and received the quotation the employer has a range of choices and should reply within two weeks. He can accept the quotation if he thinks it is reasonable. He can ask for a revised quotation. He can, for example if he sees how expensive the new instruction will be, withdraw the instruction or he can opt to make his own assessment. It is clearly the intention of the parties that he is not bound by the quotation put forward by the consultant.

[22] Clause 63 has the rubric “Assessing Compensation Events”. Clause 63.1 reads as follows:

“The changes to the prices are assessed as the effect of the compensation event upon:

- the actual Time Charge for the work already done and
- the forecast Time Charge for the work not yet done.

The date when the employer instructed or should have instructed the consultant to submit quotations divides the work already done from the work not yet done.”

[23] This clause is central to the defendant's case. The courts have found that the date on which the employer should have instructed the consultant to submit quotations was 10 January 2013. Therefore, submits the defendant, the "quotation" for the work done after that date is in the form of a "forecast". There was no actual time charge before that date and therefore the actual time charges of the defendant after the date are irrelevant.

[24] Clause 63.6 reads:

"Assessment of the effect of a compensation event includes risk allowances for cost and time for matters which have a significant chance of occurring and are at the consultant's risk under this contract."

Pausing there it is part of Mrs Dane's case that there is emphasis throughout the clause here on assessing the effects of the compensation event. What better way of assessing those effects, one might ask, than by seeing the actual time spent by the employees of the consultant? In particular, I observe, 63.6 again is clearly contemplating a situation where the quotation and/or the employer's assessment if they do not accept the quotation is looking forward to what the cost might be of a compensation event such as a change of instructions.

[25] The defendant relies on Clause 63.7:

"Assessments for work not yet done are based upon the assumption that the consultant will react competently and promptly to the compensation event and that the accepted programme can be changed. Assessments for work already done include only cost and time which were reasonably incurred."

[26] Insofar as relevant Clause 64.1 reads as follows:

"The employer assesses a compensation event:

- if the employer decides that the consultant has not assessed the compensation event correctly in a quotation and he does not instruct the consultant to submit a revised quotation."

[27] Clause 65 bears the rubric "Implementing Compensation Events" and so far as relevant for these purposes reads as follows:

"65.1 A compensation event is implemented when:

- the employer notifies his acceptance of the consultant's quotation.
- the employer notifies the consultant of his own assessment, or
- a consultant's quotation is treated as having been accepted by the employer.

65.2 The assessment of a compensation event is not revised if a forecast upon which it is based is shown by later recorded information to have been wrong."

I shall return to this clause later.

[28] NEC3 provides for certain options if a party uses NEC 3. The Housing Executive here chose Option G, which includes a Clause 60.2 and some amendments to Clauses 63 and 65.5.

[29] There is a section on dispute resolution. Again parties can opt either for W1 or W2 and the plaintiff here opted for and the defendant accepted Option W2. By W2.1 any dispute arising under or in connection with this contract is referred to and decided by the adjudicator. "A party may refer a dispute to the adjudicator at any time". The role of an adjudicator under this contract is to review the material and reach an adjudication which further to W2.3(11):

"is binding of the parties unless and until revised by the Tribunal and is enforceable as a matter of contractual obligation between the parties and not as an arbitral award. The adjudicator's decision is final and binding if neither party has notified the other within the times required by this contract as he is dissatisfied by the matter decided by the adjudicator and intends to refer the matter to the Tribunal."

[30] In this case the High Court and the Court of Appeal upheld the adjudication which has been paid by the plaintiff but does not prevent it from seeking a review by "the Tribunal". By Part 1(1) of the Contract Data Part 1 of the contract "the Tribunal is courts of Northern Ireland" (sic). It is not in dispute that this High Court is the Tribunal.

[31] Paragraph W2.4 deals with review by the Tribunal i.e. the Court. Insofar as relevant it reads as follows:

"(1) A party does not refer any dispute under or in connection with this contract to the Tribunal unless it has first been decided by the adjudicator in accordance with this contract.

(2) If, after the adjudicator notifies his decision a party is dissatisfied, that party may notify the other party of the matter which he disputes and state that he intends to refer to the Tribunal.

(3) The Tribunal settles the dispute referred to it. The Tribunal has the powers to reconsider any decision of the adjudicator and to review and revise any action or inaction of the employer related to the dispute. A party is not limited in Tribunal proceedings to the information or evidence put to the adjudicator."

[32] Mrs Danes lays particular stress on W2.4(3) as expressly providing that the Tribunal is not confined to the material before the adjudicator, who did not have the actual time cost involved, but can go beyond that. In effect, therefore, applying the normal rules of evidence the court should ask itself whether this material is relevant to an assessment of the cost to the consultant of the instruction of 10 January 2013. Clearly it is relevant to such an assessment unless the court is precluded by the contract from looking at the material. The plaintiff submits that the clear effect of W2.4(3) is to allow its introduction.

[33] The contract was signed on behalf of the consultant on 16 January 2013 and on behalf of the plaintiff on 6 March 2013 but the parties are agreed that they were already in contract from 19 December 2012.

Consideration

[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.

[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.

[36] As indicated above the defendant relies on Clause 63.1 in saying that as the employer should have instructed it on 10 January 2013 the assessment of the work not yet done at that stage is made by a forecast.

[37] The defendant seeks to pray in aid 63.6 where assessment of the effect of a compensation event such as a change in instruction includes “risk allowances for cost and time for matters which have a significant chance of occurring and at the consultant’s risk under this contract.” It does not seem to me that this does in fact assist the defendant. What it is stating, as one might expect, is that the assessment made in advance of doing the work should try and allow for the cost and time which is likely to be incurred by the consultant. That is entirely consistent with the plaintiff’s position that any assessment by the court in reviewing the adjudicator’s decision should have the assistance and benefit of the actual cost and time expended by the consultant.

[38] Mr Humphreys laid considerable stress on Clause 63.7 also but it does not seem to me that it assists the defendant either. Again the assessments should be based on assumptions that the consultant will react competently and promptly and that where they include work already done that should be cost and time which was reasonably incurred. Here, where the “quotation” or “forecast” took place after the actual work was done in 2013 the defendant is seeking to exclude relevant evidence as to the competence or promptness of the consultant’s action and the “cost and time which were reasonable incurred”. It seems to me that the court would need to know of these matters to make such an assessment.

[39] The defendant prays in aid the emphatic statement at Clause 65.2:

“The assessment of a compensation event is not revised if a forecast upon which it is based is shown by later recorded information to have been wrong.”

[40] Mr Humphreys says that this means that the actual type and cost involved, even if it were to show his client’s quotation/forecast to be wrong is irrelevant. But this sub-clause is part of ‘implementing compensation events’.

[41] It seems to me that the language of the clause is somewhat unclear but that it is straining that language to say the process now before the court is one of implementing the compensation event. If one looks at 65.1 and 65.2 together it seems to me that what it means is that if there is an employer’s assessment, and assessment is by the employer not the consultant, which is based on a forecast i.e. from the consultant, the employer cannot subsequently revise the assessment if it turns out that he had accepted a forecast from the consultant which was unduly pessimistic, even “wrong”, because in fact the consultant was put to less trouble and expense than it had forecast. That is to achieve a meaning consistent with business common sense for this clause. But that is not the situation here. Rather than the employer notifying an assessment based on the consultant’s forecasts it rejected them out of hand and made an assessment of zero cost. It may well be that that was much too optimistic of the employer but it could not be said to be based on the forecast/quotation of the consultant. On the contrary, it is a rejection of the

consultant's quotation/forecast. It seems to me therefore that 65.2 simply does not apply to the situation.

[42] Are there other factors to be put on to the scale against these somewhat fragile arguments of the defendant? It seems to me there are.

[43] First of all, it is a cardinal principle of contractual interpretation that one should look at the agreement overall. This particular contract begins with the agreement that the employer and the consultant shall act "in the spirit of mutual trust and co-operation"(10.1). It seems to me that 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. 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.

[44] I have already pointed out that Clause W2.4(3) is against the consultant entitling as it does the Tribunal to go beyond the information or evidence put to the adjudicator.

[45] In support of that view the leading text book on the subject Keating on NEC3, 2012, comments as follows at 11-050:

"This provision (W2.4) effectively confines the Tribunal to the scope of the dispute that has been adjudicated. However, the adjudicator's decision has no binding effect on the Tribunal, and the parties are not confined to the submissions they made at the adjudication. The referral to the Tribunal is effectively a rehearing of the dispute."

The Tribunal is confined to the dispute as pleaded and defined before the adjudicator but in determining that dispute it is at liberty to take into account any relevant materials that will assist it and are put forward by the parties.

[46] Keating goes on as follows:

"There is also no provision equivalent to Clause W1.3(7) and so it would appear that the Tribunal might be able to approach the issue of assessing compensation events even more broadly, albeit the Tribunal will have to have regard to Clause 63 when assessing any entitlement."

[47] At 7-109 the learned author comments as follows with regard to "Assessing Compensation Events":

“There are also indications of a broader approach within the wording of the contract. First, Clause 63 requires the effect of compensation events to be assessed. Every clause uses the words ‘assessment’, ‘assess’, ‘assessing’ or ‘assessed’. Assessment suggests an idea of appraisal or judgment.”

[48] The author considers the effect of Clause 63. I would say this with regard to Clause 63. It is clearly contemplating a situation where the employer complies with the contract and notifies the instruction at the time that he is given. He should then invite a quotation where the consultant, within two weeks, estimates the cost to it of the change of instruction. The reality, however, is that in this case that did not happen. While in the wording of the contract the word “forecast” is applicable if what should be done is done what in reality the consultant was doing in August and October 2013 was making a claim for work done. It seems to me that to give an efficacious and business-like interpretation to 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.

[49] In Rainy Sky S.A. v Kookmin Bank [2011] UKSC 50 the judgment of the court with which the other members agreed was that of Lord Clarke. He said the following at paragraph [21]:

“The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.”

[50] Applying that test here the defendant contends that the contract is open to two possible constructions, but if so I prefer the construction which is consistent with business common sense i.e. that the information as to the actual time and cost expended by the consultant should be made available to allow this court as Tribunal

to fairly assess the compensation event. 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.

[51] The reference by Lord Clarke to business common sense reminds one that Lord Diplock in DPP v Hester [1973] AC 296 said that common sense was the mother of the common law.

[52] One of the authorities relied on by the editor of Keating was Bwllfa and Merthyr Dare Steam Colliers (1891) Limited v The Pontypridd Waterworks Company [1903] AC 426. It was a case about compensation for mine owners where the adjacent waterworks was entitled to require them to leave a seam of coal unworked. The collier owners were entitled to be paid compensation in return. The issue before the arbitrator was whether that compensation should be from the date of the notice of the waterworks or the date of the hearing by which time the price of coal had risen considerably. The arbitrator found in both alternatives. The matter ultimately came before the House of Lords where the principal decision was delivered by Lord Macnaghten. I quote from paragraph 431 of the judgment:

“It appears to me that the case put forward on behalf of the respondents is based on a false analogy. The counter-notice by the undertakers following a notice of the mine owners under S. 22 does not operate to make a contract or to transfer property. It is not even a step towards a contract or a step towards expropriation. The undertakers acquire no property in the minerals. The property remains where it was. The mine owner is prohibited from working, and the undertakers are bound to make full compensation. That is all. If the question goes to arbitration, the arbitrator’s duty is to determine the amount of compensation payable. In order to enable him to come to a just and true conclusion it is his duty, I think, to avail himself of all information at hand at the time of making his award which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark? The mine owner prevented from working his minerals is to be fully compensated – the Act says so. That means that so far as money can compensate him he is to be placed in the position in

which he would have been if he had been free to go on working.”

[53] The case is not, of course, on all fours with the case before me. But it is valuable as a statement of principle in the context of “compensation”. It is not about damages for breach of contract. Mr Humphreys pointed out that was the case in Golden Strait Co-operation v Nippon Yusen Kaisha [2007] UKHL 12 where Lord Carswell quoted Lord Macnaghten in Bwllfa with approval.

[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?

[55] As a matter of principle the plaintiff’s proposition is much to be preferred.

[56] I take into account the submissions of the defendant including the passages from Eggleston, The NEC3 Contract, A Commentary [2006] 2nd Edition. It seems to me, particularly in relation to what that author says about Clause 65, that it does not assist the defendant here. The clauses relied on by the defendant are either not applicable to this situation or are to be construed in accordance with the intention of the parties as ascertainable from the contract as a whole. The view put forward by the plaintiff is in accord with business common sense while that put forward by the defendant is not.

[57] Mr Humphreys relied in conclusion on the doctrine of contra proferentem i.e. that a contract should be construed more strongly against the maker thereof. I dealt with this topic in Hollway v Sarcon (No. 177) Limited [2010] NICH 15. For convenience I set out paragraph [22] of that judgment:

“In addition they rely on the proposition still referred to by lawyers by the concluding words of the Latin maxim ‘verba cartarum fortius accipuntur contra proferentem’ (Bacon’s Maxims Three). A deed or other instrument shall be construed more strongly against the grantor or maker thereof. It is clear that Sarcon was the maker here. The rule applies only in cases of ambiguity and where other rules of construction fail. London and Lancashire Insurance v. Bolands Limited [1924] AC 836, 848; Lindus v. Melrose [1858] 3 H&N 177, 182. I share the view of Eveleigh LJ in The Olympic Brilliance [1982] 2 Lloyd’s Rep. 205, CA that the principle was “usually a rule of, if not last, very late resort.” This was a view shared by the Court of Appeal in Macy v Quazi The Independent 13/1/1987 and by Auld LJ in Direct

Travel Insurance v McGeown [2004] 1 All ER Comm 609. The proper approach is to seek to ascertain the intention of the parties from their contract in its context. If the court is left in a real state of uncertainty as to the correct interpretation due to ambiguity in the language then contra proferentem applies. As Lord Sumner said in London and Lancashire Fire Insurance Co Ltd [1924] AC 836 at 848 it –

‘is a principle which depends upon their being some ambiguity that is to say some choice of expression – by those who are responsible for putting forward the clause, which leaves one unable to decide which of two meanings is the right one.’

Sir John Pennycuik said in St Edmundsbury v Clark (No 2) [1975] 1 All ER 772, at 780, delivering the judgment of the Court of Appeal in England:

‘.. it is necessary to make clear that this presumption can only come into play if the court finds itself unable on the material before it to reach a sure conclusion on the construction of a reservation. The presumption itself is not a factor to be taken into account in reaching the conclusion.’”

[58] Mr Humphreys validly submits that while this was a standard form contract within the industry the plaintiff had not only exercised options to choose several parts of it e.g. W2 and Option G but had also made a significant number of amendments to the contract which are set out therein. I accept his submission that it should be regarded as the maker thereof. I accept that there might be a degree of ambiguity in the contract with regard to the questions which I have to determine. However pursuant to the authorities I am not left in “a real state of uncertainty as to the correct interpretation” of the contract. I am satisfied that this is a situation where the right course to adopt is also the lawful course to adopt.

[59] I therefore find that the answer to both the questions posed by the parties at [6] above is yes. It follows from that that the defendant should make discovery of all relevant documents in its possession, custody or power relating to the actual costs incurred and time spent by it as a result of and following the employer’s instruction of 10 January 2013.

