

PAYING THE PRICE – THE RISK OF NOT AGREEING TO THE COST OF CONSTRUCTION WORKS AT THE OUTSET OF A PROJECT

By Riaia Donald and Irene Kim

A recent High Court decision highlights the importance of parties agreeing on a pricing mechanism for construction works from the outset to prevent disputes arising as to the cost of the works. This is particularly relevant now, given the level of residential construction activity occurring. Whether it be new builds or renovations, there is a need for both contractors and homeowners to secure a contract (preferably written), that is clear as to price, scope and documents any changes. Educating contractors on such issues regarding the contract is a focus of the Construction Accord, but it is equally important for principals.

Introduction

In *Rebnik Properties Limited v Dobbs* [2020] NZHC 3494, the High Court implied a term requiring a contractor to charge a reasonable amount in a construction contract that was silent on price. When determining the reasonable amount for the works, the Court considered expert evidence from quantity surveyors provided by the homeowner, Rebnik Properties Limited (RPL), and the builder, Dobbs. The Court determined that RPL had overpaid and was entitled to a repayment of \$845,965.32.

RPL engaged Dobbs to carry out remedial work to his house with no formal, written contract. The informal construction contract arose from emails, oral discussions, and conduct. The remedial work continued for three years with the scope of the works being constantly increased. By the end, Dobbs had charged a total of \$2.53 million. RPL paid \$2.46 million and refused to pay the final two remaining invoices. Overall, no price was agreed upon in the contract and a dispute arose regarding the cost of the work.

The Court implies a term of ‘reasonable price’

The first issue was whether Dobbs was only entitled to charge a reasonable price as the contract was silent on the price. The Court implied a term requiring Dobbs to charge only a reasonable price which was to be assessed objectively. The

Court primarily relied on leading construction law textbooks, which stated that where no price was stipulated, a term will be implied that the principal is to pay a reasonable price for the construction work. The Court dismissed Dobbs’ argument that the general principle did not apply as the parties had agreed on the hourly charge-out rate for the provision of services, as this did not cover the entire field of the contract. Even if there had been agreement on hourly rates for services, this did not cover other aspects such as materials.

The Court’s assessment of ‘reasonable price’

The next issue was what a reasonable price was in these particular circumstances. RPL argued that it was charged more than a fair and reasonable price with RPL’s experts considering the job to be worth \$631,008.45 — a far cry from the \$2.53 million Dobbs had charged. There was no dispute between the parties on the approach in assessing reasonable price, which begins by taking all relevant circumstances into account. The Court dismissed Dobbs’ argument that a reasonable price must contemplate a range of potential values rather than one exact figure. The Court held that the word *reasonable* expresses that the price is objectively assessed and does not allow for a range of prices – the Court’s role is to *fix the price*.

The parties, in this case, relied primarily on expert opinion evidence of quantity surveyors. The Court essentially considered each line item of estimates



from the quantity surveyors and determined an amount they believed to be reasonable. Assessments were made based on market rates and considering the reason and rationale behind each expert's assessment. The Court also referred to cross-examination answers of each expert to determine the reliability of their figures.

The scope of the work was an issue in this case as the scope was increased throughout the project and was in most cases not documented in writing, rather than there being a set scope of works from the beginning based on plans and designs that were amended. This meant that the Court also had to determine in some instances what the actual scope of the work was based on factual and expert evidence. For example, in the line item *reinstallation of joinery on middle level*, the Court preferred Dobbs' expert evidence as the expert had considered the fact that the joinery had been reinstalled multiple times while RPL's expert had not. RPL's expert later acknowledged that his estimate was light in this area during cross-examination. There was no clear scope and some work had been redone.

The partial agreement on hourly rates was also considered. The Court acknowledged that RPL should have been aware that there was a trade-off between productivity and perfection and RPL had given the appearance that it was willing to pay for more hours to achieve good quality. The Court, therefore, allowed for 17,000 hours to reflect some of the work that was not done by 'techs'. Agreed labour rates were also to be considered. The Court considered that a purely market-rate assessment would allow for a margin. However, it was held that a purely market-rate assessment was inappropriate here as the parties had agreed on some of the labour rates. The Court dismissed Dobbs' expert assessment allowing for a margin.

The Court also made determinations based on the most likely scenario. For example, for *Drainage*, Dobbs' expert based his estimate on Dobbs' evidence that the trenches were dug by hand, while RPL's expert made his estimate based on work being done with a digger. The Court considered that hand digging was a reasonable approach and preferred Dobbs' expert's evidence.

Ultimately, the High Court held that the reasonable price was \$1,618,260 based on expert evidence. Therefore, RPL was overcharged and was entitled to be repaid \$845,965.32.

Similarly, in *Electrix Ltd v Fletcher Construction Co Ltd (No 2)* [2020] NZHC 918, the Court stated that the market price of the services is relevant, but the cost of the services actually provided is a better starting point in determining a reasonable price. However, the cost of the services should reflect the market value of the particular inputs. If the principal can show that the actual costs incurred were more than what was reasonable in the market conditions, they should be reduced by that amount.

The Court in *Electrix* also considered expert evidence to determine the cost, but unlike the present case, considered one expert's evidence more valuable than the others. That expert was considered more detailed and reliable because she was the only one to assess the actual costs of the contractor's work through a comprehensive Workbench project management software and she conducted a variety of verification tests. The Judge ultimately decided the overall reasonable cost based on that expert's assessment.

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The Court determines contractor was liable on his own account

Another issue was whether ARL (Dobbs' company) and/or Dobbs (the builder) were liable on his own account for the repayment amount. ARL was not incorporated at the time of initial dealings and Dobbs' personal GST number was used, along with his personal email address and bank account details. Three months after giving the initial quote, ARL was incorporated. However, even after ARL's incorporation, Dobbs continued to use his own GST number. Dobbs had never disclosed that he was entering into the contract on behalf of ARL before entering into the contract. The Court held that Dobbs had given every objective indication to RPL that he was acting on his own account and was therefore liable separate from ARL.

This serves as a timely reminder to employees or agents of smaller companies of the importance of ensuring they act consistently with the instruction of their company and to make it clear to their clients who they are dealing with. This can include

the use of the company email address, GST numbers, and bank accounts.

Agree on a price at the outset

While this case has a unique set of facts (most residential construction contract disputes are not for millions of dollars and do not reach the courts), it provides a useful reminder to everyone in the construction industry. It emphasises the importance of having an agreed contract price or pricing mechanism at the time of entering into the contract and recording that agreement. This is for the protection of both the principal and the contractor. It allows the principal to assess the costs claimed against that price/pricing mechanism and gives contractors certainty of payment by making it harder for principals to withhold costs for spurious reasons. This needs to be balanced against savvy contractors who serve inflated payment claims that comply with the Construction Contracts Act 2002 on unwitting residential homeowners who do not respond with a payment schedule.

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