Hudson Alive And Well in Scotland

A recent Scottish case has reminded us that Scots often march to their own tune; on this occasion applying the Hudson formula to calculate damages for lost overheads and profit. This month our regular contributor Dr Arthur McInnis looks at the case.

A Short Summary

The case is called *Beechwood Development Company (Scotland) Limited v Stuart Mitchell (t/a Discovery Land Surveys).* It was heard in the Outer House of the Court of Session in Scotland and at present remains unreported. The judgment itself was delivered just a few months ago on February 12, 2001. Briefly, the claimant, Beechwood Development Company (Scotland) Limited (Beechwood) is a house-builder. During the early 1990s it worked almost exclusively for a development company called Westpoint Homes Ltd (Westpoint). As readers familiar with formulae work in damage calculations this seems like a relevant factor. The arrangement between Beechwood and Westpoint was such that Beechwood carried out each contract consecutively with its workforce moving on to the next project when the previous contract was substantially completed.

In 1994, Westpoint sought to develop a site known as Mair's Garden Centre, which it had contracted to purchase subject to planning permission. In October 1994, Beechwood engaged the defendant, Stuart Mitchell, a land surveyor, to provide a topographical survey of the site. Based on this survey, the lay-out plans for the planning application were drafted and submitted by Westpoint on November 30, 1994. Once the application was accepted Westpoint applied for a building permit, or warrant as it is called in Scotland, and agreed with Beechwood to develop 28 apartment units in several blocks.

During a site visit in June 1995, an error in the configuration was discovered. It became apparent that construction of one of the apartment blocks could not proceed in accordance with the planning permission, which had been granted. At the time of discovery, the building permit or warrant had yet to be granted. It was not until November 26, 1995 that the warrant to build was eventually obtained, seven months after the initial application. The defendant accepted that the error in the topographical survey constituted a breach of contract and a breach of the duty of care. The key question that followed for the Court was to thus decide what damages should be awarded.

The Claim for Damages

After attributing ten weeks of the delay to obtaining the building permit to Stuart Mitchell, Lord Hamilton elaborated on the claim for damages in this way: "The delay resulted in a reduction of the (claimant's) turnover which otherwise would have been earned in the financial year to 31 March 1996. The (claimant) did not generate turnover from the resources devoted to the contract in the period of delay. That turnover would have contributed to the recovery of the (claimant's) head office overheads (which were incurred in any event) and to the generation of their profit in that financial year. In the over-run period for the works for the development caused by the delay, those resources would otherwise have been able to generate turnover from other activities ... the commencement of which was delayed as a result of that over-run.

There is no practicable means of assessing this loss other than application of a formula utilising the percentage of the pursuers' turnover represented by overheads and profit."

The highlighted text underscores that Lord Hamilton saw no other sensible way in which to assess damages than by using a formula. He did so and relied upon the Hudson Formula – so named as it was originally described in the 10th edition of the text *Hudson's Building and Engineering Contracts. Keating on Building Contracts*, in the current 7th edition, describes the formula.

The formula looks like this.

Head Office/Profit Percentage x 100	Contract Sum x Contract Period (eg in weeks)	Period of Delay (eg in weeks)

It calculates the loss as the contractor's overhead and profit percentage based on fair annual average multiplied by the contract sum and the period of delay and divided by the contract period.

Caveats regarding the use of the formula were given at the time of its release in the 10th edition of the Hudson text. The text noted the formula assumed that the profit budgeted for by such a contractor in his prices had to have been capable of being earned by him elsewhere if he had been able to have finished the contract on time. In the *Beechwood* case this is why the consecutive contracting carried out for Westwood took on an added importance. One cannot stop there though in seeking to apply the formula for its proper use would also have had to assume that Beechwood did not habitually underestimate its costs in pricing and that no material change would occur in the market. It is regarding evidentiary questions of this nature that the use of formulae stand or fall in the courts.

In response to an argument by defendant's counsel that the claim should be rejected for lack of such evidence, Lord Hamilton responded: "While an evidentiary basis must be laid upon which such an assessment can be made, that does not, in a case of this kind, necessarily involve, in my view, expert accountancy evidence. Provided the pattern of ordinary trading is established, together with relative information as to the finances of the company, the court may be in a position to make an evaluation...In the present case sufficient, and essentially unchallenged, evidence has, in my view, been laid before the court to enable an appropriate assessment of the type of loss in issue to be made. With that finding made arriving at the appropriate level of damages for lost profit and overhead costs was easy and some £31, 000 was awarded to Beechwood.

Views

Beechwood is an interesting case for two reasons. First and foremost it is a very good recent illustration of the use of the Hudson Formula to calculate damages for lost profit and overheads. While the formula has been applied in some cases *(Shore & Horowitz Construction Co. Ltd. v. Franki of Canada Ltd.* (1964) *S.C.R. 589, Ellis-Don Ltd. v. Parking Authority of Toronto* (1978) 28 BLR 98, *J.F. Finnegan Ltd. v. Sheffield City Council* (1988) 43 BLR 124) there are few reported instances of its use. Perhaps it is the absence of good accounting records over time against which profits can be judged that sometimes preclude its use. Lastly, Beechwood demonstrates that even though a claimant may wish to rely upon the formula to be successful it must still provide sufficient evidence for a court to make an assessment of damages. Alfred A Hudson would be pleased. ■:AC

Friends from Scotland

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