

CONSTRUCTION : BULLETIN

Is it possible to re-open an invoice that has already been paid?

Where there is no agreement as to the number of hours that a subcontractor's daily rate is based, what grounds does a paying party have to dispute an invoice that it has already paid?

*A daily rate provision can be broken down into a simple exchange of X hours of work to be carried out, in return for X pounds to be paid. In the recent Court of Appeal case, **Furmans Electrical Contractors v Elecref Ltd**, the simplicity of the daily rate was lost and a dispute arose because the parties, having agreed to contract on the basis of a daily rate, established the rate to be paid but failed to establish the number of hours to be worked.*

***Furmans Electrical Contractors v Elecref Ltd** is discussed below and provides insight into how the courts will interpret ambiguous daily rate clauses and how contracting parties can avoid unnecessary disputes and costly confusion.*

Furmans Electrical Contractors v Elecref Ltd.

Elecref subcontracted electrical cable installation works to Furmans. Furmans were originally paid on the basis of quantity installed and worked as long as it took to install the cabling but never longer than a 9 hour day. From July 2004 Elecref employed Furmans to carry out work on a daily rate basis. Elecref agreed to pay Furmans a daily rate based on £650 for four men, increased to £700 if the site was far away to include accommodation. Unfortunately a dispute arose as to the number of hours on which the daily rate was based. Furmans charged the daily rate basing its figures on four men working a 9 hour day. In comparison Elecref's

own men worked an 11 hour day. Furmans submitted invoices that had been checked by the relevant site supervisor and until September 2007 Elecref paid the invoices. During September 2007 Elecref allowed a sum from an invoice to become outstanding and it was around the same time that Mr Furman notified Elecref's Mr Bride that he intended to increase the daily rate.

The Dispute

Mr Bride protested the proposed daily rate increase in a fax sent to Mr Furman on 5 September 2007. The fax identified that Furmans' men were not working the 'agreed' 11 hour day and that they were charging for accommodation on Fridays when it was not always used. In the fax Mr Bride stated that rather than increasing the daily rate he believed that a £50 per day reduction was necessary. Despite objecting to the daily rate, Elecref did not make a claim for repayment of any overcharged amounts and obscurely paid Furmans a further sum of £26,129.99 on 2 October 2007 whilst refusing to pay any invoices for August to October 2007.

Furmans issued proceedings in November 2007 in which it claimed £23,203.31 in relation to six invoices between August 2007 and October 2007. Elecref issued a defence and counterclaim for the sum of £40,529.37 on the basis that Furmans were in breach of a verbal agreement that the daily rate was based on an 11 or 12 hour day.



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The County Court Judgment

The Court found that Elecref and Furmans had not agreed a specific number of hours on which the daily rate was based. Furmans tried to argue that a daily rate based on 9 hours work had been established through a course of dealings. However the Judge was unwilling to accept this argument as Mr Bride was unaware of the basis on which Furmans were charging and that the site supervisors had insufficient information to bring about an agreement by conduct. Although quantum meruit had not been pleaded by either side, the Judge found it to be an appropriate basis on which to assess Furmans' claim. The Judge did not distinguish between the paid and unpaid invoices and assessed the meruit for all the invoices by reference to Elecref's evidence that "*£650 per day was reasonable for an 11 hour day but not for a 9 hour day*". The Judge ordered that a sum of £7,751.31 was to be paid by Furmans to Elecref. The ordered sum represented the amount that Elecref believed that it had overpaid in previous invoices less the sum that Furman's claimed for the unpaid invoices.

The Appeal

The Court of Appeal agreed with the County Court that there had been no express agreement as to the specific hours that the daily rate was based upon and that a course of dealings had not established a 9 hour daily rate. However, the Court of Appeal found that the County Court had erred by failing to distinguish between the paid and unpaid invoices. The Court of Appeal commented that "*the recorder simply took the view that the issues relating to the paid invoices were precisely the same as for the unpaid invoices. He thus thought that what he was concerned to do was calculate what sum had been over-charged on the paid invoices and what was being charged on the unpaid invoices and set that off against the claim...in failing to distinguish between paid and unpaid he, in my view, fell into error.*"

The Court of Appeal distinguished between the invoices and firstly considered whether there was any basis upon which the paid invoices could be reopened. The Court commented that the site supervisors should have picked

up the difference in the working hours between Furmans' men and Elecref's men. The Court stated that by employing the site supervisors Elecref assumed the risk of the mistakes that they made and consequently it would be very difficult to reopen the issue of the paid invoices.

The Court of Appeal held that an even greater insuperable difficulty arose as a result of Elecref's conduct following its objection to the invoice. Having objected to the daily rate and protested that Elecref was being overcharged in September 2007, Elecref made no attempt to claim for the return of any money and obscurely followed the protest with a very substantial payment to Furmans. The Court held that by failing to act in accordance with its protest, (i.e. by making an immediate claim for the over paid money or withholding the overcharged money) Elecref had waived its right to claim that it had been overcharged by Furmans.

Having established that the paid invoices could not be re-opened, the Court of Appeal considered the unpaid invoices and identified that the fundamental question was "*what is the reasonable sum that Furmans were entitled to receive on their unpaid invoices?*" The Court of Appeal held that £650 per day is reasonable for an 11 hour day but not for a 9 hour day and this was reflected in its decision to deduct £3,500.00 from the unpaid invoices.

Practical Considerations

There is no doubt that a claim such as this should not have ended up in the Court of Appeal. Each side incurred great expense arguing over a relatively insubstantial sum of money that stemmed from a basic misunderstanding. Contracting parties cannot afford to make such mistakes and therefore should take note of the following points to avoid unnecessary disputes and costly confusion.

For parties contracting on a daily rate basis time is undoubtedly money. It is essential therefore, that such parties always negotiate, establish and record in writing both the rate to be paid and the hours to be worked.

In the Furmans and Elecref case the Court of Appeal placed significant emphasis on the role of the site supervisor. Contractors should be mindful that by employing a site supervisor to sign off time sheets, the employing party is assuming the risk of any mistakes made by the supervisors. To limit the Contractor's potential risk of paying for un-worked hours, site supervisors should be made aware of the number of hours on which subcontractors' daily rates are based.

Furmans' case confirms that the Court will use reasonableness as a starting point in relation to any unpaid disputed invoices. It would therefore be prudent for any party negotiating a daily rate term or for a party at the outset of a dispute with regard to the daily rate to consider what the courts will interpret to be a 'reasonable' daily rate.

Finally and most importantly Furmans' case identifies that, regardless of whether the court considers the daily rate term to be unreasonable, if a party protests an invoice and then acts in any way that is contrary to its protest, that act alone can waive the right to dispute an invoice. In the instant case Elecref should have put its money where its mouth was and after disputing the daily rate it should have refused to pay any of the invoices or paid a reduced amount to reflect the overcharging. By failing to do so Elecref waived its right to dispute the paid invoices.

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