

IN THE MATTER OF:

Expert Energy Reports in Cavity Wall Insulation Claims.

Advice

1. I am asked to advise urgently on the following points:
 - a. Is the claim for energy loss as evidenced by the energy loss reports a separate head of claim;
 - b. The recoverability of such reports at any subsequent assessment hearing;
 - c. Whether the energy loss reports and the surveyor reports ought to be combined so as to aide recovery at an assessment.
2. In order to provide this advice I have not been furnished with any papers over and above my instructions. Those instructions contain a sufficiently detailed summary such that I have not required any additional documents in order to advise.

Heads of claim.

3. Quite properly, the surveyor reports in such matters provide the breach and causation evidence in addition to providing expert evidence on quantum in respect of physical remedial works.
4. I am told that the energy reports provide evidence in respect of conducted heating loss which arises from the failure of the cavity wall insulation. That is in two aspects:

- a. Losses incurred as a result of failures to increase the insulation of the property to the greater degree promised by use of the cavity wall insulation;
 - b. Losses arising from damage caused to the pre-existing insulation during the installation process causing a reduction to the pre-existing insulation and thus a greater heat loss than previously experienced.
5. I am told that this report is provided by an expert in heating loss as opposed to the surveyor. Indeed, I am told that the surveyors instructed are generalists who would not carry the required expertise to credibly evidence the heating loss as outlined above.
6. It ought to be noted from the outset that I am not a housing disrepair expert. That said, I have undertaken numerous costs assessments on such claims, for both paying and receiving parties. It does appear to me that the question of any potential heating or energy loss that may or may not have been suffered is a separate and distinct question from whether any physical remedial repairs are required to the structure of the building.
7. I am told that the two disciplines are separate, require different skill sets and evidence different aspects of loss. I have no reason to doubt that as being correct. It would appear to me entirely reasonable to engage a heating engineer to calculate any heating loss and a surveyor to calculate any remedial repairs. Due to the distinction in their areas of expertise I would not expect the heating engineer to calculate remedial repairs, nor vice-versa. Indeed, I would anticipate significant, damaging, cross examination as to credibility if that were to be the case.
8. It may be that the need for remedial repairs has caused a further heating loss, but that, to my mind, does not mean that the two are one and the same when one is quantifying any resulting loss flowing from breach.

9. For example; if an individual is injured in a road traffic accident and consequently suffers both a broken leg and depression, an expert report would be required from both an orthopaedic surgeon and a psychologist. The court would not expect to hear evidence from the orthopaedic expert on the question of psychological damage for want of expertise. I cannot see any distinction in principle from the situation at hand.
10. As to whether such heating loss is a properly recoverable head of loss, the usual tests of reasonable foreseeability and remoteness would of course apply to each individual claim.

Recoverability:

11. If the following can be made out, then costs expended in evidencing such a head of claim would prove recoverable at any assessment hearing:
 - a. The claim was one which was cost bearing between the parties: put otherwise, it was a claim which was not subject to small claim fixed costs;
 - b. The heating loss expert was one which was proportionately required to evidence that head of claim and thus one which had been provided for in directions;
 - c. If the claim settles pre-issue, then it is a head of loss that is recovered between the parties and not one which is expressly rejected by the defendant and thus expressly excluded from any settlement amount;
 - d. There are no other conduct issues which occur specifically in the claim resulting in the exclusion of the heating loss expert's evidence or the costs of seeking the same.
12. The heating loss evidence would be capable of being recovered separately to any breach and causation report which includes discussion as to remedial damage. It engages with a separate head of loss which requires different expertise to be brought to bear.

Proportionality of two reports:

13. When one is engaged in the process of recovering costs, it is trite that separation to the lowest level possible has the effect of increasing costs recovery. This is for the simple reason that the more information a judge has relating to separate items has the following effect:

- a. An item's cost is easier to justify if it is clear and distinct in what it relates to;
- b. Psychologically, it is easier to justify two separate items relating to two separate issues than it is to claim one higher amount for two separate issues. This is because it is a well-known and successful tactic to claim what appears to be two amounts across two separate items than seek one higher amount covering bulk work. Bulk items covering more than one item of work will almost invariably be reduced down on assessment because of the element of doubt which inevitably creeps in absent clear, distinct and separate items of work;
- c. Judges become annoyed very quickly if an item in a bill appears to be in relation to one single item of work but actually includes more than one item. This is especially so on provisional assessments, which it is more than likely such costs would be caught under.

14. Furthermore, if one is looking to maximize cost recovery, recoverable profit costs will invariably increase if one is able to instruct two experts. For example, the solicitor will be able to charge for instructing two experts, reviewing two experts reports and considering the interplay between the two experts reports and the effect of both on quantum.

15. Such a step will also invariably have an increased effect on quantum thus increasing the proportionate level of costs recovery due, not only to the increase in the amount in dispute, but also due to an apparent increase in the complexity of the claim. Both of which are crucial factors under the new proportionality test contained in CPR 44.3 (5).

Conclusion:

16. If one is capable of properly justifying the instruction of two separate experts to evidence two separate heads of loss then, generally, such a step ought to lead to a greater level of cost recovery both in terms of disbursements and also profit costs.

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