

From: Stewart, Chris (DFE)
Sent: 13 October 2016 12:07
To: McCormick, Andrew (DFE); Cousins, Heather
Cc: Ingram, June; McIlwrath, Linda
Subject: FW: Hibernia Dispute - Arthur Cox
Attachments: Hibernia Dispute - Arthur Cox ; Hibernia Dispute - Arthur Cox

Categories: AMcC

Andrew, Heather

To see. Further detail on the background to this can be provided if it would be helpful.

In essence, this Department had to engage in a protracted, difficult process of contract mediation in relation to Project Kelvin. The outcome, which I am satisfied was the best that could be achieved in the prevailing circumstances, was, nevertheless, sub-optimal in terms of value for money.

In examining the lessons learned, I asked for advice on the potential for seeking redress from the specialist commercial lawyers involved in drawing up the contract, as the matter appeared to have stemmed from avoidable ambiguity in the contract documentation. You will see that the advice on this point is negative.

The wider issue here has a clear parallel with aspects of RHI. The Department relied on specialist legal advice on a key matter, the quality of which (I contend) is open to question. There is no readily available means by which policy civil servants can exercise effective due diligence over specialist or technical matters in such advice (or other similar forms of consultancy). Of course, as we have seen from RHI, that limitation does not extend to errors of fact, process, or logic which we can (and should) challenge. Nevertheless, the enduring difficulty is how Departments can satisfy themselves on the quality of specialist advice or input, when our lack of competence in the matter is the very reason for procuring the input in the first place.

The lack of response from CPD is disappointing, and I am minded to write.

C

From: Blaney, Eamonn
Sent: 13 October 2016 11:15
To: Stewart, Chris (DFE)
Cc: Ingram, June; Preston, Alan
Subject: Hibernia Dispute - Arthur Cox

Chris

In the context of the Lessons Learned Report on the contract dispute with Hibernia Networks, we agreed to explore the possibility of action against Arthur Cox.

DSO advice received on 13 September (attached) concluded that such action would be difficult and unlikely to succeed. They did, however, ask to see the documents which led to the appointment of Arthur Cox.

Following a further review, which established that Arthur Cox had initially been engaged by MPD International (the first technical consultants on Project Kelvin) and not through a procurement, DSO further advice, dated 12 October and also

attached, is more definitive and concludes that pursuing a case against Arthur Cox (or MPD International) regarding the legal advice would have little merit and could not be recommended.


If you are content, I will copy to Accountability colleagues to be passed to DoF to close this matter.

You had asked, within the Lessons Learned process, for DoF comments on what they/CPD might be able to do to avoid the use of 'off the shelf' contracts in future procurements. I understand from Accountability Branch that no response has been received.

Eamonn

Eamonn Blaney

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From: McCullagh, John
Sent: 13 September 2016 15:01
To: Blaney, Eamonn
Cc: Todd, Rosemary
Subject: Hibernia Dispute - Arthur Cox

Eamonn,

I discussed this with Rosemary Todd recently and you and I spoke last week. As discussed on the telephone, I think there are difficulties in bringing a case against Arthur Cox and I agreed to outline these to you in writing (having reviewed my file since we spoke). Although I am not a litigator myself, I would suggest that a successful negligence case against Arthur Cox would involve the Department/DCENR proving that the following three elements exist:

- That the advice provided by Arthur Cox was negligent;
- That the negligent advice has caused a loss; and
- And that the Department/DCENR are not barred from bringing a claim by the passage of time.

It would be useful to see the terms of engagement between DCENR/DfE and Arthur Cox not least because may be subtle differences depending on whether the terms of engagement are governed by Irish law or Northern Irish Law.

Negligence

-
The law here is fairly clear in that solicitors owe a duty of care to their clients in giving professional advice. Negligence can be demonstrated if it can be shown that this duty has been breached because of poor or inadequate advice. The allegation here would be that the drafting in terms of the definition of "Customer" is inadequate and that it should have been clearly drafted to mean any customer using the service regardless of that customer's location. Whilst it is clear to me that the words used to define the term "Customer" are potentially ambiguous, there is little, if any, evidence from the papers that I have seen (in advising previously in this matter) that there was a clear intention amongst the parties that Customer should have had that wider definition. You confirmed in April 2013 that:

- "a review of our records has not provided any evidence prior to contract, of an intention by both parties that revenue from all customers using Kelvin infrastructure should be taken into account when calculating excess annual revenue. I can also confirm that the Contracting Authority is unable to identify instances within the contract that support its wider definition of customer".

Given that the tender document did not suggest an intention on the part of the parties that revenue from all customers be taken into account in the calculation of excess revenue, it is unlikely (but not impossible) that Arthur Cox were given clear instructions that Customer should have the wider definition referred to above. The only way to investigate this properly, is to trawl through all emails passing between the Department and Arthur Cox at the time when the agreement was drafted. If you wish to do that this point could be investigated further. I note also that Peter Curran of Arthur Cox who drafted the agreement contends himself that the narrower definition of customers based in the North West is the correct definition (see email from Diarmuid McLoughlin to Eamonn Blaney dated 20 November 2012). On the face of it therefore, whilst the drafting of the definition for "Customer" is potentially ambiguous, it is far from clear that Arthur Cox have been negligent in the failure to ensure that Customer was given the wider definition which would of course have benefited the Authority.

Loss

My understanding is that the main issues here were the Definition of Customer (which of course impacted upon the calculation

of Net Revenue, and in turn on that of Excess Annual Revenue) and Depreciation have been dealt with to the satisfaction of the customer and, therefore, no loss should arise that could be attributable to Arthur Cox if any negligence were found on their part.

Limitation

The terms of engagement between DCENR/The Department and Arthur Cox will stipulate whether Irish law or Northern Irish Law applies. As alluded to above I would like to see them. As far as Northern Ireland Law applies, the time limit appears to be 6 years from the date on which the cause of action accrued (the giving of the advice in this case) or 3 years from the date on which the Department had knowledge required for bringing an action for damages (assuming an action for negligence in tort is brought). It seems to me that the Department is now out of time under both heads given that the contract was signed in 2008 and the problem was identified around 2012. That Statute of limitations in Ireland again gives time limit appears to be 6 years from the date on which the cause of action accrued (the giving of the advice in this case) but I do not see an equivalent provision where facts relevant to the case are not known at the date of accrual. Limitation is in itself a tricky area in both jurisdictions and I must stress that these are initial observations only – limitation is not particularly my area of expertise. Further advice could be sought on this point once you have confirmed which law applies. Rosemary, if you have any observations on limitation at this point I would be grateful.

Conclusion

For the reasons stated above, I would suggest that a case against Arthur Cox would be fraught with difficulty and would, on the face of it, be unlikely to succeed. Please do not hesitate to contact me once you have had a chance to read this note.

Regards

John McCullagh LLB

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From: Todd, Rosemary
Sent: 06 September 2016 10:37
To: McCullagh, John
Subject: RE: Hibernia Dispute - Arthur Cox

John

Yes, please contact Eamon and proceed according to your note

Rosemary

Tel: 90 (5) 42525

From: McCullagh, John
Sent: 06 September 2016 10:11
To: Todd, Rosemary
Subject: Hibernia Dispute - Arthur Cox

Rosemary,

I have had nothing from the Client as yet and so have done nothing further since we spoke. Perhaps it is best if I contact Eamonn directly and set the ball rolling. The initial focus should be on whether the client can produce clear evidence that the contract does not accord with the instructions given by the Client to Arthur Cox. If I remember correctly, the Client will not be able to do this. If, however, the Client can produce a dossier of emails/minutes of meetings and other similar documents which clearly show that the drafting did not accord with the Client's instructions, some kind of analysis could be done by Counsel. Before I contact Eamonn I will go through whatever minutes of meetings I have to see if anything was recorded regarding negativity shown to pursuing such a case by (i) DfE (negative); (ii) DCENR (negative in the extreme); and Counsel (I can't remember). I will copy you into an initial email to Eamonn (probably by tomorrow) and leave it to you as to whether you wish to attend any meeting that may follow. Also, as you mentioned in our conversation, the 6 year limitation period needs to be highlighted to the Client.

Let me know if you are content with this course of action.

Many thanks

John McCullagh
42404

From: Todd, Rosemary
Sent: 05 September 2016 16:43
To: McCullagh, John
Subject: FW: Hibernia Dispute - Arthur Cox

John -

Further to our discussion in August, have you been able to look at this and form a view?
I had understood that DfE sought advice/ opinion. I now note the request to meet.

Rosemary

From: Blaney, Eamonn
Sent: 05 September 2016 16:11
To: Todd, Rosemary
Cc: Boyd, Steven (DfE)
Subject: Hibernia Dispute - Arthur Cox

Rosemary

Further to our discussion on 22 August, we are keen to move on the meeting to discuss any potential case against Arthur Cox. You had agreed to consider with John McCullagh and let me know who should attend from DSO (and potentially counsel). Are you able to confirm as yet? I can then let you have some possible dates.

Thanks

Eamonn

Eamonn Blaney

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From: McCullagh, John
Sent: 12 October 2016 09:21
To: Blaney, Eamonn
Cc: Ingram, June; Preston, Alan; Boyd, Steven (DfE)
Subject: Hibernia Dispute - Arthur Cox

Eamonn,

Many thanks for providing additional documents which, I think, are helpful in drawing the issue to a conclusion. The Terms of Reference are entitled "Technical Consultant Support" and relate largely, as the name would suggest, to technical specifications for the project. A number of items are specifically **excluded** from the Terms of the Reference one of these being:

- Legal issues associated with the contract other than those directly related to telecommunications standards and technical specification

This suggests that general legal advice is not being sought under the Terms of Reference. By the time the ITT was drafted the procurement strategy had changed. This suggests, at "Contractual Requirements", that:

- "The consultancy team will be required to provide all aspects of commercial, technical, legal and financial assistance and advice during the procurement process and during post award contract management and monitoring"; and
- That the Contractor will be required to "prepare, in association with the Contracting Authority's legal advisers, the appropriate contractual agreements and deal with all property, title and other general legal issues in the project."

It appears then that the Contractor, through the ITT, is asked to put together a multidisciplinary team rather than focusing merely on the technical side. On the basis of this strategy then, MPD International itself could be liable to the Authority for the poor legal advice rather than Arthur Cox. Of course a Court could find that, taking into account the circumstances of the case, a duty of care extended to the Authority also. A collateral warranty would be conclusive in allowing the Authority to litigate against Arthur Cox directly but I seen nothing to suggest that such a warranty exists. In any event, it would appear that the Terms and Conditions of Contract (under which MPD International were appointed) are governed by NI Law (see paragraph 48.1). Subject to previous comments, this in itself appears to rule out any claim in negligence on the basis of the following passage in my previous email:

- "As far as Northern Ireland Law applies, the time limit appears to be 6 years from the date on which the cause of action accrued (the giving of the advice in this case) or 3 years from the date on which the Department had knowledge required for bringing an action for damages (assuming an action for negligence in tort is brought). It seems to me that the Department is now out of time under both heads given that the contract was signed in 2008 and the problem was identified around 2012."

Next, your email suggests to me that we do not have an evidential basis on which to allege that Arthur Cox were negligent in failing to capture a clearly communicated revenue sharing mechanism in the contractual drafting (your comments on the email chain refer).

On the basis of the foregoing, it is my advice is that pursuing a case against Arthur Cox (or MPD International) regarding the legal advice would have little merit and I could not recommend pursuing a claim of this type.

Please do not hesitate to contact me further in this matter. I would be grateful if you could acknowledge receipt of this email.

Regards

John McCullagh LLB

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From: Blaney, Eamonn
Sent: 04 October 2016 15:00
To: McCullagh, John
Cc: Ingram, June; Preston, Alan; Boyd, Steven (DfE)
Subject: RE: Hibernia Dispute - Arthur Cox

John

As per your request below, I attach the documents which led to the appointment of Arthur Cox. My understanding is that they were brought in by MPD International, who were the initial technical consultants on Project Kelvin, to provide the legal advice.

With regard to NI or RoI law, I believe it is NI. I'm not sure the documents will confirm that. The Kelvin contract was signed only by DETI and DCCAE (formerly DCENR) colleagues have always made the case that NI law applies.


With regards to the email chain between the Department and Arthur Cox, I believe we have exhausted that as part of our research in support of the mediation.

Let me know if you need anything further.

Eamonn

Eamonn Blaney

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Annotated by RHI Inquiry