

June 2011

CONSTRUCTION LAW BULLETIN

CONTRACTOR CANCELS JBCC CONTRACT

Introduction

In the JBCC cancellation clause there is a provision to the effect that neither the employer nor the contractor can cancel the contract if at the time the party wishing to cancel is itself in breach of a material term of the contract.

The old BIFSA White Form Contract had a similar provision which was the subject of judicial scrutiny in a court case which gave useful guidance on the practical effect of that provision. Unfortunately the case is of no help with the JBCC clause due to the wording being very different.

In June 2011 the Supreme Court of Appeal delivered judgment in a case¹ in which the court had to consider amongst other things the provision in the JBCC contract.

Importantly the case also dealt with the obligation of an employer to afford a contractor an opportunity of rectifying defective work.

¹ MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd and Ano, SCA Case No 157/10, date of judgment 8 June 2011.

Background Facts

MSC Depots (Pty) Ltd (“MSC”) employed a joint venture, the partners of which comprised WK Construction (Pty) Ltd and Winfords Civil & Development CC (“the Joint Venture”), in terms of the JBCC Principal Building Agreement, to construct a container depot in Despatch in the Eastern Cape. MSC required the depot to store containers of motor vehicle parts for use by Volkswagen South Africa at its motor manufacturing plant in Uitenhage. The works entailed bulk earthworks, paving, stormwater, water and sewerage reticulation and mast lighting.

MSC employed a firm of outside consulting engineers to carry out the necessary design work and to supervise the construction of the works.

The yard surface of the container depot had to be designed to handle heavy loads. MSC intended to use special reach stackers with a carrying or lifting capacity of 45 tons to move the containers around the depot.

Shortly after practical completion it was noticed that the reach stackers which were at the time being used to move empty containers onto the site for storage purposes were causing the depot surface to deflect in places.

The Joint Venture was at this stage in possession of an interim payment certificate for approximately R1m which had as yet not been paid.

A meeting was held on site between the Joint Venture, the engineer and the principal agent to discuss the problem. Certain remedial work was agreed upon and the Joint Venture agreed to undertake the necessary work. However, some two weeks later the engineer instructed the Joint Venture to stop the remedial work, apparently due to some uncertainty as to whether the design of the remedial work was sufficient or appropriate.

Three months passed without the Joint Venture being given instructions to resume the remedial work and without the outstanding interim certificate being paid.

The Joint Venture issued a notice in terms of the cancellation clause giving MSC 10 working days within which to pay the interim certificate. The letter was addressed to the principal agent and copied to MSC. Ten days passed and as no payment was forthcoming, the Joint Venture issued a letter to MSC and the principal agent cancelling the contract.

MSC sued for damages comprising the cost of remedying the defects in the depot surface and the Joint Venture counterclaimed for payment of the amount of the interim certificate.

Validity of Cancellation

MSC challenged the validity of the Joint Venture’s cancellation of the contract on two grounds.

Firstly, it complained that the 10 working day notice had been addressed to the principal agent and only copied to it as opposed to being addressed to it directly. The court rightly and promptly discarded this argument as spurious.

Secondly, MSC contended that the Joint Venture had been in material breach of contract at the time of its purported cancellation of the contract and as such was not entitled to cancel. The material breach relied on was the fact of the defect in the works which it contended was attributable to defective workmanship on the part of the Joint Venture.

Various expert investigations were undertaken by both parties with a view to identifying the cause of the failure. After analysing the relevant facts and expert opinions, the court concluded that the proximate cause of the failure was defective design by the engineer. It seems that the pavement should have been designed to be much thicker in order to accommodate the poor in situ soil conditions. The weak subgrade was unable to carry the very large surface loads which caused bearing capacity failure in both the subgrade and in the overlying layers.

Soil investigations had however revealed that contrary to the specification, the Joint Venture had left oversized material comprising boulders in the layer works. However, it was established that despite this, the compaction achieved by the Joint Venture exceeded the compaction required in terms of the specification. As such the court concluded that this breach of the specification by the Joint Venture had not contributed to the surface failure.

The court acknowledged that irrespective of who was to blame for the failure, there was an obligation on the Joint Venture to rectify the defects albeit that it would be entitled to be paid for that work.

At no time had the Joint Venture indicated that it was not willing to undertake the required remedial work. As such it could not be said to have been in breach of any of its contractual obligations at the time it cancelled. The cancellation was accordingly valid.

Conclusion

Despite there being defects in its works, a contractor will not be in breach where it is willing and tenders to attend to remedying the defects concerned. In this case the Joint Venture had tendered to do that but had been instructed to stop work pending the engineer deciding on what was required to remedy the defects.

Interestingly the court remarked that the Joint Venture's entitlement to payment of the interim certificate was not dependent or conditional on any reciprocal obligation on its part. In other words it was entitled to payment irrespective of whether any remedial work for which it was responsible was as yet incomplete.

ALASTAIR HAY

Direct Tel: 031 - 536 8508
Mobile: 082 552 9227
E-mail: ahay@coxyeats.co.za