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ATTORNEYS

Notification of Claims - Substance is Key

The leading role in the execution of the contract as "Engineer" (under the GCC) or "Principle Agent" (under the JBCC) requires frequent decisions and rulings on the activities on site. This function is also often underestimated and can attract significant liabilities.

Professionals in the construction and engineering industry are often appointed as the Engineer or Principle Agent. It is required of the professional fulfilling this critical function to be *au fait* not only with the terms of the contract, but also the execution thereof.

What are the implications of poor decision making by the Engineer or Principle Agent under these construction contracts? One instance where the courts discussed the yardstick with which the Engineer or Principle Agent is to be measured is in the case of *Hawkins Hawkins & Osborn (South) (Pty) Ltd V Enviroserve Waste Management*. The decision not only sets the current benchmark in this regard, but also sounds a warning to Engineers and Principle Agents to act in a reasonable manner when conducting themselves as the Employer's representative on site.

In this case, as in many other instances in the construction and engineering industry, the Employer (Enviroserve Waste Management) concluded an oral agreement with the Engineer. The Engineer was appointed to supervise and administer certain contract works.

The Employer then entered into a written agreement with a Contractor to do excavations on a particular site. The written agreement between the Employer and the Contractor incorporated the General Conditions of Contract for Works of Civil Engineering Construction - 6th edition.

The contractor raised a dispute in relation to a "*notification*" of potential claims communicated to the Engineer in a letter. The Engineer did however not regard the letter as proper notification. The result of the Engineer's decision was a deadlock between the Employer and the Contractor which had to be resolved by an Arbitrator. The Arbitrator ruled that the letter was indeed proper notification and that the contractor was entitled to claim as notified therein.

Resulting from the Arbitrator's ruling, the Employer had to pay the Contractor's claim, but then claimed damages for breach of contract from the Engineer in the High Court. The Employer based its claim on an allegation that the Engineer breached the agreement by failing to construe the Contractor's letter as an appropriate notice of the intention to claim payment for additional work as contemplated in clause 50(1) of the GCC.

The initial court determined that no breach of contract had occurred as the Contractor's letter did not constitute proper notice as contemplated in clause 50(1) of the GCC.

However, it was held by the Supreme Court of Appeal that:

"…there was no reason why the notice contemplated in GCC 50(1) could not be in the form of a letter provided the letter was so framed as to communicate unequivocally to the addressee that the writer was invoking, or relying upon, the provisions of the contract which provided for the giving of notice. It could do so expressly or by implication. In the present case, the contents of the final paragraph of the Contractor's letter were so closely related to the substance of clause 50(1) that it satisfied that standard. The letter furnished the information required by clause 50(1) (a) and (b)."

The Contractor's letter therefore complied with the requirements of the the agreement in that it contained all the information that was needed to represent a notification as required by clause 50(1) of the GCC. The technical approach adopted by the Engineer in dealing with the "notification" by the Contractor was not regarded as reasonable by the Court on appeal. On the contrary, the Court found that the Engineer's conduct in this regard was not acceptable as measured against the standard of the "*reasonable engineer*".

The letter therefore constituted a notice which any reasonable engineer would have construed as such. The Engineer's failure to do so therefore constituted a breach of the Engineer's duty of care and, consequently the agreement with the Employer. The Engineer was found liable to the Employer in the amount due and payable to the Contractor under the award of the Arbitrator in the initial arbitration between the Employer and the Contractor.

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