Construction

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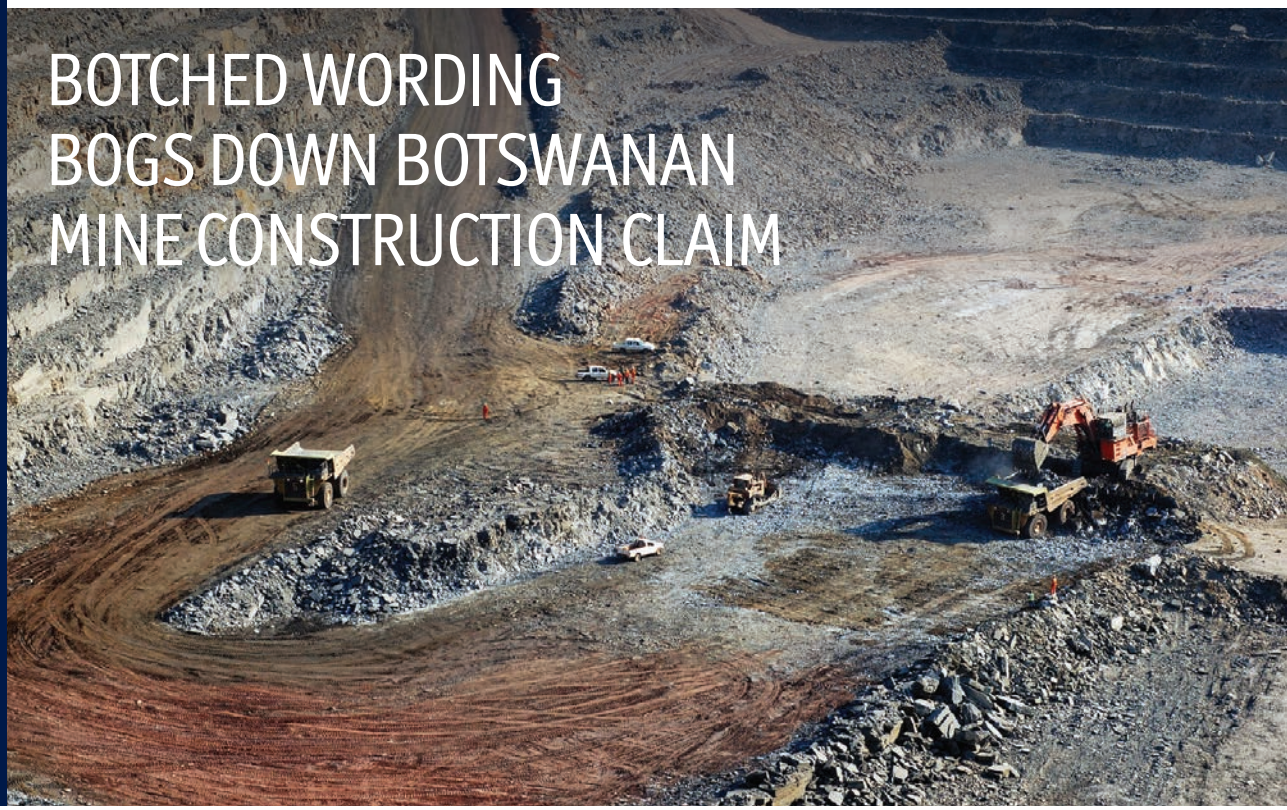
BOTCHED WORDING BOGS DOWN BOTSWANAN MINE CONSTRUCTION CLAIM



Sedgman South Africa (Pty) Limited & Ors V Discovery Copper Botswana (Pty) Limited [2013] QSC 105

The recent decision of the Queensland Supreme Court in Sedgman South Africa & Ors v Discovery Copper Botswana (Pty) Limited (30 April 2013) highlights the need for careful drafting of payment clauses that are relied upon in fast track procedures such as summary judgement, statutory demand or adjudication.

Summary judgement applications and statutory demand proceedings (the initial step in a winding up application) can be particularly effective forms of debt recovery. A common theme in both is the need to establish that the defendant has no real, arguable or genuine defence. Construction contracts are often drafted with these proceedings firmly in mind and one drafting tool used to achieve this is the use of clauses that deem certain amounts to be a "debt due and payable".

This wording is used, for example, where there has been an undisputed certification by the superintendent or where a claim for a variation, EOT or other such claims are not rejected within the stipulated time periods in the contract. In such cases, it can be argued that, absent special circumstances, the defendant has no real, arguable or genuine defence. Summary judgement or a statutory demand then becomes an appropriate option for the claimant.

The creation of a "due debt" has other advantages in court, arbitration and adjudication proceedings in that claims for such amounts are generally easier to prove that standard claims for breach of contract.[1]

What is often not appreciated is that clear drafting is required if parties wish to create a "debt" and in the Sedgman case, the claimant's application for summary relief failed for want of such drafting.

1 In particular, the rules on causation, remoteness and mitigation do not apply.

Facts

Sedgman, the Contractor, and Discovery, the Employer entered into a USD90m EPC contract for the engineering, design, testing, procurement, construction and commissioning for the Boseto copper plant in Botswana, Southern Africa. The contract, which was governed by the law of Queensland was based on the FIDIC contract for EPC/Turnkey Projects with some variations.

Clause 14.3 of the contract allowed for interim payment claims to be made by the Contractor. Relevantly, interim payment claims could arise under separate clauses dealing with the valuation and certification of work, variations, adjustments for changes in the law etc. The interim payment clause, however, required the Employer to serve a notice within seven days of the interim payment claim of items in the payment claim with which the Employer disagreed (Clause 14.4). Dispute resolution was through a DAB and then arbitration.

An interim payment claim for USD20,027,470.07 was served under Clause 14.3 of the contract but the Employer failed to serve its seven day notice under Clause 14.4. The Contractor then commenced Court proceedings. As the project was based in Botswana, adjudication under Queensland's Building and Construction Industry Payments Act 2004, which may well have been a cheaper and quicker process, did not apply.

An issue for the Court was whether the Employer's failure to serve this notice caused the interim payment claim to become a debt due an payable. The Employer denied that the failure to serve its notice had this effect and argued that the commencement of Court proceedings was an attempt to by-pass the dispute resolution and arbitration clause in the contract. The Contractor contended that as the Employer had not served the required seven day notice under the contract there was no genuine dispute and therefore nothing to arbitrate.

The decision

The Court disagreed with the Contractor. It held that there was simply nothing in the wording of Clause 14.3 that would transform an unanswered claim into a debt due and payable. It noted, in particular, that the interim payment clause had to be viewed in the context of a number of other provisions dealing with the valuation of work, variations and other claims and processes under the contract anterior to the claim being included in an interim payment application. The Court reasoned that if the Employer had, for example, valued a variation under the variation clause, it would be incongruous for that valuation to be displaced by an interim payment claim for a higher amount that became a "debt" because the Employer had not responded within seven days to the interim payment claim.

Lessons learned

The lesson here is that clear wording is required if you want a failure to respond to a claim to give rise to a debt. Caution should be exercised however in ensuring that such clauses interact correctly so that incongruities do not arise.[2]

Many standard construction contracts expressly provide that were an employer fails to respond to claims within fixed time period, the claim becomes a debt. For example, if the superintendent fails to certify a progress claim within a fixed time frame, the progress claim is deemed to be the payment certificate which must be paid by the Principal (for Australia, see clause 37.2 of AS4000 and similarly clause 42.1 of AS2124). Subject to arguments about the lack of information provided by the Contractor in its payment claim, the courts in Australia generally uphold the Contractor's claims[3] and this may clear the way for fast track processes such as summary judgment[4] or, more usually, statutory adjudication.

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2 In this case, an incongruity could have reared it head had the drafting of the interim payment clause been such that a failure to serve a seven day notice rendered the claim a debt because, in the example cited by the court, that would have allowed a certified variation to be displaced by an unanswered interim payment claim.

3 see Brewarrina Shire Council v Beckhaus Civil Pty Ltd (2003) 56 NSWLR 576; [2003] NSWCA 4; Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd [2004] 8 VR 16; [2004] VSCA 18

4 see Devaugh Pty Ltd v Lamac Developments Pty Ltd [1999] WASCA 280

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