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JBCC: Are Acceleration Claims under the JBCC admissible?

Introduction

Acceleration in the construction industry gives a whole new meaning to the phrase "putting your foot down". Exploring the JBCC and acceleration claims – when to say no

"Acceleration" refers to an increase in the pace of work. Under most construction contracts, a contractor is entitled to accelerate the pace of its works should it choose to do so, although the contract will not usually require the employer to pay the contractor for its accelerative measures. [1]

Construction contracts often empower the employer or agent to instruct the contractor to accelerate its works. Usually there are 2 circumstances in which an instruction to accelerate may be given:

1. An employer / agent may be empowered to give such an instruction where the contractor's works are running late as a consequence of the contractor's default, and the purpose of the instruction is to ensure that the contractor completes its works by the time for completion. In such case, where the contractor is being instructed to make up his own lost time, the contractor is not usually entitled to recover any additional costs incurred as a consequence of accelerating.[2]

2. A contractor may be instructed to accelerate its works where the project is running behind schedule due to circumstances beyond the contractor's control. In the absence of an instruction to accelerate, the contractor is not required to accelerate the works to ensure that the project works are completed within the time for completion. Such instruction usually results in additional costs being claimable by the Contractor. The question is – how?

There are economic consequences to a contractor accelerating his works. These consequences are generally the payment of additional costs. In the matter of *Waring v Manchester, Sheffield and Lincolnshire Railway Co*.[3] it was held that:

> *"Everybody knows that a work of this sort, where it is accelerated, and to be done within a limited period, is much more expensive and much more inconvenient to the contractor than where a long time is allowed"*

Under normal construction contract conditions, the contractor will be entitled to an extension to his time for completion in circumstances where delays have been caused by the employer or other direct contractors. In this regard, if the extension of time is granted, the contractor is unlikely to have to accelerate as his time for completion is extended. Using the JBCC Edition 5.0 2007 Principal Building Agreement ("PBA") as an example, Clause 29.0 is the clause of

[1] Construction Law (Volume II), Julian Bailey, Informa Law @ page 889

[2] See, for example, the FIDIC Red Book Clause 8.6 [*Rate of Progress*]

[3] (1850) 2 H&Tw 239 [47 ER 1672]

the PBA which sets out the situations where the contractor is entitled to an extension to the date for practical completion (either with or without an increase in the contract value). This is the only clause in the PBA dealing with delays.

Acceleration by its nature is a pre-emptive strategy to reduce the construction time of a project. Whether this entails moving an agreed completion date earlier, or simply increasing resources to negate an extension of time, the effect is the same.

Contractor's are often persuaded to forego their entitlement to an extension to the time for completion and to accelerate the work to finish within the original time for completion.

We have seen all too often that contractors and subcontractors get caught up in the moment trying to be the employer's or contractor's problem solvers on site – agreeing to work faster, bring more resources and work longer hours in order to keep their respective clients happy. After all, it brings the promise of more work in the future from these clients.

But at the end of the day, being a problem solver may end up biting them in the butt. There may be arguments over the additional costs of acceleration (who is responsible for them?), whether or not the agent had the authority to instruct such acceleration, and believe it or not – whether the contract or subcontract actually provides for circumstances of acceleration and the payment of additional costs in respect thereof.

So how does acceleration work under the JBCC? It is common knowledge that the JBCC suite of contracts has been updated twice in recent years. The 2005 suite was revised by the 2007 suite, and recently, the 2014 suite was made available to the public. Part of each suite is, *inter alia*, the PBA and the N/S Subcontract Agreement "N/S Subcontract" to be read with such PBA.

After reading through each of the 2005, 2007 and 2014 suites, not one of the documents contains or uses the word "acceleration". This does not necessarily mean, however, that the act of accelerating is not somehow implied from the contract terms. So lets take a closer look at what these documents actually say about "acceleration"…

Firstly, the employer appoints a principal agent to act as his agent in the execution of the contract. The definition of principal agent in the 2007 PBA is:

"The party named in the contract data and/or appointed by the employer <u>with full authority and obligation to act in terms of the agreement</u>" [our emphasis]

In other words, the principal agent can only act in terms of the agreement.

Although Clause 15.6.1 states that:

"The Contractor shall prepare a programme of the works ... in sufficient detail to enable the principal agent to assess the progress of the works and timeously provide the necessary contract instructions",

Clause 17.0 of the 2007 PBA (which provides the principal agent with the authority to issue contract instructions) does not have a corresponding clause which enables the principal agent to give any such instructions regarding progress of the works. Due to the fact that the principal agent can only act in terms of the agreement, it stands to reason that he cannot give such a contract instruction and if he does so, he does so outside of his authority.

On the other hand, the 2007 JBCC N/S Subcontract at Clause 17.1.11 entitles the contractor to issue an instruction to the subcontractor regarding "*the programme*". This clause is cross-referenced with clause 15.6, which provides that:

"15.6 The contractor in consultation with the subcontractor shall:

15.6.1 Regularly update the subcontractor's programme in relation to the n/s works together with a schedule of outstanding construction information in sufficient detail to enable the principal agent to assess the progress of the n/s works and timeously provide the information required; and

…

15.6.3 Continuously revise and modify the programme and the schedule of outstanding construction information and issue copies timeously to the subcontractor and principal agent."

A similar clause is found in the 2005 N/S Subcontract, but not in the 2014 N/S Subcontract (this is interesting, and probably as a result of the confusion that it may have caused in the past).

But does the presence of this clause in the 2005 and 2007 editions entitle the Contractor to claim additional costs as the result of the instruction? It does not seem that way. Adjustments to the contract value can only be made on instructions issued "*consequent upon a contract instruction in terms of the principal building agreement*".[4] Similarly, expense and loss is only envisaged where, *inter alia*, the circumstance of such expense and loss is "*the issue of a contract instruction consequent upon a contract instruction issued in terms of the principal building agreement*".[5]

It can only be determined therefore, that the drafters of the JBCC suite of contract did not envisage either the contractor or the subcontractor being entitled to the additional costs associated with accelerating the works. In fact, contractors could simply say "No" to any instruction to do so.

But in reality – instructions to accelerate happen. How would a contractor or subcontractor protect himself from having to bear the brunt of the additional (often excessive) costs that go hand in hand with working faster? Firstly, they need to understand that their contract does not clearly provide for acceleration measures, and even if you can read such measures into the contract by some miracle, there is no entitlement to be paid for them.

Clause 1.8 of the PBA (both 2005 and 2007 Editions), as well as the 2005 and 2007 N/S Subcontract contain the following provision (or something similar thereto):

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[4]Clause 32.2

[5]Clause 32.5.1

"This agreement is the entire contract between the parties regarding the matters addressed in this agreement. No representations, terms, conditions or warranties not contained in this agreement shall be binding on the parties. No agreement or addendum varying, adding to, deleting or terminating this agreement including this clause shall be effective unless reduced to writing and signed by the parties."

This tells us that if the principal agent or contractor (as the case may be) require the inclusion of the ability to instruct the contractor or subcontractor (as the case may be) to accelerate the works / n/s subcontract works, an amendment will need to be made to the contract. Amendments can only be done in writing – and note that the principal agent is not authorised to sign such amendment – it has to be the "*parties*" to the contract.

Along with such amendment should be the agreement on the costs of the acceleration and how they will be paid under the contract.

We all know that contractors and subcontractors want to deliver the works to their respective employers on time. Hence, should a contractor or subcontractor wish to start the acceleration works on a "goodwill" basis, they should note that this is a commercial judgment for them to make which carries risk if the agreement does not materialise.

Additional pressure may come from an employer, who has promised beneficial occupation dates to prospective tenants, and who, in turn, put pressure on the principal agent to reject claims for extensions of time - to force the contractor to constructively accelerate. By the time the "dispute" over such rejection gets to adjudication or arbitration, the practical completion date may have passed. In this situation, contractors must not feel pressurised by the threat of late completion penalties. Mckenzie[6] states that:

"In certain cases a contractor will be excused form performing within the stipulated time when the delay is not caused by any fault of his own. Where the delay is due to the fault of the employer, as for instance where he fails to deliver materials timeously, the employer cannot claim damages for non-performance within the contract time".

It should be noted, however, that a contractor would be required to take steps to mitigate the delays. These steps must be reasonable and surely not at the expense of the contractor.

We have very recently been involved with a matter that involves the instruction to accelerate under the 2007 JBCC N/S Subcontract. The dispute was concerning not only the ability of the contract to deal with acceleration, but also the authority of the agent to have issued that instruction. It turned nasty and ended up in arbitration, which arbitration is not yet finalised. Our client (the subcontractor) while attempting to argue that the N/S Subcontract did, in fact, allow for acceleration through Clause 17.1.11, based its entitlement to costs on the case of *Bank v Grusd*[7]. *Although an old case, Bank v Grusd* remains good law[8].

In *Bank v Grusd* the following occurred:

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[6]The Law of Building and Engineering Contracts and Arbitration, Ramsden 6h Edition, Juta, @ page 160

[7]*Bank v Grusd* 1939 TPD 286

[8]*Brisley v Drotsky* 2002 (4) SA 1 (SCA)

The owner and her building contractor verbally agreed to the performance of extra work not specified in their written contract in exchange for a reasonable price.

However, their written contract provided that no extra work was to be done except with the owner's written authority.

The purpose of this clause was to protect the owner from unilateral variations of the contract by the building contractor by limiting the parties' rights to verbally vary the contract.

The building contractor duly performed the extra work, but in the heat of the construction had failed to obtain written authority.

Relying on the terms of the written contract, the owner seized the opportunity not to pay.

The court held that when the employer knows and consents to the additional work being carried out on its behalf, to rely on the formality of the contract avoid paying would be a fraud.

This case has found consistent support and has been referred to with approval in *Brisley v Drodsky* and *Barkhuizen v Napier*[9]. The Constitutional Court has been adamant that the strict contractual ties are capable of being loosened where there is justice to be done between man and man.

Essentially, it could be argued that where an employer does not want to pay for accelerated works (after instructions were given to do so and the employer sat back and acknowledged and benefitted from such acceleration) and attempts to rely on the fact that the contract does not provide for acceleration, such defence is based solely on what is in effect a technicality. The weight of case law referred may, however result in this defence being unavailable to such an employer.

It should be noted that the outcome of this arbitration is pending, hence the arguments presented are merely theoretical at this point. What it does do, however, is illustrate the complexity that can arise should a contractor or subcontractor accelerate the works without an amendment to the contract.

Where you, as a contractor (or subcontractor) are faced with an imploring principal agent / employer / contractor (as the case may be) who, for whatever reason, would rather you work faster than be given your revision to the practical completion date – don't be the "nice guy" – carefully analyse and fully appreciate the underlying factual position and adequately manage the accompanying contract, commercial and time related risks. And don't be bamboozled by the threat of late completion penalties – it may just be a red herring.

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[9] *Barkhuizen v Napier* BCLR 691 (CC)