



FIDIC:

Termination under FIDIC – Pulling the Termination Trigger and Some Target Practice

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We have seen a number of cases of termination lately, whether this is an indicator of financial difficulties in the industry it is hard to say. All of our standard form construction contracts make provision for termination of the contract by both parties in certain circumstances, it is however vital that a party wishing to terminate must have the correct grounds upon which to do so, otherwise pulling the termination trigger is nothing more than taking an ill aimed shot in the dark at a swiftly moving target.

Termination of a contract can occur by use of the common



law or by virtue of the contract itself (relying on specific provisions). However, the party terminating may not use both and an election must be made by firstly considering the contractual provisions in play. Before assessing the FIDIC specific termination grounds, the common law principles of when a party may terminate will be briefly set out.

At common law there are certainly instances where the party to a contract may be discharged from its obligations under the contract and thus entitled to terminate. The first of which is supervening impossibility, impossibility must however by more than it being uneconomical for a party

to carry out its obligations¹. Another common law principle by which a contract is brought to an end is that of Merger or *confusion* - the typical example is a creditor becoming heir to his debtor which renders him subject to the debt. The consequence of *confusio* is that it destroys the obligation in respect of which the contract operates.

The last, and most common, example of a common law remedy is that of repudiation. Where a party is said to have repudiated the contract, this allows the aggrieved party to terminate the contract forthwith. Lord Coleridge commented on repudiation in *L CJ in Freeth v Burr*² stating *'the true question is whether the acts or the conduct of the party evince an intention no longer to be bound by the contract'*.

When a party is said to have repudiated the contract, the aggrieved party has an election open to it to accept such repudiation and terminate the contract immediately and claim any damages due to it or in the alternative demand specific performance.

Thus the common law affords a contracting party relief even where they may not have been a breach of a contractual term or condition however, under FIDIC (like most standard form construction contracts) there are very specific instances entitling either party to terminate the contract.

Clause 15.2 of FIDIC sets out the circumstances where an employer may terminate (one of which entails a failure to adhere to a notice to correct (under clause 15.1) any failure to carry out an obligation under the contract). Clause 16.2 of FIDIC sets out the circumstances under which the contractor may terminate the contract (one of which includes a substantial failure by the employer to perform under the contract). FIDIC however also affords the employer the right to terminate for convenience on notice under clause 15.5, which right is not reciprocally extended to the contractor.

Whilst FIDIC is very clear as to the circumstances under which a contracting party may terminate and how the termination

¹ RH Christie & GB Bradfield *'Christie's The Law of Contract in South Africa'* 2011 6ed at p491

² (1874) LR 9 CP at p 214

process is to occur, as stated in the foregoing this does not limit the parties from using their common law rights, but the terminating party must be very careful in its choice. If the terminating party is alleging repudiation and acceptance of such repudiation but continues to rely on contractual clauses (for example issuing notices to correct under clause 15.1) the party may be seen to be affirming the contract and not in fact unequivocally terminating it. Furthermore, a non performing contractor, or a non-paying employer doesn't immediately amount to repudiation, it is more likely to amount to one of the circumstances listed in the FIDIC clauses mentioned above as a breach of a term of the contract.

To illustrate how both FIDIC and the common law may come into play in the same contractual relationship, below are some scenarios where the trigger may have been pulled incorrectly by a party seeking to terminate:

The long shot

What happens when a notice to correct under Sub-clause 15.1 is issued by the employer, a period of time lapses and a few months later a termination notice is issued by the employer purporting to cancel the contract immediately, but in the intervening months the contractor has remedied the cause/s of complaint and therefore disputes that the employer was in fact entitled to terminate the contract at all.

In such a case, the actions of the contractor between the date that the notice to correct was issued and date of the purported termination occurred will be taken into account by the adjudicator or arbitrator to ascertain whether the cause of complaint has actually been remedied and if it has (which will be a factual enquiry) it is likely that the termination will be wrongful. In this example, the employer as the terminating party should therefore monitor the actions of the contractor if it wishes to take its time in deciding whether to terminate the agreement in order to ensure its right to do so is not lost.

The ricochet

There is another scenario that demonstrates the importance of ensuring that a termination notice is issued correctly under

the provisions of the contract and in accordance with the requirements thereof.

In this scenario the Engineer sends the contractor a letter instructing the contractor to remedy certain defects but fails to cite clause 7.6 (Clause 7.6 of FIDIC states that the Engineer may instruct the Contractor to remove or re- execute any work that isn't in accordance with the contract) or any contractual term and the contractor fails to remedy the defects complained of to the satisfaction of the Engineer or Employer.

The employer then proceeds to send a letter terminating the agreement immediately without any reference to any contractual term or clause but states simply that the contractor is in breach of its obligations under the contract. It may, on the face of it at least, seem like this may be a valid termination. However, it is trite law that where a party wishes to enforce a cancellation clause, the conditions for its implementation must be strictly followed³.

With this in mind the following must be assessed (1) did the employer wait the 28 days within which to allow compliance with the clause 7.6 notice as required by clause 15.2 (c)? (2.) did the employer give the contractor 14 days' notice of the termination? And (3) did the employer cancel under a general principal of law (for general breach of a material term) or did the employer in fact follow the contract pertaining to termination? It would appear, on the limited example given, that the employer has purported to cancel under the general principles of law and not followed the required process set out in 15.2 and the validity of the termination must therefore be brought into question. In fact, in the case of *Irwing Construction 512 CC*⁴ a similar situation occurred and an arbitrator's award (although under the JBCC and not FIDIC) was set aside and the court stated that the matter shall be submitted to arbitration afresh as the arbitrator failed to examine whether the letter of cancellation was justified in terms of the contract and not simply the general principles of law.

The misfire

What happens where a party to a contract receives a termination notice which cites a contractual term incorrectly and therefore

³ *Irwing Construction 514 CC v Pienaar 2016 JDR 0096 (GP)* unreported at paragraph 45

⁴ *2016 JDR 0096 (GP)* unreported at paragraph 65

bases termination on an obligation that does not exist? In this scenario say the employer terminates under clause 15.2(c) but cites a failure to provide documents to sub-contractors when so requested by the sub-contractor as the default and the employer proceeds to issue a notice of termination (giving the 14 days' requisite notice under clause 15.2) for the failure to provide the documents (again incorrectly citing a ground for cancellation). The employer is citing the correct contractual mechanism for termination and using the correct procedure which does in fact entitle it to terminate but there is no existing contractual ground on which the termination is based. A contractor in this situation may well allege that the employer's conduct is nothing more than a repudiation as the employer is not only acting in a manner inconsistent with the contract itself (repudiatory breach of the contract) but is acting in a manner that would lead the reasonable person to believe that the employer did not intend to be bound by the contract.

The lesson to therefore be learnt is that termination is a dangerous weapon and if not wielded with care and executed with absolute skill and in accordance with the entitlements that exist under the contract it may well cause a lot more pain and long term suffering than is necessary due to lengthy and costly dispute resolution processes.

The target practice lesson therefore being to take your time, aim properly, and ensure that great care is taken when executing the right to terminate.