

Loss & Expense : “Within” and “Beyond” Reasonable Contemplation

JABATAN KERJA RAYA MALAYSIA & KERAJAAN MALAYSIA v SUNISSA SDN BHD [2022] 1 LNS 1119 [COURT OF APPEAL]

30th December 2022

Previously, the High Court in *Sunissa Sdn Bhd v Kerajaan Malaysia & Anor* [2020] MLJU 283 decided, amongst others, that Clause 44.1 of the PWD Contract 203A (Rev.2007) is a condition precedent for loss and expense claims under the Contract and the failure to comply with the same would bar the contractor’s claim. The High Court further held that this bar only applies to claims which are not “within reasonable contemplation” of the parties.

As such, the High Court allowed part of the Contractor’s claim for loss and expense which are within the parties’ reasonable contemplation on the basis that such claims are not barred by the condition precedent requirement under Clause 44.1.

The High Court also held that the Contractor’s acknowledgement / admission in the Certificate of Final Accounts that there is no further claim is not a bar to the Contractor’s subsequent pursuit of its rejected loss and expense’s claim as the Employer was entertaining the Contractor’s appeals on the rejected loss and expense claim.

Dissatisfied with the outcome, the Employer appealed to the Court of Appeal.

The Appeal was allowed by the Court of Appeal and is reported in the case of *Jabatan Kerja Raya Malaysia & Kerajaan Malaysia v Sunissa Sdn Bhd* [2022] 1 LNS 1119.

HIGH COURT’S DECISION

The Learned High Court Judge drew a distinction between losses which are “beyond that reasonably contemplated” and losses which are “reasonably contemplated” and held that the condition precedent only bars claim for loss and/or expense beyond that reasonably contemplated.

Consequently, part of the Contractor’s claims, such as the recurring items in the Contract Preliminaries, were found to be reasonably contemplated by the parties and allowed by the High Court.

On the issue of the Certificate of Final Accounts, the High Court held that “the Certificate of Final Accounts was not a bar to the instant claim because the Employer “was entertaining appeals” from the Contractor after 16.10.2014”, i.e. when the Contractor signed the Certificate of Final Accounts acknowledging / admitting that there is no further claim.

ISSUES ON APPEAL

The main issue on appeal is the effect of the Contractor's failure to comply with the 30 days' period pursuant to Clause 44.1 of the Contract and the distinction between losses which are "beyond that reasonably contemplated" and losses which are "reasonably contemplated".

Apart from the above, the Court of Appeal also considered the issue as to whether a Contractor can maintain its loss and expense claim after signing the Certificate of Final Account and acknowledging that there is no further claim under the Contract.

LOSS & EXPENSE "BEYOND" OR "WITHIN" REASONABLE CONTEMPLATION

The Court of Appeal affirmed the High Court's decision that Clause 44.1 is a condition precedent as it was "couched in mandatory language which is unambiguous" and a severe penalty for non-compliance was also provided.

However, the Court of Appeal finds that the words "beyond that reasonably contemplated" do not signify that there exists another type of loss that is "within reasonable contemplation".

"[34] We also do not think that the words "beyond that reasonably contemplated" in clause 44.1 carries such significance as to permit one to conclude that there exists another type of loss, ie, one that is "within reasonable contemplation" which the learned High Court Judge said is not caught by the said clause. Such a reading would strain the meaning of the words in question. We are of the opinion that the words "beyond that reasonably contemplated" is simply a general description of loss that was not expected at the outset of the project but ensued as a consequence of delay.

The Court of Appeal held that, if there a distinction between claims which are "beyond that reasonably contemplated" and those which are "within reasonable contemplation", then such claims within reasonable contemplation would have been provided under the Contract.

"[33] Clauses 43 and 44 deal with delay and consequences thereof. Clause 43.1 deals with the grant of extension of time... It is plain to us that Clauses 43 and 44 are the only provisions in the contract that deal with the manner of submitting a claim for loss arising from delay that is not caused by the Contractor and for which an EOT has been granted by the S.O. In the premises, in our view, any loss to the Contractor that is caused by delay has to be done within the ambit of clause 43 and 44. We note that there is no other provision in the contract that allows for the claim of any other type of "loss", for example, one that is "within" reasonable contemplation.

[35] ...Nonetheless, for reasons given earlier, we are of the view that if the words "beyond that reasonably contemplated" has the effect of addressing one type of loss that is subject to a condition precedent, other clauses would have been inserted into the contract to address loss "within" reasonable contemplation. In our respectful view, Clauses 43 and 44 are exhaustive on the subject of claiming for loss due to delay for which EOT has been granted. "

[Emphasis added]

Consequently, the Court of Appeal disagreed with the Learned High Court Judge's findings that there is a distinction between losses that are "beyond" and "within" reasonable contemplation. Thus, the condition precedent would apply to the whole of the Contractor's claims for loss and expense under the Contract regardless.

FINAL ACCOUNT

The Court of Appeal also made interesting observations in relation to how parties dealt with the Final Account vis-à-vis the legal principles on a Certificate of Final Account.

From 2013 to 2017, the Contractor appealed against the rejection of its loss and expense claims. In between the appeals, the Contractor had on 16.10.2014 signed a Certificate of Final Account acknowledging / admitting that there is no further claim against the Employer.

In relation thereto, the Court of Appeal found that, "with the absence of fraud or some vitiating factor" the Certificate of Final Account "should be treated as a final rendering of the state of accounts between the parties" and held that the Contractor's claims are barred by the acknowledgement / admission made therein.

Whilst the Employer stated that it will consider the appeals upon receiving the same, such statement does not amount to the Employer waiving its position to treat the Certificate of Final Account as final.

"[44] In the instant case, all that happened was that the Contractor had appealed against the rejection of the further claim time and again. And **the Employer had stated upon receipt of each of the appeals that they will consider it. There was nothing remarkable about the fact that such a reply had been given**, especially since JKR is a government department. **But it is significant to note that at no time a concession or forbearance was granted by the Employer to the effect that they would refrain from treating the certificate as final on account of the appeals. Thus, the indulgence granted by the Employer to merely consider the appeals cannot be equated with a waiver to treat the certificate as not final.** In the premises, we cannot agree with the learned High Court Judge that the appeals had effectively prevented the certificate from barring further claims."

[Emphasis added]

The Court of Appeal also observed that the Contractor could have reserved its rights to pursue the loss and expense appeals when signing the Certificate of Final Accounts, but had failed to do so. As there was no such reservation, the Court of Appeal found that the claim was barred by the Certificate of Final Accounts.

"[51] For sake of completeness, it must be said that we also acknowledge, as did the learned High Court Judge, that **the Contractor was in an unenviable position as they were not satisfied with the rejection of their first appeal and intended to**

pursue the matter further. However, they could have made a reservation when they signed the Certificate of Final Accounts. This option was in fact acknowledged by the learned High Court Judge...”

[52] However, no such reservation was made and therefore the claim was barred given the terms of the Certificate of Final Accounts which was signed by the Contractor.”

[Emphasis added]

COURT OF APPEAL'S DECISION

Premised on the above, the Court of Appeal allowed the appeal and set aside the High Court's judgment.

MOVING FORWARD

Following the decision, it is important to note that:-

- (a) Under Clause 44 of the PWD Contract 203A (Rev.2007), there is no distinction between loss and expense within or beyond reasonable contemplation.
- (b) All claims for loss and expense under Clause 44 of the PWD Contract 203A (Rev.2007) must comply with the condition precedent thereunder failing which, the Government / employer “shall be discharged from all liability in connection with the claim”.
- (c) Where there is an admission in the certificate of final accounts that there is no further claim under the contract, the contractor would be barred from further claims, save where there is fraud or other vitiating factor.

If you have any questions or comments on this article, please contact:-

CONTACT



ANDREW HENG YENG HOE

Partner

+603 6207 9331

+6012 205 8413

andrew@zainmegatmurad.com

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ZAIN MEGAT & MURAD

D2-5-1 to D2-5-3A, Block D
Solaris Dutamas No.1, Jalan Dutamas 1,
50480 Kuala Lumpur, Malaysia

+6 03 6207 9331

+6 03 6207 9332

zmm@zainmegatmurad.com