

FIDIC's Silver Book – Payments due shall not be withheld ... really?

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There is a substantial difference between the payment provisions of the FIDIC 1999 Red and Yellow Books compared with the Silver Book. This article explores how a court in Queensland (Australia) has dealt with the Silver Book's provision. Contractors have good cause to be wary.

Role of interim payment certificate

In *Dawnays Ltd v F G Minter and Trollope & Colls Ltd [1971] 1 WLR 1205*, the English Court of Appeal judge, Lord Denning, expressed the view that: “an interim certificate is to be regarded virtually as cash, like a bill of exchange.” This bold statement was however quickly rejected by the higher English courts. Viscount Dilhorne of the House of Lords held in *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1973] 3 All ER 195* that there was ‘no scintilla of authority’ for Lord Denning’s opinion. Viscount Dilhorne went on to say that treating a certificate as conclusive could easily cause injustice. Lord Diplock added that although a correctly issued interim certificate does create a debt due from the employer to the contractor, what it does not do is stop the employer from raising a set-off or cross claim to the sum due.

The Irish judiciary was equally dismissive. In *John Sisk & Son v Lawter Products BV [1976-1977] I.L.R.M. 204* the Irish High Court disagreed with Lord Denning’s ‘dogmatic proposition’ and considered that the correct approach was to ascertain whether the terms of the particular contract were inconsistent with the exercise of a right of set-off by the employer.

The position in England has since changed with the introduction of the payment provisions within the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009. Now a paying party has to pay the notified sum unless it has served a “Pay Less Notice”. In

summary the payer must now give notice of what it intends to set off and loses its right of set off if the notice is not given. FIDIC’s Silver Book has a very different regime.

Set-off and deduction under FIDIC

The payment provisions in FIDIC’s Red and Yellow Books are dealt with at Clause 14. The contractor submits an application for payment and the engineer, under sub-clause 14.6, ‘fairly’ determines what is due. Sub-clause 14.6 (a) and (b) allow the engineer, to make certain deductions where the work done is not in accordance with the Contract or the contractor has failed to perform its obligations. Under sub-clause 14.7 the employer is required to pay the amount certified in each Interim Payment Certificate.

Under FIDIC’s 1999 Silver Book the contractor submits an application for payment and the employer is required to give notice to the contractor within 28 days of any item which he disagrees with. Similar to the Red and Yellow Books, sub-clause 14.6 (a) and (b) allows the employer to make certain deductions where the work done is not in accordance with the Contract or the contractor has failed to perform its obligations. Sub-clause 14.6 then states ‘Payments due shall not be withheld, ...’

Silver Book’s ‘payment due’ provisions under court scrutiny

In *Sedgman South Africa (Pty) Ltd and Ors v Discovery Copper Botswana (Pty) Ltd [2013] QSC 105* the Supreme Court of Queensland analysed the meaning of sub-clause 14.6 of FIDIC’s Silver Book and, in particular, what was meant by the words ‘payments due’.

The facts of *Sedgman* were that Sedgman contracted to design and construct parts of the Boseto Copper Project in Botswana for Discovery Copper. The contract was under an amended FIDIC Silver Book. Sedgman applied for an interim

payment of USD 20 million. Sub-clause 14.6 (as amended) required Discovery Copper to give notice within seven days if they disagreed with any items in the application for payment. Discovery Copper failed to give the notice within seven days and did not contest the application until fourteen days later. Sedgman applied to the Court for payment of the sum claimed.

Discovery Copper challenged Sedgman's right to payment on three grounds.

1. The claim was not served in the format specified by the contract.
2. According to the proper interpretation of the contract, the absence of a specific notice within seven days challenging the claim did not automatically entitle the applicants to the amount claimed.
3. The application to the Court for payment should be stayed to arbitration as the contract contained an arbitration clause.

Sedgman sought to argue that it was clear that they were entitled to payment and that there could be no genuine dispute over the sum claimed.

Only payments 'due' need be paid

One of the most useful additions is Section 4.4 of The Court dismissed Sedgman's application for payment, holding that there was a genuine dispute which was apt for determination under the dispute resolution provisions and that Sedgman's interpretation of the contract was incorrect. The Court held that: 'This contract did not entitle the applicants to be paid the sum which they now claim, simply from the fact that there was no response to their interim claim within the period of seven days stipulated in the contract.'

McMurdo J in his judgment considered the words 'payments due shall not be withheld' at sub-clause 14.6 of the contract. The Judge stated that these words were 'different from saying that a payment will become due if a notice of disagreement is not given,' as Sedgman contended. The Judge then held: 'The alternative view of sub-clause 14.6 is that it does not make a payment due. Rather, it governs payments which, by the operation of

another term or terms, have [already] become due.' The Judge, in his reasoning, stated that that operation of the various clauses of the contract to determine claims and variations could otherwise be displaced by the operation of sub-clause 14.6, if Sedgman were correct. If the contractor included a claim in his application for payment which was inconsistent with, for example, a DAB's determination, and the employer did not give notice of disagreement, the outcome would be that the DAB's determination would be displaced.

The conclusion reached by McMurdo J was that sub-clause 14.6 had to be read in the context of the whole contract. He fundamentally disagreed with the assertion by Sedgman that if the notice of disagreement was not given within seven days then 'everything that had occurred between the parties about these components of the present claim was made irrelevant.' The Judge therefore rejected the idea that claims which may have been disallowed or in contention between the parties could become debts simply because the notice was not given on time.

Silver Book payment provisions favour the employer

There is therefore a substantial difference between the payment provisions of the Red and Yellow Books compared with the Silver Book. While sub-clause 14.6 of the Red and Yellow Books obliges the employer to pay to the contractor the 'amount certified in each interim payment certificate', the Silver Book only requires the employer to pay 'the amount which is due in respect of each statement.' The amount which is due is not the sum claimed by the contractor but the sum which is determined by applying all the provisions relating to payment. The sum claimed is therefore open to dispute.

Conclusion

The decision in *Sedgman v Discovery Copper* has a number of practical consequences. One example relates to termination. Under sub-clause 16.2(c) of the Red and Yellow Books a contractor may terminate the contract where it does not receive the amount due under an Interim

Payment Certificate. Under 16.2 (b) of the Silver Book the contractor may terminate where it does not receive the amount due in the period which payment is to be made. However, a contractor must now be extremely careful because the amount due can only be determined by applying all the provisions relating to payment. Under the Silver Book an employer is in a much stronger position if it wishes to withhold money. There is no quick way for the contractor to get paid without going through the dispute resolution provisions. If, as stated by Lord Denning, ‘cash flow’ is the very ‘lifeblood’ of the construction industry, then a contractor needs to be wary of the Silver Book’s payment provisions.



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