



Payment Certificate and Provisional Sentence

What is the situation when a certificate for payment is issued but the Employer refuses to pay?

Clause 31.1 of the JBCC 2000 Principal Building Agreement provides that:

The principal agent shall issue an interim payment certificate every month until the issue of the final payment certificate.

The payment certificate may be for a nil or negative amount and shall be based on a valuation prepared within seven (7) calendar days before the stated date.

Clause 31.9 provides that:

The employer shall pay to the contractor the amount certified in an interim payment certificate within seven (7) calendar days of the date for issue of the payment certificate. Payment shall be subject to the contractor giving the employer a tax invoice for the amount due.

Clause 1.7 provides that:

For the purposes of sentence in relation to a payment certificate only, the employer and contractor consent to the jurisdiction of any court of the country as stated in the schedule although the amount of the claim by either of the parties against the other may exceed the jurisdiction of such court.

The Principal Agent, being appointed by the Employer in terms of the contract, acts as the Employer's agent for various purposes, including the issue of payment certificate. The Employer, as is the normal case in an Agency relationship, is bound by the act of his Agent in issuing a payment certificate, the position being the same as if the Employer himself had signed the acknowledgement of debt, the only exceptions being those that would normally apply in law such as fraud, collusion or exceeding of the Agent's mandate. In the absence of any of these factors the Employer is bound to pay the sum certified and Principal Agent's certificates have to be regarded as being virtually equivalent to cash.

A payment certificate is an example of a liquid document.

A liquid document is a document signed by a Debtor or his duly authorised Agent in which the Debtor acknowledges his indebtedness to the Creditor in a fixed sum of money.

In order to qualify as a liquid document, the certificate itself must clearly record an acknowledgement of indebtedness by the Debtor to the Creditor and no evidence, apart from the document, should be required to establish the Creditor's rights to claim payment of the stated amount from the Debtor.

(It should be noted that some certificates issued by Agents, Architects and Engineers, lack this requirement in their format and would not qualify as a liquid document).

If the Employer does not pay the amount due on a certificate by the due date he is in breach of a material term of the contract agreement and this would enable the Contractor to take action under the cancellation clause (38-0).

In addition or alternately, the Contractor may use the payment certificate to apply for Provisional Sentence. This is the form of proceedings in the Courts available to the Creditor in terms only of a liquid document. A simple form of summons is issued against the Debtor to which is attached the liquid document and the contract document on which the Creditor relies for his claim.

Ordinarily the hearing will take place reasonably quickly after the issue of Summons. If the Debtor chooses to defend the Summons he is entitled to present his defense by Affidavit only. The Court will then adjudicate the matter on the summons and the Debtor's Affidavit. Normally, no oral evidence may be given by either party.

If judgment is given in favour of the Creditor, the Debtor must pay the Creditor capital and costs and then either:

- (a) the matter will be at an end; or
- (b) he can proceed to defend the action within two months of the judgment.

Because provisional sentence is designed to give the Creditor speedy relief without a full hearing of the case, and the Debtor may in fact have a good defense, the latter is protected against unfounded demand by the requirement that the Creditor must, when he obtains payment on provisional sentence, furnish security de restituendo if the Debtor proceeds to defend the action, i.e. that he will be able to restore the money paid should he be unsuccessful in proving his claim in the principal case. In essence the principle is one of pay first and argue afterwards.

Until the Debtor makes payment, the Creditor is entitled to have the Debtor's assets attached and sold by the Sheriff.

The procedure is "provisional" as the judgment only becomes final on the expiration of two months from the date of the judgment unless the Debtor proceeds to defend the action, as above.

Provisional Sentence is a speedy remedy without complicated documentation and a protracted trial. It effectively prevents a dishonest Debtor from playing for time.

Author: R D Pickles

(GA)

Note: This article and other useful articles can also be found on our website.