

ARTICLE SERIES

**A REVIEW OF THE CONTRACTOR'S POWER TO
SUSPEND PERFORMANCE OF WORKS IN
ENGINEERING AND CONSTRUCTION PROJECTS IN NIGERIA**

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In the recent case of *Aslan v Stepanoski*[1](the *Aslan* case), the Court of Appeal of New South Wales, Australia upheld a builder's action suspending the performance of works over non-payment and denial of access to the site by the employer. The Court held that the contractor's decision to suspend works was not a repudiatory conduct as he was entitled to do so under the contract.

We note that the decision reached in the *Aslan's* case is not a one-size-fits-it-all scenario as the construction contract serves as the basis for determining whether the contractor's suspension amounts to a repudiatory breach. Based on this background, we shall further examine the extent of the contractor's right to suspend works under the standard forms of contract used in Nigeria.

What is a repudiatory conduct, and its effect on the contract?

In simple terms, repudiatory conduct is when a party either expressly or by its conduct, conveys to the other party that it is no longer willing or able to perform its obligations under the contract[2].

Consequently, where a contractor suspends a contract without any authority or justification to do so, the suspension will be seen as a repudiatory conduct. This is a breach of the contract referred to as repudiation.

It discharges the contractor repudiating from his obligations under the contract[3] and makes him liable to pay the owner damages for the repudiation.

Background facts on the *Aslan* case

Mr and Mrs Stepanoski (the owners) entered into a Cost Plus Contract with the builder, Mr Aslan, for the construction of two properties on the owners' land. In late 2014 to early 2015, the owners and the builder signed a Lump Sum Contract relating to the same construction. The Lump Sum Contract governed the parties' relationships from the date it was signed and was effective retrospectively from 14 October 2014.

As the works progressed, the builder issued several payment applications under the Lump Sum Contract, including "payment application 4" which was issued on 14 September 2015. Thereafter, the owners locked the site and prevented the builder from entering the site. Shortly after this incident, the builder emailed the owners a 'notice of ceasing building works'. In the notice, the builder stated that he would not recommence work until payment application 4 was paid.

[1] (2022) NSWCA 24

[2] *Strong Solutions Ltd v. Sidi Yusuf Ahlan Electronics Co. Ltd* (2021) LPELR-55791 (CA)

[3] *Muhammad & Anor. v Magloda (Nig.) Ltd* (2017) LPELR-43191 (CA)

The owners subsequently commenced proceedings at the High Court against the builder claiming damages for breach by the builder of the Lump Sum Contract. The owners claimed that, because of the builder's notice of ceasing building works, and his subsequent cessation of work, the builder showed an intention to no longer be bound by the contract. The owners therefore claimed loss arising from the cost of rectification works and a loss of rental income that would have been earned if the works had been completed on time.

Although the High Court found that the builder had repudiated the Lump Sum Contract, its decision was overturned on appeal. The court held that since the builder's assertion of being locked out by the owners was not challenged by the owners and that Clause 24 of the Lump Sum Contract permitted stoppage of building works on this ground, the builder's notice of ceasing works was not repudiatory[4].

The contractor's entitlement to suspend works is contractual

Aslan's case rightly concludes that where a contract does not expressly provide for the suspension of performance

during the contract; or the basis for the contractor's decision to suspend performance of works is not permitted under the contract, then the contractor's conduct will be repudiatory.

The court's decision that the builder's suspension of performance did not constitute a repudiatory conduct was because the Lump Sum contract between the parties clearly permitted suspension on the grounds given by the builder. Specifically, Clause 24 of the Lump Sum contract provides for suspension of work by the builder and is relevant on the following terms:

"... If the owner, without reasonable and substantial cause:

...

fails to pay a progress payment or any other amount due to the contractor within the time allowed, but only if the owner fails to pay the progress payment or other amount due after a written notice from the contractor requiring payment within a further period of 5 business days...

denies the contractor or the contractor's sub-contractors access to the site so as to prevent the work from proceeding, or otherwise prevents the contractor from carrying on the work; or if the owner becomes bankrupt, assigns assets for the benefit of creditors generally, makes a composition or other arrangement with creditors or, if the owner is a company, goes into liquidation or receivership or is otherwise without capacity,

the contractor may, without prejudice to any other rights under the contract, suspend the work by giving written notice to the owner in accordance with Clause 28 (Giving of Notices) specifying the reason. If the owner remedies the default, the contractor must recommence the work within 10 business days unless the contractor has ended the contract under Clause 26."

[4]Aslan v Stepanoski, para 80.

Another important step will be to examine the contractor's entitlement to suspend works under the various standard forms of construction contracts used in Nigeria.

The Contractor's power to suspend works under the General Conditions of Contract for the Procurement of Works in Nigeria, 2011 (the GCC 2011)

The contractor is not permitted to suspend works as doing so constitutes a fundamental breach and the owner is entitled to terminate the contract[5]. Clause 78.1 (b) (ii) of the GCC 2011 provides that:

(a) The Employer or the Contractor, without prejudice to any other remedy for breach of contract, by giving twenty-eight (28) days written notice of default to the other party, may terminate the Contract in whole or in part if the other party causes a fundamental breach of Contract

(b) Fundamental breaches of the Contract shall include, but shall not be limited to, the following:

(i) The Contractor stops work for twenty-eight (28) days when no stoppage of work is shown on the current Programme and the stoppage has not been authorized by the Engineer;

Now does this mean that the contractor will be left with no alternative if the owner suspends work, denies the contractor access to the site or/and has refused to pay the contractor? Not at all. Rather, the GCC 2011 allows the contractor to terminate the contract upon the happening of any of these events, but not the suspension of performance under the contract[6].

The Contractor's power to suspend works under the Federal Ministry of Works Standard Conditions of Contract (Road works), 1999 (FMOWC)

Like the GCC 2011, the contractor lacks the power to suspend the performance of works under the FMOWC. It is only the owner (through his representative – engineer or architect) that is empowered to suspend the works[7]. Again, the only option available to the contractor is to terminate the contract and claim loss or damages against the owner[8].

The contractor's power to suspend works under FIDIC Red Book 1999 and 2017 editions.

Both editions allow the contractor to suspend the performance of works on the following grounds:

[5]GCC 2011; Clause 78.1 (b) (i)

[6]GCC 2011; Clause 78.1 (b) (ii) and (vii)

[7]FMWH; Clause 40 (1)

[8]Ibid; Clause 68 (1)

(a)The owner has refused to certify the contractor's payment application in the manner provided under the contract[9].

(b)The employer fails to furnish proof of its capability to finance the project from start to completion (financial arrangements)[10].

(c)The owner refuses to pay the contractor the amount certified by the engineer and due the contractor[11].

The 2017 edition goes further to add two more events that ground the contractor's decision to suspend works:

(a)The owner has failed to comply with the engineers' determination[12].

(b)The owner has refused to comply with the decision of the Dispute Avoidance and Adjudication Board (DAAB) which has become final and binding on the parties[13].

Final Thoughts: Note to Contractors

Pause and confirm

It is natural to feel exasperated over the owner's refusal to pay or deny a contractor access to the site. However, before deciding to suspend works based on the owner's actions, the contractor must ascertain whether he is entitled to do so under the contract, and whether the owner's conduct entitles the contractor to suspend the performance of works.

Take action or seek alternatives

If the contractor is clearly within its right to suspend works, then the contractor is by all means allowed to do so. However, where there is no entitlement to suspend works, the contractor must cease suspending works and look for an alternative provided under the contract. This will shield the contractor from being susceptible to huge losses and damages against the owner.

[9]See FIDIC Red Book 2017; Sub-clause 16.1 (a). Also see FIDIC 1999; Sub-clause 16.1.

[10]FIDIC Red Book 2017; Sub-clause 16.1 (b). See FIDIC 1999; Sub-clause 16.1.

[11]FIDIC Red Book 2017; Sub-clause 16.1 (c). Also see FIDIC 1999; Sub-clause 16.1.

[12]FIDIC Red Book 2017; Sub-clause 16.1 (d).

[13]Ibid; Sub-clause 16.1 (e).

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