

FORM A
FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT

PARTIES:

Case Number: **734/2007**

High Court: **Port Elizabeth**

DATE HEARD: **31 November 2009; 1 – 4 December 2009; 8 –**

11 December 2009

DATE DELIVERED: **4 February 2010**

JUDGE(S): **D. Chetty**

LEGAL REPRESENTATIVES –

Appearances:

15 for the Plaintiff(s): **Adv Pammenter SC/ Adv Mossop**

16 for the Defendant(s): **Adv Nelson SC / Adv Huisamen**

Instructing attorneys:

Plaintiff(s): **Shepstone & Wylie**

c/o Goldberg & De Villiers

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Defendant: **Joubert Galpin & Searle**

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CASE INFORMATION -

Nature of proceedings:

Topic:

Key Words: *Practice – Absolution from the instance – Building contract – JBCC series 2000 – Clause 15.3 providing that contractor proceed with due skill, diligence, regularity and expedition – Contention advanced that clause be read in isolation and not in conjunction with clause 17.2 – Such would lead to absurdity in as much as contractor could be precluded from remedying defects as instructed by principal agent and yet finding itself in breach of Clause 15.3 – Where contract instructions issued Clause 15.3 must be interpreted having regard to the provisions*

of Clause 17 - Contractor commenced remedial work but instructed to discontinue - Such act clearly not in breach of Clause 15.3 - Latent defects - Clause 27.1 affording contractor opportunity to remedy latent defects - Where such contractor willing and able to attend thereto prior to final completion stage being reached, contractor not in breach of Clause 15.3 provided it remedies such defects with due skill, diligence, regularity and expedition

**REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

Case No: 734/07

In the matter between:

MSC DEPOTS (PTY) LIMITED

Plaintiff

And

W K CONSTRUCTION (PTY) LTD

WYNFORD'S CIVIL AND DEVELOPMENT CC

First Defendant

P D NAIDOO & ASSOCIATES

Second Defendant

P.D NAIDOO AND ASSOCIATES AND

BHAM TAYOB KHAN MATUNDA

Third Defendant

Coram: Chetty, J

Dates Heard: 31 November 2009; 1 – 4 December 2009; 8 – 11 December 2009

Date Delivered: 4 February 2010

Summary: *Practice – Absolution from the instance – Building contract – JBCC series 2000 – Clause 15.3 providing that contractor proceed with due skill, diligence, regularity and expedition – Contention advanced that clause be read in isolation and not in conjunction with clause 17.2 – Such would lead to absurdity in as much as contractor could be precluded from remedying defects as instructed by principal agent and yet finding itself in breach of Clause 15.3 – Where contract instructions issued Clause 15.3 must be interpreted having regard to the provisions of Clause 17 – Contractor commenced remedial work but instructed to discontinue – Such act clearly not in breach of Clause 15.3 – Latent defects – Clause 27.1 affording contractor*

opportunity to remedy latent defects – Where such contractor willing and able to attend thereto prior to final completion stage being reached, contractor not in breach of Clause 15.3 provided it remedies such defects with due skill, diligence, regularity and expedition

JUDGMENT

CHETTY, J

[1] This is an application which has been made by the first defendant at the end of the plaintiff's case for absolution from the instance. In order to appreciate the issues which arise for consideration, it becomes necessary to consider the pleadings, the contract documents and the nature of the evidence adduced. Before embarking upon that exercise however, it is apposite to record certain events which occurred during the trial. On the morning of the hearing I was informed that there would be no appearance on behalf of the third defendant, a joint venture comprising the second defendant and a firm of quantity surveyors, Bham Tayob Khan Matunda (BTKM) in view of a settlement having been reached. The plaintiff's cause of action against the third defendant, succinctly put, was that in terms of a written agreement concluded between themselves the third defendant was appointed as the project manager and breached the agreement by failing to perform its quality management obligations as a result of which the first defendant failed to carry out its work in accordance with the design

with the requisite degree of skill and diligence. On the third day of trial the matter between the second defendant and the plaintiff was likewise settled although the exact parameters of the settlement reached were not fully divulged. The plaintiff's cause of action against the second defendant was based on a written agreement concluded between them which the plaintiff alleged had been breached in as much as the design was inadequate for the pavement to withstand the weight it would be subjected to and failed to monitor the site works. Consequently and notwithstanding the citation of the second and third defendants as defendants the first defendant is the sole remaining defendant. To avoid any confusion however I shall refer to the parties as cited in the plaintiff's particulars of claim.

Introduction

[2] The plaintiff, as its name indicates, is a shipping company. It concluded an agreement with Volkswagen South Africa for the delivery of motor vehicle parts to its factory in Uitenhage and required a container depot in order to fulfil its contractual obligations. By reason of the contractual time frames relating to the delivery of the containers, the Nelson Mandela Logistics Park in Despatch, in close proximity, provided the ideal site for the construction of a container depot where the full and empty containers could be stored. The second defendant, a firm of consulting engineers and the third defendant, a joint venture comprising

the second defendant and BTKM were engaged ¹ by the plaintiff to oversee the project. Plans were duly prepared, a bill of quantities prepared and the contract awarded to the first defendant. Upon completion of the container depot and prior to its full operational capacity being reached premature surface deformation of the surface paving occurred. Investigations were conducted and reports detailing the probable cause of the pavement failure were prepared by the second defendant and in addition, the first defendant, of its own accord and expense, commissioned a firm of engineers, Ninhaan Shand, to investigate and report. The first defendant was thereafter instructed by the second defendant to effect certain remedial work and commenced therewith but shortly thereafter was instructed by them to stop. The plaintiff thereafter dispensed with the services of the second defendant and engaged Vawda Thornton, a firm of consulting engineers to examine the cause of the pavement failure and to do whatever was necessary to render the container depot functional. It is common cause that at the outset of the initial contract it was in the contemplation of all the contracting parties that the pavement would, given the tremendous forces it would be subjected to, remain operational for a period of 20 years. It is not in dispute that the pavement in its present state, notwithstanding the remedial work, has a lifespan of between three to five years.

¹ I use the word advisedly because in its plea, the second defendant denied being appointed consulting engineer by the plaintiff but alleged that it had been appointed the consulting engineer by the third defendant. (For purposes of this judgment however nothing turns on this).

The Pleadings

[3] In its amended particulars of claim the plaintiff alleged that annexure A thereto constituted the agreement concluded between it and the first defendant. Annexure A is a standard building agreement prepared by the joint building contracts committee incorporated known colloquially as the JBCC series 2000. I shall refer to it interchangeably as either the JBCC 2000 or the agreement. The particulars of claim further alleged that the first defendant, in its capacity as the contractor, was to carry out certain works comprising the bulk earthworks, paving, storm water, water and sewerage reticulation and mast lighting at the container depot. In amplification and by incorporation it referred to the bill of quantities and contract drawings and averred that the first defendant was to perform its contractual obligations in conformity therewith with *“due skill, diligence, regularity and expedition to bring the works to, inter alia, final completion”* in terms of clause 15.3 of the JBCC.

[4] The respects in which the first defendant is alleged to have materially breached the agreement is stated in paragraph 10 of the particulars of claim as –

“(a) The specifications called for the project to include a paved surface of the container park of paving blocks laid in a herring bone pattern;

- (b) The First Defendant laid the paving blocks unevenly over the entire site with varying joints widths;
- (c) The paving blocks are creeping and opening and the jointing sand between the blocks is being washed out by storm water;
- (d) As a result of the foregoing:
 - (i) the storm water will reach the bedding sand on which the paving blocks are laid;
 - (ii) once saturated the bedding sand will allow further creep of the paving blocks which will ultimately lead to the failure of the underlying works;
- (e) There is a joint in the paving where the herring bone patterns meet. This joint is failing due to lack of interlock which will ultimately lead to the failure of the underlying layers;
- (f) There are two service manholes in the paved surface each of which is surrounded by a concrete apron. In each case this apron, together with the surrounding block paving, has failed as a result of a lack of compaction around the manholes;
- (g) Large settlements and deflections have occurred along the construction stake lines due to incorrect construction processes and compaction;
- (h) The in-situ material is poorly compacted thus impacting on the bearing capacity of the paving."

The evidence

[5] These alleged defects which the plaintiff contended constituted a material breach of contract pursuant to the provisions of clause 15.3 were in fact sourced from an inspection report compiled by the plaintiff's expert, Mr *Doyle*, of Vawda Thornton, a firm of consulting civil and structural engineers who had been commissioned by the plaintiff to determine the cause of the failures of the surface paving at the container depot. It is unnecessary for purposes of this judgment to refer to it in any detail save to record that it constituted the basis upon which the plaintiff's claim against the defendant was formulated. The essence of *Doyle's* evidence was that the thickness of the bedding sand did not comply with SABS 1200; that 40% of the bedding sand exceeded the specified thickness; that the coarse aggregate in both the base and sub-base layers exceeded the maximum dimensions specified in the SABS 1200 ME and SABS 1200 MF. In addition evidence relating to the lack of compaction along the stake lines and the presence of a butt joint on the paved surface was tendered to show that the first defendant failed to construct the pavement in accordance with the design. The aforementioned defects constitute the basis of the plaintiff's cause of action against the first defendant as will be gleaned from the reproduction of the particulars of claim in the preceding paragraph.

[6] It was submitted on behalf of the first defendant that in order to ward off absolution the enquiry is not confined to determining the possible causes of the defects but that it was incumbent on the plaintiff to overcome two distinct and

separate hurdles. Mr. *Nelson* submitted that the plaintiff had firstly to adduce sufficient evidence of those alleged defects and secondly, it was required to establish that the defects are in fact and in law such as to constitute a breach of clause 15.3 of the JBCC 2000.

[7] In my judgment, and upon a proper interpretation of the contract, the submission is unassailable. To appreciate the cogency of the argument it is apposite firstly to set out the terms of the clause and then the correct approach to the interpretation of construction contracts. Clause 15.3, minus its sub-clauses reads as follows –

“15.3 On being given possession of the **site** the **contractor** shall commence works within the period stated in the **schedule** and proceed with due skill, diligence, regularity and expedition and bring the works to. . .”

A useful synopsis concerning the interpretation of building contracts is articulated, with reference to authority, by Eyvind Finsen, **The Building Contract**² as follows –

“1.8.1 The first rule is to determine what the parties intended, and to give effect to it. “The golden rule, applicable to the interpretation of all contracts, is to ascertain and to

² A Commentary on the JBCC Agreements: Second Edition at p 10 to 11

³³ *Joubert v Enslin* 1910 AD 6

follow the intention of the parties; and if the contract itself . . . affords a definite indication of the meaning of the contracting parties, then it seems to me that a court should always give effect to that meaning.”³³

1.8.2 When setting out to interpret a particular word or phrase, it must be considered in context and not in isolation. “Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in ‘n kontrak bepaal moet word, die woorde onmoontlik uitgeknip en op ‘n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat ‘n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel.”³⁴

1.8.3 Words should be given their common meaning unless it is obvious that the parties intended a different meaning, or that the common meaning does not make sense in the context.

1.8.4 Where words in a particular context may have more than one meaning, the meaning shall be chosen that will make the context sensible and applicable rather than one that makes it ineffective.

1.8.5 Where a clause is ambiguous, it shall be interpreted so that it is in harmony with the whole contract. A contract must be interpreted as a whole.

1.8.6 Where a general word or phrase follows a series of specific words or phrases, the meaning of the general word or phrase shall be restricted to the same category as the specific words or phrases. For example, in a clause

³⁴ Rumpff CJ in *Swart en ‘n ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C.

referring to damage by fire, storm, flood earthquake and other disasters, the words 'other disasters' cannot refer to riot damage, because the former are natural disasters while the latter is due to human action. This is known as the *eiusdem generis*, (or 'same class') rule.

1.8.7 Words written by hand take precedence over typewritten words, which in turn take precedence over printed words.

1.8.8 Later written words take precedence over earlier written words.³⁵

1.8.9 Where none of these rules assists in resolving the ambiguity, the meaning is to be adopted which is the less favourable to the author of the words, because he had the opportunity to avoid ambiguity. This is known as the *contra proferentem* rule.

[8] Consequently it is of fundamental importance to immediately take cognisance of the fact that clause 15.3 has a number of sub-paragraphs which, as a matter of common sense and logic, requires that the entire section be read conjunctively. The Sub-paragraphs read as follows:

- "15.3.1 No clause
- 15.3.1 **Practical completion** in terms of 24.0
- 15.3.2 **Works completion** in terms of 25.0
- 15.3.3 **Final completion** in terms of 26.0"

³⁵ This rule may be taken further in building contracts in so far as that, where there is a discrepancy between one drawing and another, the provisions of the later prepared or issued drawing take precedence over those of the earlier.

It is apparent from the foregoing that the clause identifies these distinct phases in each of which duties and obligations are cast upon the contractor and the principal agent.

[9] Notwithstanding the various respects which the plaintiff alleged were construction faults caused by the first defendant's defective workmanship, the evidence adduced appears somewhat at variance with the admission in the particulars of claim, that "*the first defendant constructed the project according to the second defendant's design*". As between themselves therefor it was not an issue that the first defendant performed its mandate in conformity with the second defendant's design. Mr. *Nelson* submitted that the allegations relied upon in the particulars of claim that the first defendant did not perform the work entrusted to it properly was not based on any evidence that the first defendant did not execute the work strictly in accordance with the engineer's design or instructions issued to it from time to time. He submitted that the evidence relied upon to the effect that the work was not executed properly was based upon inferences drawn from the Indlela reports, the on site observations by *Doyle* and inferences drawn from the Lockpave program and that in view of the concessions made by *Doyle* and the other experts there was insufficient evidence to show that the first defendant did not perform the work properly. That argument is in my view unassailable.

[10] Doyle was constrained to concede not only that the bedding sand specified in the SABS 1200 MJ was virtually impossible to source locally but that the type of bedding sand used by the first defendant was utilised as a matter of routine by paving contractors. Notwithstanding his earlier evidence that the butt joint was a construction defect caused, so he stated, by the first defendant's complete disregard of the plans and specifications he was constrained to concede under cross-examination that no fault could be attributed to the first defendant by reason of the fact that the butt joint was created by the instruction issued to the first defendant by the second defendant to lay the interlocking pavers from opposite ends. Had *Doyle* taken the liberty to investigate these instances of what he concluded were defects in the construction with the second defendant he would no doubt have been told that in both instances, the first defendant acted precisely as instructed by the second defendant. Even on the acceptance of *Doyle's* further evidence that some of the coarse aggregate in the sub-base and base layers exceeded the specified maximum dimensions this does not assist the plaintiff's case. The presence of some coarse aggregate in excess of the specified maximum dimensions cannot result in the drawing of an inference that the first defendant failed to construct the works in accordance with the design. There is insufficient evidence to show that the presence of some coarse aggregate in the layer works in any way contributed to the failure of the pavement. The Indlela report clearly does not afford corroboration for *Doyle's* testimony nor on his own version can it be inferred that the coarse aggregate he

uncovered emanated from the base or sub-base layers. During the subsequent remedial work excavations were done and the real possibility that these formed part of the in-situ material cannot be discounted.

[11] The evidence adduced is moreover insufficient to establish that the deflections which occurred along the stake lines were attributable to incorrect construction processes or compaction. The Indlela report confirms that the compaction was properly executed and upon an appraisal of the evidence adduced on behalf of the plaintiff, I am unable to find that the first defendant did not perform the work properly. There is furthermore no evidence that when the first defendant sought a certificate of practical completion of the works in terms of clause 24 of the JBCC 2000 the works had not been performed with due skill, diligence, regularity and expedition. What in fact transpired is that only snag lists were issued by the second defendant which, it is common cause, were duly attended to by the first defendant. When thereafter depressions and deflections manifested themselves, the first defendant commenced remedying same until it was instructed by the second defendant to desist.

The Contract

[12] I turn then to consider the diametrically opposing contentions advanced on behalf of the parties regarding the alleged breach of clause 15.3. Mr. *Pammenter*

submitted that clause 15.3 is to be read on its own and not, as submitted by Mr. *Nelson* in conjunction with its sub-paragraphs and clause 17. He argued that the latter's submissions completely overlooked the fact that the agreement drew a clear distinction between a failure to carry out a contract instruction (clause 17) and a failure to proceed with due skill, diligence, regularity and expedition as provided for in clause 15.3. In making the submission he relied principally on clause 36.1 which reads as follows –

“36.1 The **employer** may cancel this **agreement** where the **contractor**:

36.1.1 Fails to comply in terms of 15.1 or 15.3

36.1.2 Refuses to comply with a contract instruction subject to 17.2”

[13] In my view clause 36.1 cannot be read in isolation but must be considered in conjunction with clause 36.2 which provides –

“36.2 Where the **employer** considers cancelling this **agreement**, the **principal agent** shall be instructed to notify the **contractor** of such default in terms of 36.1. The issuing of such a notice shall be without prejudice to any rights that the **employer** may have.”

[14] It follows as a matter of logic that the interpretative method propounded by Mr. *Pammenter* viz. that clause 15.3 must be read in isolation, cannot be correct for it will clearly lead to an absurdity. On that interpretation the contractor could

be precluded from remedying defects as instructed by the principal agent and still find itself in breach of clause 15.3 and be confronted with cancellation of the agreement by the employer.

[15] The evidence adduced conclusively establishes that the second defendant frequently issued contract instructions to the first defendant. Two examples will suffice. Firstly, *Doyle* could not dispute that when the non-availability of lime to stabilize the layers was raised by the first defendant with the second defendant, the latter, notwithstanding the specifications, instructed the former to proceed without lime stabilization. Secondly, and again contrary to the specifications, the first defendant was instructed to lay the paving from two sides notwithstanding the creation of a butt joint thereby. These two examples of contract instructions indicate quite unequivocally that clause 15.3 cannot be read in isolation but must be read in conjunction with its sub-clauses and clause 17. That this was in effect understood by all the parties is evidenced not only in the request by the first defendant for the second defendant to provide it with a certificate of practical completion but furthermore by *Georgiev's* own evidence that when the problems on the pavement first manifested themselves the initial call was for the first defendant to remedy the problem. The second defendant likewise recognized that in terms of the agreement the first defendant was contractually bound to remedy whatever defects arose, for it instructed the latter to forthwith commence therewith. The further instruction to desist from continuing with the remedial work

is a further indicator that clause 15.3, its sub-clauses and clause 17 cannot be read in isolation. In **The Building Contract**³, Finsen, under the heading ***Building Contracts***, specifically deals with contract instructions and in particular clause 17.1.1 and it is evident from Chapter 12 that clause 15.3 must be read in conjunction with clause 17. In such circumstances it scarcely behoves the plaintiff to suggest that the first defendant is in breach of clause 15.3 of the JBCC 2000. In my judgment not only has the plaintiff failed to adduce sufficient evidence that the first defendant performed the work entrusted to it defectively but it has moreover failed to show that it breached clause 15.3 of the JBCC 2000. On that ground alone the application for absolution must succeed. There is however a further basis.

Repudiation of the Agreement

[16] The allegations relied upon in support of the contention that the first defendant repudiated the agreement are that:

- The letter of demand in which cancellation was communicated was incorrectly addressed;
- The alleged breaches which the first defendant relied upon for cancellation were either conceded within ten days or were without substance; and

³ See *infra* footnote at p 8

- The first defendant was precluded from terminating the agreement as it was itself in breach of a material term of the agreement.

I have hereinbefore already found that there is no substance to the contention that the first defendant breached clause 15.3 of the JBCC 2000. The remaining grounds relied upon as constituting repudiation are likewise without substance. Clause 38.2 of the JBCC 2000 provides that *“where the contractor considers cancelling the agreement notice shall be given to the employer and the principal agent of the defendant in terms of 38.1 . . .”* The clause merely requires that notice of the intended cancellation be given to the employer. The mere fact that the letter was addressed to the second defendant and copied to the plaintiff is a spurious complaint.

[17] The breaches relied upon by the first defendant for cancellation of the agreement are encapsulated in a letter dated 14 August 2006 and stated as follows –

- “1. The Principal Agent has failed to issue a Payment Certificate in terms of Clauses 31.0 and/or 34.0 and/or
2. The Principal Agent has failed to issue a Statement to the Contractor in terms of Clauses 31.13.1 and/or
3. The Employer has failed to pay the amount certified in terms of Clauses 31.9 and/or 34.1

4. The Employer is preventing the Principal Agent from exercising his independent judgment regarding the performance of his duty and the Contractor is being prejudiced by such action.”

[18] In terms of clause 38.1 a contractor may cancel the agreement where the principal agent fails to issue any payment certificates in terms of clauses 31.0 or 34.0 or fails to issue a statement to the contractor in terms of clause 31.13.1; the employer fails to pay the amount certified in terms of clauses 31.9 or 34.10 or prevents the principal agent from exercising his independent judgment regarding the performance of his duty and the contractor being prejudiced by such action. It will be gleaned from the foregoing that any one breach would entitle the contractor to cancel the agreement and it follows as a matter of course that absolution must be granted if the plaintiff fails to establish that each of these four grounds was not sound.

[19] It was submitted on behalf of the plaintiff that in as much as the first defendant's complaint is that certificate number 4 was never issued to it on 25 August 2006, no cancellation can be based on its non-payment. The first defendant's cancellation was premised on the failure by the second defendant to issue interim payment certificates for the months of April, May, June and July 2006. Whilst conceding as much the plaintiff disingenuously seeks justification

therefore by alleging that had the second defendant in fact issued such interim payment certificates the amount reflected therein as being due for payment would not have been paid by reason of the fact that the first defendant was not entitled to any further payment.

[20] The fact that a payment certificate reflects a nil balance affords no justification for not issuing it. Clause 31.1 expressly provides that *“the payment certificate may be for a nil or negative amount . . .”* The non issue of these interim payment certificates by the second defendant clearly amounted to a breach of clause 31 of the agreement which entitled the first defendant to cancel the contract. Similar considerations apply to the failure by the second defendant to issue a recovery statement as provided for by clause 33.1. The failure to do so likewise entitled the first defendant to cancel the agreement.

[21] It is not in issue that the second defendant issued payment certificate number 4 and that the plaintiff authorised such payment. What then transpired is that the plaintiff's director, Mr. *Georgiev*, countermanded payment which in turn elicited a response from the second defendant that such a recommendation would constitute a breach of the agreement. Notwithstanding, the amount was not paid, remains outstanding and the first defendant's entitlement thereto has clearly been established. *Georgiev's* explanation for countermanding the authorised payment was that in the plaintiff's view the work was not done

according to specification and that the costs of the remedial work would be disproportionate to the amount authorised hence the plaintiff was entitled to withhold payment. The JBCC 2000 vested the second defendant with full authority and obligation to act in terms of the agreement, but, despite the latter's recommendation that payment be effected, the plaintiff desisted from acting in compliance with the principal agent's recommendation. In such circumstances there can be no question that the plaintiff prevented the second defendant from exercising its independent judgment regarding the performance of its duty. Quite clearly the first defendant suffered prejudice thereby which entitled it to cancel the agreement.

Latent Defects

[22] Allied to the submission that the first defendant was obliged in terms of the agreement to execute the contract with due skill, diligence, regularity and expedition was the further contention advanced on behalf of the plaintiff that the first defendant was furthermore obliged to perform its mandate free of defects. Arguing from the premise that all the work performed by the first defendant had been performed in conformity with the requirements of clause 15.3 and had been

approved by the second defendant, subject of course to compliance with a snag list, Mr. *Nelson* agreed in broad terms with Mr. *Pammenter's* submission with the qualification that this related to the stage when final completion is reached in terms of clause 26.0 and does not include latent defects. Relying principally on clause 27.1 of the agreement, Mr. *Nelson* correctly submitted that it is apparent therefrom that where a contractor is willing and able to attend to defects that manifest themselves prior to final completion being reached in terms of clause 26.0, such a contractor cannot be in breach of clause 15.3 provided that he remedies such defects with due skill, diligence, regularity and expedition.

[23] I am satisfied that the first defendant is entitled to an order of absolution from the instance together with costs, such costs to include the costs of two counsel as well as the qualifying fees of the first defendant's expert witnesses in respect of whom expert summaries were filed.

D. CHETTY
JUDGE OF THE HIGH COURT

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