Building Relationships

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BARRISTERS & SOLICITORS

November 2005

TENDER REVERSAL #2

In our newsletters of July 2004 and September 2004, we dealt with the Superior Court of Justice decision in Toronto Transit Commission v. Gottardo Construction Ltd. It would be fair to say that we were not overly impressed with the reasoning behind the decision. The owner appealed that decision and the Ontario Court of Appeal has now rendered its judgment.

Trial Decision

The general submitted a tender in response to a call for tenders. The general made a $1.1 million mistake in its tender, which was apparent to it but not to the owner. The tender called for the general to submit a breakdown of its contract price after submission of the tender and to submit further documents. The general submitted a breakdown of a higher amount with the error corrected, but did not submit the required documents.

The trial judge held that the breakdown demonstrated an error on the record that resulted in the owner being unable to accept the tender. The trial judge also held that the failure to submit the required documents rendered the tender non-compliant and therefore incapable of acceptance. Finally, the trial judge held that even if there had been a valid contract A, she would have rescinded the contract because it would have been unjust to have enforced it.

In our September 2004 newsletter, we said:

"If either reason for the dismissal withstands appeal, the owner is put in a dilemma. If it asks for further clarification of the bid, the general can demonstrate that there is a mistake on the face of the tender and be released from the tender. If it asks for further documents, then it puts the general in a position in which, by refusing to do what it is supposed to do, the general can withdraw its tender. We do not usually have a whole lot of sympathy for owners, but these results do not seem to make much sense."

"*Her decision turns Ron Engineering on its ear. The argument that the judge accepted in this case could have applied equally well in Ron Engineering. ... The use of the rescission remedy opens the floodgates for arguments that can nullify the law of tender, law that has been accepted for the past 23 years.*"

Issues: Error on Face and Non-Compliance

The Court of Appeal noted that *"the trial judge appears to have confused the creation of Contract A and the process of analysis that leads to the acceptance of the tender and the formation of Contract B."* Contract A is not formed after the general submits the breakdown and the required documents; Contract A is formed the moment that the owner opens the general's tender. The terms of contract A are set out in the call for tenders. In the TTC case, one of those terms called for the submission of a proper breakdown of values aggregating to the actual bid, not the bid that the general wished that it had submitted. Another term required the proper submission of the specified documents.

The Court therefore held that the general's submission of an erroneous breakdown of values did not demonstrate that the original tender was incorrect on its face; rather, the improper submission was, in itself, a breach of contract A by the general. Similarly, the failure to supply required documents did not render the tender non-compliant; the tender was already compliant. The failure to supply was a breach of contract A.

Accordingly, contract A was valid and the general breached it by its failure to adhere to the terms contained in it.

Issue: Rescission

The Court of Appeal noted, *"rescission may only be granted in cases of unilateral mistake when the unmistaken party engaged in fraud or some other unconscionable conduct or where the unmistaken party contributed to the mistake."* The Court noted that the trial judge found that the owner did not contribute to the general's mistake and that there was no fraud on anyone's part. Accordingly, the actions of the owner had to be unconscionable for the agreement not to be enforced.

The Court held that there were no unique circumstances in this case to distinguish it from Ron Engineering. Although there would be financial hardship on the general, that would be insuf-

ficient to warrant rescission. The Court felt that the burden imposed on the general was not so grossly disproportionate to make the enforcement of the contract unconscionable.

Result

The Court allowed judgment in favour of the owner for $434,000, the difference between the general's bid and the next high tenderer. The Court also granted judgment for interest, costs of the appeal of $35,000, and costs of the trial.

As it happened, it made economic sense for the general to refuse to enter into contract B because to do so would have cost it $1.1 million, rather than $434,000. The real mistake of the general was not paying up. We would guess that that decision cost it another $200,000-$300,000 in its own legal fees and those that it will have to pay to the owner.

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PROPERTY INSURANCE #2

Only two months ago, in our September 2005 newsletter, we had reported on Active Fire Protection 2000 Ltd. v. BWK Construction, a 2004 decision of the Ontario Superior Court of Justice. The general appealed this decision to the Ontario Court of Appeal.

Facts

The general had a contract with the sprinkler sub in which the general was to take out builder's all-risk property insurance. For whatever reason, the general did not do so. The sub negligently installed its sprinklers, resulting in a flood that the general spent $75,000 to clean up. Had the general taken out the insurance, the insurer would have covered the loss. Since there was no insurance, the general sued the sub for the damages incurred.

The trial judge held that the general had a duty to take out the insurance for the benefit of all of its subs and its failure to do so meant that it had no right to look to the sprinkler sub for damages.

The Court of Appeal agreed. It referred to its decision in Madison Developments Ltd. v. Plan Electric Co. (see May 1998 newsletter) as dispositive of the appeal. It stated that there would be no benefit to the sub from the contractual insurance covenants unless they applied to insured perils that the sub's negligence caused. It concurred that it would make no business sense for each sub to have to obtain its own property insurance.

In a subcontract, there is often a provision requiring the sub to obtain insurance. The Court interpreted the insurance provision in the subcontract, which it did not set out in the reasons for decision, to apply to occurrences in excess of the general's limits of insurance and, in any case, to cover third party claims, not claims from the general.

Proposition

This case and its predecessor cases stand for an entirely sensible proposition. If a general has to obtain property insurance, as it usually has to do pursuant to its contract with the owner, then its subs are covered by that insurance and if the general does not want to suffer from occurrences that are caused by a sub's negligence, it had better take out the insurance that it contracted to take out.

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