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Stephen G. Revay

Owners beware! From now on not only general contractors but also subcontractors could be making claims against you. Where is this industry heading?

One could argue that the two recent decisions analysed in this issue could give rise to a heretofore unrecognized relationship between owners and subcontractors. In reality, subcontractors asserting claims against owners is not new. "Pass-through" claims in contractual settings have existed for some time. What may be considered a departure is the suggestion that subcontractors may claim against owners in tort. However, the entire field of tort claims, particularly those dealing with "pure economic loss", is a new development and not without some hurdles.

The lead article of this issue is an excellent summary of the state of the law with respect to the ways and means available to subcontractors with a view to claiming against owners, understanding, of course, that each case is different, requiring careful analysis by competent legal counsel. It might, nevertheless, be safe to say that so-called "liquidating agreements"— precluding the subcontractor from recovering anything from the general contractor beyond whatever is recovered by the general contractor from the owner on the subcontractor's behalf— are probably enforceable not only in the USA but in Canada as well, as long as the general contractor is pursuing such a claim in a diligent manner.

While this issue of the Revay Report holds special interest for contractors and subcontractors, I would add, however, that this article should also be compulsory reading for owners who wish to avoid those traps which could give rise to claims by subcontractors.

Subcontractors' Claims Against Owners

by W.J. Kenny Q.C. and E. Jane Sidnell, Cook Duke Cox, Edmonton-Calgary with Prof. David Percy of the University of Alberta on Claims in the Tendering Process

Questions often arise as to whether a general contractor may pursue a claim against the owner on behalf of a subcontractor, and in what circumstances a subcontractor may pursue a claim against an owner directly.

Subcontractors' claims against owners arise in two major contexts. In recent times, they have occurred in the tendering process and over a longer period of time they have arisen out of the performance of the construction contract itself. In this article, we will consider in Section A developments in subcontractors' claims against owners in the tendering process and in Section B claims arising out of the performance of the contract.

A. Claims in the Tendering Process

At the outset, it is important to recognize that the law of tenders is not uniform across Canada. Since the landmark decision in *Ron Engineering*[1], it is clear that general contractors, in their tenders to owners, and subcontractors, in their bids to general contractors, can neither withdraw their tenders during the period for which they are expressed to be irrevocable nor successfully avoid liability on the grounds of mistake, except in the rarest of circumstances. They are bound to the owner and general contractor respectively in a bidding contract, described as Contract "A". In most provinces and in the Federal Court of Canada, it is accepted that Contract "A" also creates obligations on those who receive tenders, whether they are owners or general contractors. It seems settled that recipients of tenders must observe the express terms set out in the Invitation to Tender[2], as well as certain implied terms, such as the duty not to apply in the evaluation of tenders undisclosed criteria that are inconsistent with the tendering process[3] and the duty to consider all tenders submitted in good faith.[4] However, the obligations of those who receive tenders are far less settled in Alberta and Ontario, where the courts have generally (but not consistently) allowed a wide discretion in dealing with tenders through a generous interpretation of the privilege clause, which usually states that the lowest or any tender need not be accepted.

Despite the serious lack of uniformity in the basic law of tenders, some courts have taken the further step of allowing claims by subcontractors directly against the owner. These claims have arisen where the owner, or the owner's representative, in violation of Contract "A" prevents a subcontractor from entering into a contract with the general contractor or otherwise fails to ensure that the general contractor meets its obligations under Contract "A".

In *Ken Toby Ltd. v. British Columbia Building Corp.*[5], the owner issued an Invitation to Tender for an upgrade of the Royal British Columbia Museum. The Invitation stated that the Bid Depository System was to be used and required contractors to subcontract stipulated portions of the work, including masonry and the granite and marble work. The plaintiff subcontractor made the only bid for combined masonry, granite and marble work as well as the only bid for the single item of masonry work. According to the rules of the Bid Depository, where there was a single bid, general contractors were required to use that bid in their own tenders. However, after the deadline for submitting subcontract bids to the Bid Depository had passed, the owner became concerned about the effect of a possible single high bid for the masonry portion of the work and issued an addendum which required general contractors to replace the masonry portion of the work with a cash allowance of $15,000.00. Thus, general contractors were no longer required to use the plaintiff's sole bid and, as a result, the plaintiff was not employed on the project.

The owner's actions breached a rule of the Bid Depository, which permitted any addendum affecting subcontracted work to be issued three working days before subcontract bids closed. Under traditional law, however, this breach of the rules did not give the subcontractor any rights against the owner. The British Columbia Supreme Court overcame this obstacle in two unusual ways. The owner was found to be liable in the tort of negligence to the subcontractor for issuing the addendum in breach of the rules of the Bid Depository and, more remarkably, for the breach of a contract, which the court found was formed when the subcontractor submitted its bid to the Bid Depository. Under the terms of this implied contract, the owner was obliged to follow the rules of the Bid

Depository and act in good faith towards any subcontractor which submitted a bid.

The finding that an owner owes a duty of care in negligence to a subcontractor is supported by a recent Ontario case. In *Twin City Mechanical, a division of Babcon of Waterloo Ltd. v. Bradsil (1967) Ltd.*[6], the Government of Ontario issued an Invitation to Tender which also required the submission of subcontractor bids through the Bid Depository. The rules of the Bid Depository required the general contractor to employ the subcontractor named in its tender. In this case, the successful general contractor carried the name and the price of the plaintiff subcontractor. However, instead of awarding the subcontractor contract when its own tender was accepted, the general contractor "shopped" the original bid and found another subcontractor to perform the work at a lower price. The court decided that this action constituted a breach of Contract "A" between the general contractor and the plaintiff, but found that the owner was also liable in negligence to the plaintiff. The theory of the decision was that the owner, having decided to invoke the rules of the Bid Depository, assumed the responsibility of ensuring that the rules were followed. It negligently failed to carry out that responsibility by allowing the general contractor to change subcontractors and indeed by requiring the general contractor to provide an indemnity against any loss that the owner might suffer as a result of this change.

Despite the differences in the theoretical approach of these decisions, the subcontractor in each case was awarded damages based on the amount of profit that would have been earned if it had been allowed to perform the work.

These trial decisions are the first to allow an action by a subcontractor against an owner as a result of irregularities in the tendering process. A third possible way of bringing the owner's conduct into question also exists. If, according to the terms of Contract "A", a general contractor should employ a particular subcontractor to perform the work and the owner then prevents the general contractor from doing so, it can be argued that the owner has induced the general contractor to breach the terms of Contract "A" with the subcontractor. This could occur, for example, if the owner's representative required the general contractor to employ a subcontractor who had been disqualified under the rules of the Bid Depository[7]. This argument was raised in the *Ken Toby Ltd.* decision, but found to be inapplicable because, as a result of the addendum, no general contractor had incorporated the plaintiff's bid in its own tender.

There are, therefore, interesting avenues open to subcontractors who feel that they have been unfairly treated in the tendering process. However, it should be noted that actions by subcontractors directly against owners are surrounded by considerable difficulty. In the *Ken Toby Ltd.* decision, the creation of a direct contractual link between the owner and the subcontractor is contrary to most existing authorities and creates a contract in a situation where experience suggests that neither party intends to contract with the other. The finding in both cases that the owner can be liable in negligence to a subcontractor is less unusual, but the resulting damage awards are harder to explain. Damages for pure economic loss (in the form of lost profits) are not normally awarded in a negligence action and can only be justified by the creative juggling of existing precedents. Finally, in relation to all three avenues, it must be emphasized that appellate courts, at least in Alberta and Ontario, have been reluctant even to allow subcontractors to succeed in actions against general contractors for apparently serious breaches of Contract "A"[8]. It would be unusual if those courts were to allow much more novel actions against owners.

B. Claims arising out of the performance of the Contract

1. Cases where the prime contract, by its terms, provides relief such as payment on account of delay, escalation or different soil conditions encountered or where quantities have changed beyond a specified percentage.

A subcontractor has no privity of contract with an owner. This means the subcontractor cannot sue the owner in contract. Where, however, the subcontract incorporates the terms and conditions of the prime contract, the subcontractor may claim against the general contractor on the basis of changed conditions clauses in the prime contract. The general contractor in turn may seek indemnity against the owner. In such a case the general contractor may advance the claim on behalf of the subcontractor. The CCA S-1 (1994) Canadian Standard Construction Short Form Stipulated Price Subcontract incorporates the prime contract by the following provision:

> Article 1 — Work to be Performed
>
> 1.3 The requirements, terms and conditions of the prime contract so far as they are applicable to this subcontract, shall be binding upon the contractor and the subcontractor as if the word "owner" appearing therein had read "contractor" and the word "contractor" had read "subcontractor". In the event of any conflict between the terms of this agreement and the prime contract, the prime contract shall govern.

The issue here is whether the subcontract includes the payment relief provisions of the prime contract. Generally, where the parties by agreement import terms of some other document (such as the prime contract) as part of their agreement (the subcontract), those terms must be imported in their entirety, subject to the caveat that if any of the imported terms in any way conflict with the expressly agreed terms, the latter must prevail over what would otherwise be imported.[9] This CCA Short Form Subcontract uniquely gives precedence to the prime contract over the subcontract, whereas the CCA long form subcontract does the opposite.[10]

A subcontractor, who does not have a subcontract that incorporates the prime contract is in a more precarious position. In such a case it may have to argue that the terms of the prime contract are impliedly incorporated into the subcontract. Alternatively, the subcontractor may assert that to deny payment in such circumstances would be an unjust enrichment to the general contractor if payment was received from the owner, although the availability of this remedy in the face of a contract is tenuous. [11]

2. Cases where the subcontract incorporates the terms of the prime contract and where delay, acceleration or other events impacting the subcontractor's performance are encountered because of, among other things:

(a) lack of site availability;
(b) late delivery of owner supplies materials and equipment;
(c) late delivery of drawings;
(d) failure to provide instructions on a timely basis;
(e) late approval of shop drawings;
f() interference by the owner, its representatives or others; and
(g) design error.

In cases where the subcontract imports the terms of the prime contract, the subcontractor can commence an action against the general contractor and the general contractor can claim over against the owner for the amount of the subcontractor's claim. In *Foundation Co. of Canada v. United Grain Growers*,[12] the sheet metal subcontractor claimed against the general contractor for loss of productivity, acceleration cost, deficiency program, overhead for delays and extras. The British Columbia Court of Appeal acknowledged that the subcontractor's claims were passed through the general contractor to the owner. With regard to the quantification of the claim for extra work, the court said, at paragraph 98:

> *It is understandable that [the owner] would not wish to pay more than contract rates for Extra work, or for these items to be treated as if it had a contract with [the subcontractor], but as the judge found at para. 754, there is no contract or subcontract prices for Extra work and if [subcontractor]'s price is reasonable, as the judge also found, then [the contractor] becomes liable for that amount and it can be passed along to [the owner].*

The starting point for a subcontractor's claim to be included in the general contractor's claim against the owner is establishing that there is a subcontract between those two parties and that the general contractor has assumed the same obligations to the subcontractor as the owner has to the general contractor. If that contractual relationship can be proven, the subcontractor's claims can be recovered against the general contractor who is entitled to indemnity from the owner. If there is no subcontract then this basis for a claim does not exist. [13]

A defence that has been raised, although with limited success, against general contractors claiming damages for the losses suffered by subcontractors is "champerty and maintenance".

> *Champerty: A bargain by a stranger with a party to a suit, by which such*

third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered ... Maintenance consists of maintaining, supporting or promoting the litigation of another.

Black's Law Dictionary

In the event that the owner causes a delay or takes some other action that causes damage to the general contractor for which it is liable to its subcontractors, the owner should answer for the damages suffered as a result of the owner's actions. The Federal Court of Appeal allowed the claims of subcontractors as part of the general contractor's claim in the *Thomas Fuller*[14] case and rejected the defence of champerty and maintenance. The general contractor claimed that it was liable under its subcontract to the subcontractor and that liability would entail a certain amount of loss to the general contractor. When the general contractor's claim includes an amount for which it is liable to subcontractors, the defence of champerty and maintenance cannot assist the owner.

The general contractor must only show that it has a liability to the subcontractor, not that the liability has been paid or that judgment has been granted.[15] Once that is established a general contractor may include a subcontractor's claim in its claim against the owner.

3. Cases where (a) the subcontractor has been misled during the bidding process by misrepresentations of the owner or failure of the owner to adequately or properly disclose the actual conditions in the tender documents, or (b) there exists no subcontract incorporating the terms of the prime contract.

A subcontractor may claim against the owner directly where the owner has made negligent misrepresentations in the tender process or documents.[16] The subcontractor to succeed on the basis of negligent misrepresentation, must show that the owner owed a duty of care to the subcontractor regarding the tender process or documents and did not qualify or restrict the use that the subcontractor could make of the information. The owner would have to reasonably foresee that the subcontractor would rely on the representation made and that reliance on the representation was reasonable in all of the circumstances.[17] Whether or not the subcontractor's reliance is reasonable depends, to some extent, on the purpose for which the representations were made. Generally, if the owner issues tender documents to a subcontractor directly, or to a general contractor knowing they will be passed on to a subcontractor, without qualification or limitation on the use that may be made of the information in them, and the subcontractor submits a tender on the basis of information that is misrepresented in those tender documents, the subcontractor can claim directly against the owner for the losses it suffers in reliance thereon.[18]

Should it be found that the obligations of the owner to the general contractor for such things as site availability, timeliness of drawings, adequate design and the like are not incorporated into the subcontract, the question then arises whether a subcontractor can pursue a claim directly against the owner for negligence in failing to provide these items. These claims may be different from negligent misrepresentation cases unless it can be said that the owner has implicitly represented their timely availability to the subcontractor. That is because the contract documents may be silent on the matter and there was no representation made by the owner that was relied on by the subcontractor. A further class of such cases may arise where the owner's actions cause the loss, but do not relate to anything represented by the contract documents. Interference may be one example.

Recovery against an owner should be possible if the owner was negligent where (a) the owner contemplated that a subcontractor would be used, and (b) there are no policy reasons to limit the owner's duty to subcontractors as a class or to limit the damages arising from the breach of duty.[19] The negligent acts must also be sufficiently proximate to the damage to ground liability.[20] The Ontario Court of Appeal has recently found a subcontractor to be liable to an owner on the basis of negligence for faulty workmanship while performing welding repairs to a furnace.[21] While cases the other way round are rare, the same principle should apply, although considerations limiting recovery for economic loss need to be considered. [22, 23]

The Supreme Court of Canada has held that there is sufficient proximity to establish a duty between an engineer employed by an owner and a general contractor to establish a claim in negligence in a construction matrix.[23] It therefore seems logical that an owner should owe a duty to a subcontractor in a construction contract setting. This is particularly so where the contract documents expressly contemplate the use of subcontractors, and may even require the owner's approval to any subcontractor nominated for selection.

There may, however, be policy reasons to limit the owner's duty to the subcontractor where the subcontractor seeks damages of the kind that the general contractor is precluded from recovering because of a contractual limitation. It appears unjust to make an owner liable to a subcontractor for damages of the type that it has expressly bargained to exclude in its contract with the general contractor. This would be particularly so where the exclusionary term of the prime contract was also incorporated by reference into the subcontract.

Conclusion

Depending on how a subcontractor suffers a loss, a subcontractor has at its disposal numerous methods for claiming losses from an owner. Those claims may arise through a claim against the general contractor, who is in turn indemnified by the owner, or, in certain circumstances a claim directly against the owner, as a result of the owner's negligence.

References

1 *Ron Engineering & Construction (Eastern) Ltd.* (1981), 119 D.L.R. (3d) 267 (S.C.C.)

2 See, eg., R. v. *Canamerican Auto Lease & Rental Ltd.* (1987), 37 D.L.R. (4th) 591 (F.C.A.); *Zutphen Bros. Const. Ltd. v. Nova Scotia* (1993), 12 C.L.R. (2d) 111 (N.S.S.C.)

3 *Chinook Aggregates Ltd. v. District of Abbottsford,* [1990] 1 W.W.R. 624 (B.C,C.A.); *Kencor Holdings Ltd. v. Saskatchewan,* [1991] 6 W.W.R. 717 (Q.B.); *Sound Contracting Ltd.v. Nanaimo (City),* unreported, B.C.S.C., Down J., July 10, 1997

4 As suggested in the *Zutphen Bros., supra,* and other decisions. Many of these cases are considered in David R. Percy, Claims Arising From Tenders, Proceedings of the Canadian Institute Construction Law Super Conference, Vancouver, British Columbia, April 1996

5 *Ken Toby Ltd. v. British Columbia Buildings Corp.,* [1997] B.C.J. No. 1057 (S.C.)

6 *Twin City Mechanical, a division of Babcon of Waterloo Ltd. v. Bradsil (1967) Ltd.* (1996) 31 C.L.R. (2d) 210 (Ont.Gen.Div.); a Notice of Appeal has been filed in this action

7 These facts arose in *Bate Equipment Ltd. v. Ellis-Don Ltd.* (1993), 2 C.L.R. (2d) 157 (Alta.Q.B.); Aff'd (1996), 157 A.R. 274 (C.A.). The argument of inducing breach of contract was not raised in the decision and the subcontractor's action was unsuccessful.

8 As in the *Bate Equipment Ltd.* decision, *supra,* and *Scott Steel (Ottawa) Ltd. v. R.J. Nicol Construction* (1975) Ltd. (1994), 15 C.L.R. (2d) 10 (Ont.Div.Ct.)

9 *Modern Wales Building Ltd. v. Limmer & Trinadad Co. Ltd.,* [1975] 1 W.L.R. 1281 (C.A.); *Ryan v. Village of Carleton Place* (1900), 31 O.R. 639 (appeal of referee); *Central Reinforcing Steel Service Ltd. v. Pigott Project Management Ltd.* (1992) 3 C.L.R. (2d) 124 (Alta. C.A.)

10 Note the inconsistency between the CCA short form and the CCA L-1 (1995) Stipulated Price Subcontract Long Form, which, in Article 1 Work to be Performed, provides that in the event there is a conflict between the Subcontract and the Prime Contract, the Subcontract will prevail.

11 In *Vanguard Distributors Ltd. v. Balaclava Enterprises Ltd.,* [1994] B.C.J. No. 1972 (S.C.) the subcontractor succeeded directly against an owner on the basis of unjust enrichment

12 *Foundation Co. of Canada Ltd. v. United Grain Growers Ltd.,* [1997] B.C.J. No. 969 (C.A.)

13 *Handy Andy Construction Ltd. v. Woodcrest Cabinet Ltd.* (1986), 48 Alta.L.R. (2d) 118 (Q.B.); *Custom Iron & Machinery Ltd. v. Calorific Construction Ltd.* (1990), 39 C.L.R. 276 (Ont. Dist. Ct.); *M.J. Peddlesden Ltd. v. Liddell Construction Ltd.* (1981), 128 D.L.R. (3d) 360 (B.C.S.C.); *Dave's Plumbing & Heating (1962) Ltd. v. Voth Brother's Construction (1974) Ltd.* (1986), 21 C.L.R. 276 (B.C.S.C.); *Fred Welsh Ltd. v. B.G.M. Construction Ltd.,* [1996] 10 W.W.R. 400 (B.C.S.C.); *Moncton Plumbing & Supply Co. Ltd. v. Brunswick Construction Ltd.* (1985), 13 C.L.R. 52 (N.B.C.A.); see also *Ron Brown Ltd. v. Johanson,* [1990] B.C.J. No. 1923 (B.C.S.C.); *Naylor Group Incorporated v. Ellis-Don Construction Ltd.* (1996), 31 C.L.R. (2d) 195 (Ont. Gen. Div.); *Scott Steel (Ottawa) Ltd. v. R.J. Nicol Construction* (1975) Ltd. (1993), 15 C.L.R. (2d) 10 (Ont. Gen. Div., Div. Ct.); and *Vipond Automatic Sprinkler Co. v. E.S. Fox Ltd.* (1996), 27 C.L.R. (2d) 311 (Ont. Gen. Div.) which concluded the contrary and the commentary of Howard M. Wise and David I. Bristow, Q.C., "Damages Arising from the Bidding Process", Calculating Construction Contract Damages (Insight Press, Mississauga, 1990)

14 *Thomas Fuller Construction Co. (1958) v. Canada* (1992), 5 C.L.R. (2d) 94 (Fed. Ct. C.A.)

15 *Trident Holdings Ltd. v. Danand Investments Ltd.* (1988), 64 O.R. 54 (Ont. C.A.)

Case Comment

by *Jonathan Speigel*, Speigel Nichols Fox, Brampton, Ontario

I have learned that there are two truisms in anticipating the result of the court battle:

- Where the facts are such that a rancid odour emanates from one side, that side will almost invariably lose. The trial judge will push, fold and extend the law to fit the facts.
- If the trial judge's findings of fact are strong enough, there is some evidence to support those facts, and the odour still lingers, the appellate courts will be loath to overturn the decision of the trial judge.

In *Twin City v. Bradsil* the trial judge was outraged by the conduct of the contractor. He was even more outraged by Her Majesty the Queen in right of Ontario, the owner. The owner knew about the contractor's poor conduct. Instead of interceding to force the contractor to deal fairly with the plaintiff subcontractor, the owner allowed him to run roughshod over the subcontractor and, even worse, attempted to protect its own backside with an indemnity from the contractor.

The trial judge felt that he could not hold the owner liable in contract, because he could not conceive that there could be a contract between the owner and the subcontractor (actual conception was left to the trial judge in *Ken Toby* — see below). However, he decided that he could hold the owner liable in tort. He concluded that there was a duty of care owned by the owner to the subcontractor to ensure that the general contractor abided by the terms of the bid depository and by the terms of ultimate general contract, Contract B.

In *Ken Toby Ltd. V. British Columbia Building Corporation*, the trial judge was outraged that the owner set the ground rules and then, when it appeared that it would be required to pay more money under those rules, breached them. He held, like the trial judge in *Twin City*, that the owner was liable in tort. In addition, he held that the owner was also liable in contract.

A contract was not readily available, so the trial judge invented one — just as Mr. Justice Estey did in *Ron Engineering*. The trial judge analysed the facts as follows:

- When the owner published an invitation to bid and stipulated the use of the Bids Depository, the owner agreed to be bound by the Depository Rules and agreed to act in good faith.
- When the subcontractor submitted its bid, it agreed to be bound by the Depository Rules.
- As soon as the subcontractor submitted its bid, there was a contract between the owner and the subcontractor whereby they each agreed to be bound by the Depository Rules and the owner agreed to act in good faith.

The fact that the owner would have been astonished to learn that it was entering into any such contract was a mere annoyance that could be disregarded.

These cases apply to a bid depository system. They can be easily extended to a non-bid depository situation — as long as the smell factor is present.

Are the principles outlined in these cases sound law? It almost does not matter. With the advent of *Ron Engineering* and the use of what I refer to as the "weasel clause" (i.e. the owner need not accept the low or any tender), the pendulum had swung full scale to the owner. In any tender situation, the general contractor was bound to perfection, the subcontractor was bound to perfection, and the owner was bound to nothing. The pendulum is now swinging back and an owner, who acts in a particularly greedy manner, swings with it.

16 *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.)

17 *Hercules Managements Ltd. Ernst & Young* (1997), 146 D.L.R. (4th) 577 (S.C.C.)

18 *Mawson Gage Associates v. Her Majesty the Queen* (1987), 13 F.T.R. 188 (Fed Tr. Div.)

19 *Mawson Gage Associates v. Her Majesty the Queen, supra*, see also *Turf Masters Landscaping Ltd.v. T.A.G. Developments Ltd.* (1994), 17 C.L.R. (2d) 5 (N.S.S.C.); (1995), 24 C.L.R. (2d) 9 (N.S.C.A.); appeal dismissed with costs March 21, 1996, S.C.C. Bulletin, 1996, page 440

20 *D'Amato v. Badger* [1996] 8 W.W.R. 390 (S.C.C.)

21 *Qit Fer Et Titane Inc. v. Upper Lakes Shipping Ltd.* (1994) 21 C.L.R. (2d) 122 (Ont. C.A.)

22 *Winnipeg Condominium Corp. v. Bird Construction Co.* (1995), 18 C.L.R. (2d) 1 (S.C.C.)

23 *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, [1993] 8 W.W.R. 129 (S.C.C.)

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