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READ AND UNDERSTAND THE CONTRACT

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It is open to the parties to a contract to attempt to reduce their agreement to writing in order to establish with specificity and beyond doubt just what the terms of the contract are. Each party to an agreement is entitled to performance of the contract according to its terms. Importantly, in reducing the agreement to writing, the parties are free to distribute risk as they see fit, even if such distribution is unfair or contrary to custom or practice in the industry.

Generally speaking, in reducing a contract to writing, it will be presumed that the parties read, considered and understood the terms of the contract. With respect to the construction industry specifically, that presumption will be strengthened as the courts will assume that the parties are sophisticated business entities with sufficient knowledge and business acumen to understand the contract they have agreed to.

Ordinarily the usual rule that the words in a written contract are to be given their plain and literal meaning applies in circumstances involving onerous clauses. Otherwise the words of a contract would mean nothing when it came to interpretation time. The courts have gone so far as to say that where a party signs a document which it knows affects its legal rights, that party is bound by the document in the absence of fraud or misrepresentation, even though the party may not have read or understood the document. Further, in the usual commercial situation, there is no need for a party presenting a document to bring an onerous clause to the attention of the signing party or advise the other party to read the document. The court will assume that the party signing the document intends to be bound by all terms of the contract.

The courts have held that any person who fails to exercise reasonable care in signing a contract is generally precluded from denying that an agreement was made based on the terms set out in the contract. Accordingly, a person receiving a document requiring execution should, in the ordinary course of business, approach the document with the sense that it was sent for a purpose and has some function (i.e. that person should read and understand the entire contract in the context of the agreement being entered into).

Two recent decisions from the British Columbia Court of Appeal demonstrate the importance of reading and understanding the contract. These cases show that the courts will not relieve a contractor from a bad or harsh bargain. Rather, the court will generally enforce the terms of the contract agreed to between sophisticated business entities engaged in the construction industry, no matter how unfair the deal actually is.

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In *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*,[2] the request for proposals contained an exclusion clause which provided:

> Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim.

The bidder submitted its bid with knowledge of this exclusion clause. Unbeknownst to the bidder, a separate bidder submitted a materially non-compliant bid which the Ministry of Transportation accepted with full knowledge of the non-compliance. In fact, the court found that the Ministry of Transportation was complicit in trying to cover up the material non-compliance and accept the bid.

Despite the Ministry's egregious behavior, the Court of Appeal found that the exclusion clause was "clear and unambiguous and effectively bar[red] the [contactor's] claim". The Court of Appeal wrote:

> … In my opinion, however, the answer lies not in judicial intervention in commercial dealings like this but in the industry's response to all-encompassing exclusion clauses. If the major contractors refuse to bid on highway jobs because of the damage to the tendering process, the Ministry's approach may change. Or, the industry may be prepared to accept that the Ministry wants to avoid suits for contract A violations, and the contractors will continue to bid in the hope that the Ministry acts in good faith.

While the Court of Appeal's decision was narrowly overturned by the Supreme Court of Canada, the message from the Court of Appeal was that the courts in British Columbia will not help a contractor or supplier in the face of a harsh contractual term.

This message was confirmed by the Court of Appeal in In *Greater Vancouver Water District v. North American Pipe & Steel Ltd.*,[3] wherein the supply contract contained the following warranty provision:

> The [supplier] warrants ... that the Goods ... will conform to all applicable Specifications ... and, unless otherwise specified, will be fit for the purpose for which they are to be used. ...
>
> The [supplier] warrants and guarantees that the Goods are free from all defects arising at any time from faulty design in any part of the Goods.

While the pipe delivered by the supplier met the contractual specifications, the pipe's design, which was provided to the supplier by the owner, gave rise to defects in the pipe.

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[2] *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2007 BCCA 592

[3] *Greater Vancouver Water District v. North American Pipe & Steel Ltd.*, 2012 BCCA 337

The Court of Appeal found that the supplier warranted that the pipe it delivered would meet the owner's specifications and, quite separately, would be free of defects arising from faulty design. The Court of Appeal viewed these provisions as separate contractual obligations, despite any practical conflicts. The Court of Appeal held that as the pipes contained defects resulting from the owner supplied design, the supplier was liable for the damages caused by those defects. It did not matter whose design gave rise to the defects as there was no qualification in the warranty clause.

The Court of Appeal concluded:

> Clauses such as 4.4.4 distribute risk. Sometime they appear to do so unfairly, but that is a matter for the marketplace, not for the courts. There is a danger attached to such clauses. Contractors may refuse to bid or, if they do so, may build in costly contingencies. Those who do not protect themselves from unknown potential risk may pay dearly. Owners are unlikely to benefit from circumstances where suppliers and contractors are faced with the prospect of potentially disastrous consequences. Parties to construction or supply contracts may find it in their best interests to address more practically the assumption of design risk. To fail do to so merely creates the potential for protracted and costly litigation.

The moral of these stories is that the courts cannot be relied upon to extricate a party to a construction or supply contract from unambiguous and onerous contractual terms. It will be presumed that those involved in the construction industry are sufficiently knowledgeable and experienced to assume the contractual risk they have agreed to and perform the contract, no matter how unfair the bargain turns out to be. And, it will be up to contractors and suppliers faced with onerous clauses to respond as they see fit because "[t]hose who do not protect themselves from unknown potential risk may pay dearly".