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Thomas Heintzman specializes in the field of alternative dispute resolution. He has acted as counsel in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia and New Brunswick and has made numerous appearances before the Supreme Court of Canada.

Mr. Heintzman practised with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, broadcasting and telecommunications, construction and environmental law.

Thomas Heintzman is the author of ***Heintzman & Goldsmith on Canadian Building Contracts**,* 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Heintzman & Goldsmith on Canadian Building Contracts has been cited in over 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering.

Which Term Prevails In A Building Contract: The Specifications, Or A Warranty Of Fitness For Purpose?

A building contract usually includes a term requiring that the work or materials supplied adhere to the specifications. The contract may also contain implied or express warranties that the work will be fit for the intended purposes of the building project and free of defects. What happens when those terms result in inconsistent results? What happens when, by adhering to the specifications, the work is not fit for the purposes intended or contains a defect?

In two recent decisions, the courts have held the contractor was liable to the owner when the contractor followed the owner's specifications and, in doing so, produced work which was not fit for the intended purpose. Is this a fair and proper result? Does this fairly account for the owner's responsibility for the specifications? Should there be a sharing of the blame if the specifications result in a defective work?

Double Dutch Construction Inc. v. Colwell

Mr. and Mrs. Colwell wanted to build a new home. Their draftsman prepared construction plans (the "IFC plans") based on concrete construction. The Colwells hired Double Dutch as the contractor. Double Dutch recommended the use of wood construction, instead of concrete, and the Colwells agreed. The Colwells and Double Dutch signed a bare bones contract which the Colwells said resulted in Double Dutch being the general contractor. Double Dutch said that it was not hired as the general contractor, but only to construct certain specific parts of the building.

During construction, the relationship between the Colwells and Double Dutch broke down, due to disputes over responsibility for work done by other contractors and to difficulties arising from the use of wood instead of concrete. The final inspection by the building inspector found numerous violations of the National Building Code. In addition, the Colwells pointed out many other deficiencies.

Double Dutch said that the deficiencies were due to the use of the IFC plans prepared by the Colwells's draftsman and that the Colwells were responsible for those deficiencies. The Colwells said that Double Dutch initiated the changes in the construction method and was obliged to raise any concerns if the changed construction methods raised any issues about using the IFC plans. Based on the wording of the contract and the evidence about the pre-contract negotiations, the court found that Double Dutch was the general contractor.

The contract contained little in the way of specifications but did state that the building was to conform to the National Building Code. The court held that "In the absence of any express term in the contract which specifies the manner in which work is to be done, there is an implied warranty in all contracts for work and labour that the work will be carried out in a good and workmanlike manner...."

Furthermore, the court held that Double Dutch had a duty to advise the owners of any inherent dangers in the design proposed by the owner to be used for the building. The court quoted from the judgment of the Supreme Court of Canada in ***Nowlan v. Brunswick Construction Ltd.***, [1975] 2 S.C.R. 523 (SCC) as follows:

> "…[A] contractor of this experience should have recognized the defects in the plans which were so obvious to the architect…. and, knowing of the reliance which was being placed upon it, I think the appellant was under a duty to warn the respondents of the danger

inherent in executing the architect's plans, having particular regard to the absence therein of any adequate provision for ventilation…" (emphasis added)

The Brunswick court quoted the following words from the decision of the Supreme Court of Canada in ***Steel Co. of Canada v. Willand Management Ltd.,*** [1966] 1 S.C.R. 746, which in turn quoted from Hudson's Building and Engineering Contracts, 10th ed.:

"….a contractor will sometimes expressly undertake to carry out work which will perform a certain duty or function, in conformity with plans and specifications, and it turns out that the works constructed in accordance with the plans and specifications will not perform that duty or function. It would appear that generally the express obligation to construct a work capable of carrying out the duty in question overrides the obligation to comply with the plans and specifications and the contractor will be liable for the failure of the work notwithstanding that it is carried out in accordance with the plans and specifications. Nor will he be entitled to extra payment for amending the work so that it will perform the stipulated duty. (emphasis added)

Based upon these principles, the trial judge found that the contract between the parties contained terms that obliged Double Dutch to construct the home in accordance with the ICF plans and the National Building Code and that the work was to be completed in a good and workmanlike manner. Even if the plans were part of the contract, the duty to warn and the duty to build in a good and workmanlike manner over-rode the plans and required Double Dutch to build to that standard, and compensate the Colwells for not doing so.

Greater Vancouver Water District v. North American Pipe & Steel Ltd.

North American contracted to supply the Water District with water pipes. The specifications in the contract stated the type of coating for the pipes, being an Enamel Coal Tar Coating in accordance with a particular industry standard. The contract also contained the following warranties:

The Supply Contractor 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 Supply Contractor warrants and guarantees that the Goods are free from all defects arising at any time from faulty design in any part of the Goods. (emphasis added)

The pipe was manufactured according to the Water Board's specifications, but the pipe contained defects due to the application of a seal coat over an outer-wrapping as required by the Water Board's specifications.

The trial judge dismissed the Water Board's claim, and granted North American judgment on its counterclaim. She concluded that the conflict between the specifications and the warranties should be resolved as follows:

> "The general rule is that defects caused by an owner's specification are not the responsibility of the contractor, unless the contractor expressly guarantees that the construction would be fit for a specific purpose, or a warranty can be implied by the owner's actual reliance on the contractor's skill and judgment."

The trial Judge concluded that the contractor had not expressly guaranteed that the coating would be fit for a particular purpose and that the Water Board had relied upon its own expertise for the coating and not that of North American.

The British Columbia Court of Appeal allowed the appeal, basically for two reasons.

First, it held that North American's obligation to supply pipe in accordance with the specifications was not inconsistent with its warranty and guarantee that pipe so supplied would be free of defects arising from faulty design. The Court said: "These are separate contractual obligations. The fact that a conflict may arise in practice does not render them any the less so. The warranty and guarantee provisions reflect a distribution of risk."

Second, the Court of Appeal found that the warranty and guarantee were unambiguous:

> "Clause 4.4.4 is clear and unambiguous. Reference to authorities that deal with difficulties construing contractual provisions that may contain an implied warranty are of no assistance in this case. North American guaranteed that the pipes would not have defects arising from faulty design. The trial judge held that the pipes did have defects arising from faulty design. In my view, on the plain language of the contract, North American is liable for any damages that resulted from those defects. It does not matter whose design gave rise to the defects. There is no such qualification in clause 4.4.4". (emphasis added)

In these circumstances, the Court of Appeal concluded that the judgment of the Supreme Court of Canada in ***Steel Co. of Canada*** was a "complete answer." In the view of the Court of Appeal, the warranties and guarantees in the two cases were practically identical. The Court of Appeal quoted this passage from the Supreme Court's judgment in *Steel Co. of Canada*:

> "... [W]hatever the reason may have been, it appears to me that any risk involved in the undertaking was accepted by those who were prepared to tender in accordance with specifications that included the requirement of providing a written guarantee that all material employed in the work as first class and without defect, and that all work... specified would remain weather tight for a period of five years." (emphasis added) ...

The Court of Appeal graphically stated the dilemma for the contractor:

> " 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 Court further underlined the contractor's dilemma by pointing out that North American's witness had testified that if it had submitted a bid with another coating specification, its bid would have been non-compliant, so instead it tendered as required by the specifications and then, having been awarded the contract, it proposed changes to the coating specifications which the Water Board refused to accept!

Discussion

These two decisions show how the express or implied warranties or guarantees in a building contract create a series of Catch-22s for the contractor.

First, as ***Double Dutch*** shows*,* if the contractor supplies work or materials which meet the specification and even if the contract contains no express warranties, the contractor may still be in breach of the implied warranties of fitness for purpose or good workmanship. That result may not be obvious to the contractor. The contractor may believe that satisfying the specification is sufficient since the owner set the specification and must surely know what is fit for use or good workmanship. But if the contractor wants to be certain of that result, then it should insert a provision in the contract excluding all such warranties, whether express or implied, at least in respect of work or materials that meet the specifications.

Second, ***Double Dutch*** also shows that the contractor may have a duty to warn the owner if it is or ought to be aware that a specification is unsuitable. And if the contractor suggests an alternative to the specifications proposed by the owner, then the contractor is even more likely to have a duty to warn about the unsuitability of the alternative, besides running the risk that the contractor's bid will thereby be rejected as non-compliant. Again, if the contractor wishes to exclude that duty to warn, it should insert a term in the contract excluding that duty, at least in respect of work or materials adhering to the agreed upon specifications.

Third, ***Greater Vancouver Water District*** shows that, if warranties of fitness for purpose and absence of defects are express, then the contractor takes on the entire risk of those warranties even if the contractor's work or materials comply with the owner's specifications. If the contractor is to avoid that risk, then these express warranties should be excluded, again at least so far as the work or materials satisfy the specifications.

Contractors could argue that this result is unfair, and that the owner should be assigned at least some responsibility for having set a specification that authorized the delivery of what turned out to be defective work or materials. If the ***Negligence Act*** applied, then the court could

apportion responsibility between the parties and allow only partial recovery by the owner against the contractor based on the degree of fault. But so far, the courts have been unwilling to adopt that approach and have placed the entire cost of remedying the defective work or materials on the contractor, even if specified by the owner, if the contractor gave a warranty of fitness for use or a warranty against defects.

See Heintzman and Goldsmith, *Canadian Building Contracts, 4th ed.* Chapter 5, part 2(b).

***Double Dutch Construction Inc. v. Colwell*, 2012 NBQB 317**
***Greater Vancouver Water District v. North American Pipe & Steel Ltd*., 2012 BCCA 337**

Building Contracts - Specifications - Implied Duty of Fitness for Purpose and Good Workmanship - Contractor's Duty to Warn of Unfit Design

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