CONSTRUCTION LAW LETTER

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GUEST ARTICLE

John R. Singleton QC
Partner
Singleton Urquhart LLP, Vancouver

THE LAW OF TENDERS: FAIR TODAY, GONE TOMORROW

The law of tendering in the nation's construction industry was turned on its ear with the 1981 Supreme Court of Canada decision, *R. v. Ron Engineering and Construction (Eastern) Ltd.* It gave life to the now infamous Contract A/Contract B analysis (since widely adopted) for which the court's underlying rationale was the need to protect the integrity of the bidding system. Each of the parties to a bid contract, the party inviting tenders and the party responding, would be bound by the terms and conditions of Contract A, the bid contract, as expressed in the Invitation to Tender or as implied as a matter of law.

Following the direction in *Ron Engineering*, a tender contract's express terms and conditions (there may be others, depending on the wording of the Instructions to Bidders) typically are

- irrevocability of the tender for a stipulated period,
- the requirement to provide the information called for in in the tender form,
- the use of the stipulated form, and
- delivery of the bid on time and at the location stipulated.

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CONSTRUCTION LAW LETTER

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It is also common to see a "privilege clause," usually giving the party inviting tenders the discretion to accept any tender or to reject all tenders. This discretion is often coupled with another that gives the project sponsor the ability to waive irregularities in a submitted bid. In addition to these express terms, there are overriding implied terms and conditions in a tender call, such as the need for fairness, transparency assuring a "level playing field" for all parties, and the absence of bias or any undisclosed preferences.

Binding parties in a tender process to the terms and conditions of Contract A—both express and implied—has undoubtedly instilled integrity in the bidding system more often than not. Nonetheless, as the obligations of the parties—particularly, those inviting tenders—has become subjected to more judicial scrutiny, the trend in the industry has been to modify tender conditions in a manner more favourable for project sponsors, not for those who submit bids. This process has now reached a point where one might argue that the "fairness" principle instilled into the law of tenders by the *Ron Engineering* legacy is being whittled away by allowing project sponsors an ever-widening discretion to accept or reject bids—compliant with tender conditions or not—giving them an absolute protection against any claims from disgruntled bidders.

Have the obligations of fairness and transparency morphed into just one obligation—to act in good faith? Support for an affirmative answer to this question might be found in the evolution of three important provisions—the privilege clause, the discretion clause, and limitation or exclusion of liability clauses—since the *Ron Engineering* decision.

In the case of the first provision, it is now not uncommon to see a privilege clause encompassing not only the right to accept or reject any tender (or to reject all tenders) but also an ability to accept a non-compliant tender. The 1999 Supreme Court of Canada decision, *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, made it clear that a project sponsor was not free to accept a non-compliant tender in the context of the standard privilege clause. In that case, the court, however, also made it clear that, if the tender conditions permitted the acceptance of a non-compliant tender, the parties would be bound by that express term and condition. Subsequent to

that decision, privilege clauses have commonly included the ability of a project sponsor to act in a manner that courts had previously determined to be unfair and outside the authority normally given to a project sponsor by Contract A.

Similarly, the discretion clause has also evolved to give more latitude to project sponsors. In its original iterations, the clause simply gave a project sponsor the ability to waive "irregularities" in a submitted bid. But the same clause now includes the ability to waive—and therefore correct—a bid that contains a material error or omission. In effect, the discretion clause often gives the owner the ability to "cure," and then accept, what otherwise would be a non-compliant bid.

Finally, there is the limitation of action or no-action clause. Thirty-one years ago, at the time of *Ron Engineering*, clauses of this nature were rarely found in tender conditions—the thought being that it would reduce the market response available to project sponsors. If the project sponsors could act without fear of consequence, contrary to the express and implied terms of the invitation to tender (particularly those relating to non-compliant bids), then a large portion of the market would be disinclined to bid to the project. But that fear has not prevailed, and no-action or limitation clauses are now commonly found in tender documents. They stipulate that a bidder will have no, or a limited, cause of action against the project sponsor even if the latter's actions are at variance to the terms and conditions of the tender documents. Indeed, some of these clauses are drafted so broadly as to preclude any action against a project sponsor even if they act in an unfair manner and in breach of their obligations under Contract A.

It appears that, in combination, the current iterations of the privilege, discretion, and no-action clauses contrive to lessen, if not negate, the protections afforded to the bidding industry by the *Ron Engineering* decision and the cases that have followed it. The express terms and conditions of the tender documents now include these broad privilege, discretion, and no-action clauses. One might expect that, as express terms of Contract A, they will be enforced by the judicial system under the rubric of freedom of contract. The only exception to this might be where the rights afforded to project sponsors are not perceived to be exercised in good faith—a significantly less onerous standard than the Supreme Court of Canada undoubtedly had in mind at the time *Ron Engineering* was decided.

It still remains to be seen how the courts will eventually treat such broad discretionary powers and limitation clauses. But, if the decision of the Supreme Court of Canada in a 2010 case, *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, is any indication, these express tender terms will be enforced if they are clearly worded.

CASE SUMMARY

Markus Rotterdam
Legal Researcher
Glaholt LLP

OWNER HAS RIGHT BUT NO DUTY TO INVESTIGATE BID FOR NON-COMPLIANCE

Rankin Construction Inc. v. Ontario

Background

The Ontario Ministry of Transportation ("MTO") called for tenders on a project to widen a stretch of

Highway 406 in Niagara Region. A number of contractors, including Rankin Construction Inc., were qualified to bid on the project.

The tender documents clearly set out that the use of domestic steel was important to MTO and would directly affect the bid price. To that effect, the tender contained a document entitled "Price Preference for Canadian Content" that set forth a formula for providing a competitive advantage to bidders, based on the proportion of Canadian-produced, or domestic, steel, which they proposed to use on the project.

Each bidder had to include in its tender a "Declared Value of Imported Steel" in respect of various listed steel tender items. The Declared Value was subtracted from the Total Tender price and a 10 per cent discount was applied to the difference (representing the total tender price excluding non-domestic steel products) to arrive at an Adjusted Total Tender for each bidder. The Adjusted Total Tenders were used to determine the low bidder.

Rankin submitted what was, on its face, the low bid with respect to both its Total Tender and its Adjusted Total Tender. The Adjusted Total Tender was based on a Declared Value of $170,000. This figure was comprised of one component that Rankin proposed to use and that it had determined was not made in Canada. However, the bid did not include the cost of H-Piles in its Declared Value.

H-Piles were specified in the tender package to be driven into the ground by a pile driver in order to provide subsurface stability for bridge structures forming part of the project. The H-Pile supplier's original quote to Rankin did not specify whether the H-Piles were domestic or imported, and when a representative of Rankin enquired of it by telephone, the supplier advised that the H-Piles proposed to be supplied by it would be "domestic." This led Rankin not to include the cost of the H-Piles, being approximately $500,000, in the Declared Value on its tender. It was later revealed that the H-Piles were manufactured in the United States.

MTO awarded the project to the second lowest bidder on the basis that Rankin failed to properly declare the value of the imported steel it proposed to use on the project. Again, this failure was not apparent on the face of the bid. It was discovered after MTO investigated the details of the bid components upon receiving letters from another bidder and the Ontario Road Builders' Association advising of possible discrepancies in Rankin's declaration of Canadian steel content.

Evidence showed that, with the exception of one instance in the early 1990s, the MTO had never previously carried out a review of a bidder's imported steel declaration and its policy was not to ask for supporting documentation or other proof behind the declarations of bidders. In this case, however, MTO did just that.

Mistake in Tender

Rankin argued that since its tender, on its face, was fully compliant with the tender documents, notwithstanding the mistake that it made in completion of the Declaration Value, MTO was not entitled to look behind the face of the tender and to carry out an investigation with respect to the accuracy of its Declaration Value and, in doing so, breached its obligations under Contract A.

The situation was the reverse of that in *Double N Earthmovers v. Edmonton (City)* in which the Supreme Court of Canada dealt with the question of whether an owner had a duty to look behind a tender bid and carry out an investigation on whether the bid complied with the tender documents. The majority in *Double N* declined to impose such a duty on owners, holding that generally "there is much merit to the contention that an owner should be entitled to take a submitted bid at face value."

The court in *Rankin* held that the fact that the majority in *Double N* held that an owner had no duty

to investigate allegations of non-compliance by a rival bidder did not lead to the conclusion that an owner did not have the right to do so. Justice Broad held that

> *although an owner may be entitled to take a submitted bid at face value, in my view an entitlement to do so may be something quite different from an obligation to do so.*

The court concluded on this point by observing that

> *to imply a term prohibiting an owner, such as the MTO in this case, from investigating a suggestion that it would be impossible for a bidder such as Rankin to fulfil a material condition of its bid—in this case to supply domestically manufactured rolled H-Piles, would be dangerous in terms of potentially degrading the integrity of the bidding process, and is not mandated by the case-law, including Double N.*

Material Non-compliance

Having held that MTO had a right to investigate, the court had to determine whether Rankin's non-compliance with the tender requirements amounted to material non-compliance with the tender documents so that no Contract A arose and the bid was incapable of acceptance.

Rankin argued that, in the circumstances, had its declaration of imported steel even been accurate, thereby increasing its Adjusted Total Tender by approximately $50,000 (being 10 per cent of the understatement of imported steel in the declaration), it would still have had the lowest Adjusted Total Tender and would still have been the low bidder. From that standpoint, Rankin argued that the inaccuracy in its declaration did not affect the outcome and therefore was not material.

The court refused to accept that argument, holding that materiality was to be determined objectively, having regard to the impact of the defect on the tendering process and the principles and policy goals underlying the process. Justice Broad held that the focus was not on the impact of the defect on the outcome of the particular tender process but on the impact on the process itself, including the reasonable expectations of the parties involved in the process (*e.g.*, rival bidders).

Since the accuracy of the Declared Value of Imported Steel was crucial to the determination of the low bidder, an understatement by a bidder of its Declared Value of Imported Steel would give that bidder an advantage over others in the tender process, and, furthermore, the Price Preference for Canadian Content formed an integral and fundamental element of the tender scheme for the project, non-compliance with the requirement to provide an accurate Declared Value of Imported Steel was held to amount to material non-compliance.

Privilege Clause

The court held that had Rankin's bid even been compliant, the following exclusion clause would have been a complete answer to the claim:

> *The Ministry shall not be liable for any costs, expenses, loss or damage incurred, sustained or suffered by any bidder prior, or subsequent to, or by reason of the acceptance or the non-acceptance by the Ministry of any Tender, or by reason of any delay in the acceptance of a Tender, except as provided in the tender documents.*

The court held that it was evident from these provisions that "acceptance by the Ministry" meant the awarding of Contract B—the construction contract—to the successful bidder and included acceptance of the competing bid by the awarding the contract to it and non-acceptance of Rankin's bid by not awarding the contract to it. Each of these actions by the MTO was therefore encompassed by the exculpatory clause.

Based on the Supreme Court of Canada's analysis in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, the court held that there was nothing unconscionable about the clause since Rankin was a sophisticated contractor and was free to participate, or not participate, in the tender process according to the terms set out in

the tender documents, including the exculpatory clause. Finally, the court found no policy reasons for not enforcing the clause. Therefore, even if MTO had breached its obligations under the tender documents, the court would have dismissed a claim by Rankin on the basis of the privilege clause.

Ontario Superior Court of Justice
Broad, J.
January 7, 2013

CASE SUMMARY

Michael Valo
Glaholt LLP

LITIGATION FOLLOWING ARBITRATION ACCEPTABLE WHERE CAUSE OF ACTION IS DIFFERENT

Hnatiuk v. Assured Developments Ltd.

This case is an appeal from the decision of an Alberta trial judge who struck out the lawsuit on the basis of *res judicata* because the parties had an arbitral decision rendered in a separate action related to the same contract.

> ***Res Judicata***. Latin expression meaning "a matter that has been decided." The principle of res judicata means that when a matter has been finally decided by a court it may not be reopened by the parties, other than by an appeal.

The defendant contractor Assured Development Ltd. contracted to build a house for Mr. and Mrs. Hnatiuk. The contract contained an arbitration clause requiring any disputes that may arise between the parties to be arbitrated rather than litigated.

In 2004, the Hnatiuks sued Assured over an alleged deficiency with the fireplace in the home. Assured objected on the basis that the claim had to be arbitrated, and so, among other specific defects, the Hnatiuks applied for arbitration of the fireplace issue.

Following the hearing, the arbitrator found in favour of the Hnatiuks and ordered Assured to pay $30,000 in damages to repair the defects and to pay some of the Hnatiuks' costs.

Two weeks later, the Hnatiuks issued a second claim against Assured, alleging defects different than those that were the subject of the arbitration. After discovering mould in the house, the Hnatiuks retained an expert who found out in the course of his investigation that there were serious gaps in the building envelope. Specifically, there were a number of holes and leaks in the basement and gaps in vapour barriers around windows. As a consequence, moist outside air was entering the premises, causing mould.

The mould claim went through discoveries and was set down for trial. When the trial opened, the trial judge questioned the appropriateness of the trial on the basis of two primary issues:

1. *Res judicata*, as an arbitrator had already rendered a decision in a dispute between the parties; and
2. Forum, as between a trial and arbitration.

In the result, the trial judge heard no evidence on the merits of the claim and instead struck out the suit on the grounds of *res judicata* and the doctrine of abuse of process. The trial judge ordered the Hnatiuks to pay substantial costs to Assured. They appealed the decision.

Res Judicata

The Court of Appeal looked to the specific issues in dispute between the parties in the arbitration and

in the mould claim. The arbitration related to specific issues: a planter, retaining walls, railings, a fireplace, and a kitchen cabinet, among others. The mould claim consisted of issues all relating to allegations of an improperly sealed building envelope.

The Court of Appeal found that the two proceedings were "very different" and that the arbitration had "nothing to do with a lack of air- or water-seal." In reaching this determination, the Court of Appeal reviewed the parties' books of extracts filed in the appeal, the Application for Arbitration, the reply to the Application, and the arbitrator's decision and found that none of the documents from the arbitration had anything to do with building envelope issues.

The Court of Appeal held that

> *Since the arbitration and the present lawsuit are about completely different and unrelated deficiencies, we cannot see how res judicata would apply. Causes of action are specific, not generic. If someone sues over a particular breach of contract and then later the same defendant commits a second but different breach of the same contract, nothing forbids a second suit.*

Thus, the test for *res judicata* is a test of substance: if the facts underlying the cause of action are not substantially the same, the principle does not apply.

Litigation or Arbitration

The second issue addressed by the Court of Appeal was whether the Hnatiuks were wrong to sue where their contract clearly obliged them to arbitrate.

In the instant case, the Hnatiuks brought the mould claim in court rather than arbitration and Assured pleaded in its defence the obligation to arbitrate. Assured also might have brought a motion to stay the proceedings on that basis but, apparently, did not proceed with the motion.

In fact, Assured went along with the litigation in many respects. It defended the action on the merits, counterclaimed, moved for summary judgment, participated in examinations for discovery and examinations on affidavit, and so the case was set down for trial.

The Court of Appeal found that Assured had waited too long to move for a stay, and, by participating in the litigation, it had given up its right to arbitrate.

In the result, the Court of Appeal allowed the appeal on the basis that the issue was not *res judicata* and that there was no misconduct on the part of the Hnatiuks in bringing the mould claim.

Alberta Court of Appeal
Côté, McFadyen, and Martin, JJ. A.
March 29, 2012

SETTLEMENT AGREEMENT MAKES NO REFERENCE TO HST: SHOULD HST BE ADDED?

By Michael Valo

Omega Formwork Inc. v. Pomerleau Inc.

In the course of arbitration over unpaid invoices, Omega Formwork Inc. and Pomerleau Inc. entered into a settlement agreement under which Pomerleau agreed to pay Omega two sums totalling $575,000 in final settlement of their dispute. Omega subsequently brought an application for a court order to require Pomerleau to pay Omega an additional sum of $86,250 representing the Harmonized Sales Tax (HST) payable on the settlement amount.

The settlement negotiations between the parties were conducted through an exchange of letters between their lawyers, and the final settlement document consisted of a letter from Omega's lawyer, which was accepted by Pomerleau and which provided for "settlement as reflected in all exchanges between counsel."

The payment to Omega was to be made in two tranches and, specifically, "[u]pon receipt of

the filed Notice of Discontinuation, [Pomerleau would] forward the Pomerleau cheque payable to Omega in the amount of $300,000." The $300,000 was characterized in the settlement letters as a non-reimbursable "partial payment in settlement of Omega's claim." An additional $275,000 was payable upon a certain event occurring, which did occur, entitling Omega to the full $575,000.

Pomerleau's position was that it had always intended that its liability to Omega under the Settlement Agreement would total $575,000 inclusive of HST. Omega argued that it intended the agreement to be $575,000 plus HST. Both parties acknowledged that the Settlement Agreement made no reference to HST one way or another.

The court found that on its face "the Agreement appears to be a complete statement of the terms of the settlement. The correspondence between counsel up to and including [Pomerleau's] letter of acceptance dated July 28, 2012, always referred to the amounts to settle as [a fixed amount]."

Omega argued, however, that, notwithstanding the plain language of the contract, the court should look to extrinsic evidence to find in its favour. While the Agreement made no reference to taxes, neither did the Agreement state that the settlement amount was "all inclusive." Further, Omega argued that, because the construction contracts between the parties upon which the original amounts were claimed specified that amounts paid were subject to additional payments of HST, the settlement agreement should be interpreted in the same manner.

The court reviewed well-established principles of contract interpretation and noted that

1. Contracts should be interpreted in a way that gives meaning to all terms and avoids an interpretation that would render one or more terms ineffective;
2. It is a "cardinal rule" that parties intend what they have said in an agreement;
3. The factual matrix underlying the negotiation of the contract may be considered but only on the basis of objective evidence, not on the subjective intent of the parties; and
4. An interpretation that results in commercial absurdity should be avoided.

The court also noted that it is a fundamental rule "that if the language of a written contract is clear and unambiguous, then no extrinsic parol evidence may be admitted to alter, vary, or interpret in any way the words used in the writing."

> **Parol Evidence**. Evidence given orally, as opposed to evidence submitted in written form.

The court found that, while a reasonable person would say Pomerleau promised to pay Omega $575,000 in full settlement of the claim, the court was still obligated to consider extrinsic evidence in this case. The court also considered "customary business practice."

There was no dispute that the original contracts for services specified that HST was in addition to any amounts invoiced for the supply of services. Omega also argued that it is standard practice in the construction industry that HST is required in addition to amounts for services. Finally, the history of contractual relations between Omega and Pomerleau was that taxes were specifically described as payable in addition to amounts payable for services.

The court found that the parties' past practice for setting out payment terms in writing for invoicing and for payment stood in contrast to the terms of the settlement agreement because the parties had a custom of specifying in writing when HST was extra. The settlement agreement provided no separate requirement for HST, and no timely demand for HST to be paid was made. As such, the court found that Omega was not entitled to the additional HST amounts.

Nova Scotia Supreme Court

Duncan, J.
August 1, 2012

CASE SUMMARY

Paul Sandori
Revay and Associates Limited
Editor, *Construction Law Letter*

OWNER'S EXPERT SUED AS THIRD PARTY BY DEFENDANT CONTRACTOR AND ENGINEER

CT & Associates Engineering Inc. v. Renneberg Walker Engineering Associates Ltd.

Background

In March 2004, Greg Eitzen hired Fekete Construction Co. Ltd. to build for him a home on his property in Edmonton. CT & Associates Engineering Inc. acted as Fekete's engineering consultant. Four years later, Eitzen notified Fekete of a number of structural defects in the house.

Kingsway General Insurance Company, the insurer of Eitzen's property, hired Renneberg Walker Engineering Associates Ltd. to investigate the defects. Renneberg issued a report in January 2009, which found problems with the building's foundations. Renneberg both managed and carried out the remediation.

CT reviewed Renneberg's report and assured Fekete that the repairs were unnecessary. CT was concerned that it may be held responsible for payment of some of the repair costs even if it disagreed with Renneberg's opinion.

Two lawsuits were commenced thereafter. In the first lawsuit, Kingsway sued Fekete. Then Fekete issued a third-party notice against CT. Then CT issued a fourth-party notice against Renneberg.

In a second action, Eitzen sued Fekete and CT. Then CT issued a third-party notice against Renneberg. Finally, Fekete also issued a third-party notice against Renneberg.

Arguments against Summary Judgment

In April 2011, Renneberg applied for summary judgment to dismiss the third- and fourth-party notices so that it would no longer be a party to the court actions. In December 2011, Madam Justice Browne of the Court of Queen's Bench of Alberta heard the motion in chambers.

> **Summary Judgment** is available to a defendant when it is plain and obvious that the action is bound to fail because there is no genuine issue that requires a trial. In order to initiate the procedure, a motion must be brought before the court. A hearing "**in chambers**" is held in the judge's office, rather than in court.

Fekete and CT opposed Renneberg's application to have their claims against Renneberg dismissed without a trial.

CT argued that Renneberg owed it a duty of care. The Supreme Court of British Columbia in *Burnett v. Took Engineering* held that

> *… where a person provides a professional service, such as that of an engineer, in which it is reasonably foreseeable that a third party may suffer damage as a result of a negligent performance of that service, that professional person may owe a duty of care to the third party.*

CT argued further that, although it had no direct relationship with Renneberg, CT had legitimate expectations that it could rely on the engineering advice given by Renneberg to the Owner when working on the same project that CT had worked on.

In addition, CT contended that Renneberg's opinion was the foundation of the remediation work done at the Eitzen residence, which directly impacted the liability of CT for the work it had originally done for Eitzen; therefore, Renneberg should be a defendant.

Fekete, in its own action, alleged that Renneberg was negligent in carrying out its assessment and recommendations with the result that the repairs undertaken by Eitzen were unnecessary and excessive and that Renneberg has caused Fekete economic loss through negligent performance of a service.

Decision of Chambers Judge

Justice Browne could not find any relationship between CT and Renneberg that would create a duty of care.

The original construction work was based on CT's opinion. Renneberg was hired only after Eitzen notified Fekete of the original structural defects. The same could be said with reference to Fekete's position. Renneberg had no part in causing that harm. Neither would the act of investigating and assessing an existing structural defect be the reasonable cause of the defect being investigated. To conclude otherwise would be putting the cart before the horse, said Justice Brown.

In addition, broad judicial policy consideration in relation to the nature of litigation involving expert witnesses demanded that Renneberg not be added as a party in order to enable the trial judge to make appropriate findings on evidence that would be elicited at trial.

> *It is a troubling suggestion that an expert witness hired by the plaintiff could be added as a third or fourth party by the defendants in the normal course of litigation, thereby preventing the plaintiff from calling that expert witness to establish any negligence or breach of contract that may have occurred between the plaintiff and defendant. The proposal by the defendants [CT and Fekete] would significantly change the course of litigation.*
>
> …
>
> *In the normal course of a trial the plaintiff would call his "expert" witness (in this case Renneberg) who would be challenged by the defendants in cross-examination on expertise, opinion, and the remediation work done. The Trial Judge at the end of the trial would make findings on all of those issues and could well find that Renneberg's opinion was not properly based on facts available or that remediation work was unnecessary or unduly expensive. Those findings will be made by the Trial Judge after hearing the evidence. To add Renneberg as a party strips the plaintiff of his expert and leaves the plaintiff in the unenviable position of having to hire yet another expert.*
>
> *Further, allowing Renneberg to be added as parties would change the nature of litigation involving expert witnesses, potentially creating a duty or legal relationship between opposing experts and allowing them to be added as parties.*

Justice Browne decided that there was no genuine issue for trial, and therefore Renneberg was no longer a party to the actions.

Decision of Court of Appeal

CT appealed the decision of the chambers judge. The decision of the Alberta Court of Appeal in the case of *CT & Associates Engineering Inc. v. Renneberg Walker Engineering Associates Ltd.* was issued on November 15, 2012. The opinion was written by Justice Berger, with Justices McDonald and Bielby concurring in the result.

Justice Berger quoted from the decision of the Supreme Court of Canada in *Cooper v. Hobart*, where the court reaffirmed that a determination of duty of care requires the consideration of two questions:

1. Was the occurred harm the reasonably foreseeable consequence of the defendant's act?
2. Are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?

It is obvious, commented Justice Berger, that CT's allegedly negligent conduct occurred in 2003 as part and parcel of the construction process. The Renneberg report reflected its investigations performed in 2008, which were followed by the remedial steps taken in 2009.

Although CT may feel wronged by the content of the Renneberg report, he continued, any claim CT may have against Renneberg is of no concern in the context of the underlying litigation between Eitzen and CT. Accordingly, the chambers judge had reason to conclude that CT did not have the legal relationship with Renneberg on which to base its claims. No duty of care at law was made out.

Even if Renneberg's recommendations for remediation were incorrect, Renneberg owed no duty to either CT or Fekete. The underlying actions brought by Kingsway and Eitzen contained claims against Fekete, and Fekete and CT, respectively. The thrust of the notices brought by CT were premised on claims of contribution or indemnity from Renneberg on the basis that Renneberg failed to properly execute its duties and that it owed a duty of care to CT.

There is ample case authority, said Justice Berger, that it is not unusual for a court to reject third-party claims that are in fact defences to a plaintiff's primary action (as in *Adams v. Thompson, Berwick, Pratt & Partners* in 1987). The right way for a defendant to have the damages reduced is to prove that the plaintiff failed to mitigate the damage. In this case, it would mean showing that some or all of the repairs performed by Renneberg were unnecessary.

The policy argument also fails, concluded Justice Berger. In his view, the chambers judge correctly decided that, in the context of the underlying litigation, it would be unfair to deprive the plaintiff of a chance to rely on Renneberg to provide expert evidence at trial.

For these reasons, CT's appeal was unanimously dismissed by the Court of Appeal.

Court of Appeal of Alberta

Berger, McDonald, and Bielby, JJ.A.
November 15, 2012

CITATIONS

Adams v. Thompson, Berwick, Pratt & Partners, [1987] B.C.J. No. 1388 (B.C.C.A.).

Burnett v. Took Engineering Inc., [2000] B.C.J. No. 2302 (B.C.S.C.).

Cooper v. Hobart, [2001] S.C.J. No. 76 (S.C.C.).

CT & Associates Engineering Inc. v. Renneberg Walker Engineering Associates Ltd., [2012] A.J. No. 1138 (Alta. C.A.).

Double N Earthmovers Ltd. v. Edmonton (City), [2007] S.C.J. No. 3 (S.C.C.).

Hnatiuk v. Assured Developments Ltd., [2012] A.J. No. 324 (Alta. C.A.).

Kingsway General Insurance Co. v. Fekete Construction Co. Ltd., [2011] A.J. No. 1519 (Alta. Q.B.).

M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] S.C.J. No. 17 (S.C.C.).

Omega Formwork Inc. v. Pomerleau Inc., [2012] N.S.J. No. 423 (N.S.S.C.).

R. v. Ron Engineering, [1981] S.C.J. No. 13 (S.C.C.).

Rankin Construction Inc. v. Ontario, [2013] O.J. No. 112 (Ont. Sup. Ct.).

Tercon Contractors Ltd. v. British Columbia (Transportation and Highways), [2010] S.C.J. No. 4 (S.C.C.).

INVITATION TO OUR READERS

Would you like to write a summary of a court decision that would be of interest to consultants, contractors or building owners?

Do you have an article that you think would be appropriate for *Construction Law Letter* and that you would like to submit?

Do you have any suggestions for topics you would like to see featured in future issues of *Construction Law Letter*?

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