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Gibbs Law
October 2006 Newsletter

A Commentary on Recent Cases and Relevant Legal Issues

1. Building Contracts - Tendering – Are Owners Liable to Consultants/ Subcontractors of Bid Proponents?

When an owner conducting a tendering process improperly awards the contract to another bidder, the wronged bidder may have a right to sue for its damages arising from the loss of the project. However, a question arises as to whether the owner may also owe a duty of care to the architect, consultants and subcontractors of the wronged bid proponent, who arguably have also suffered losses as a result of the flawed bid process.

These issues were recently addressed by the Federal Court of Appeal in *Canada v. Design Services Ltd.*, [2006] F.C.J. No. 1141. In that case, the "design-build" contract at issue was for the construction of a naval reserve building. Proponents were invited to bid on the contract alone or in conjunction with other entities as partners or joint venturers.

A general contractor (the "GC") submitted a bid for the contract as the sole proponent, but had assembled a team comprised of an architect, consultants and subcontractors (the "design-build team") for the purposes of the tendering process. In the event of a successful bid, the GC planned to enter into subcontracts with each of its team members to complete the work. When it was ultimately unsuccessful in winning the contract, the GC and its design-build team sued the owner on the basis of breach of duty in tort and breach of contract for their financial losses.

Shortly before trial, the GC settled with the owner. However, the members of the design-build team continued their action. At trial, the parties submitted an agreed statement of facts, which included an admission by the owner that the other bidder was non-compliant and that the GC should have won the contract. Accordingly, the only question before the trial judge was whether the owner owed a duty in tort or in contract to the other members of the design-build team.

The trial judge concluded that the owner did in fact owe a duty in tort (but not in contract) to the members of the team assembled by the GC because it was reasonably foreseeable that awarding the contract to the wrong bidder would result in financial losses to them.

On appeal, the Federal Court of Appeal upheld the trial judge's finding that the members of the design-build team were not parties to the bidding contract between the owner and the GC and could therefore not rely on the terms of the contract for their benefit. However, the Court set aside the

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judgment in tort against the owner, finding that the owner did not owe a duty of care to the design-build team and was not liable for any damages they suffered as a result of a failure to award the contract to the rightful bidder. The Court also concluded that, in the absence of an agreement to split the profits and share the losses, the members of the design-build team were not in a joint venture with the GC, so as to trigger any contractual or tort obligations on the part of the owner.

For engineers and others involved in preparing tender packages on behalf of owners, this case should serve as an important warning that contract documents must be carefully drafted to avoid creating any legal duties on the part of the owner towards persons/entities other than the intended bid proponent. To that end, documents should clearly identify who the owner will accept bids from and should specifically ban proposals from or on behalf of uninvited joint venturers and/or any consultants and subcontractors retained by the bid proponent to complete the proposed project.

Otherwise, they face the risk that owners could look to them if they are found liable for financial losses suffered by the bid proponent's consultants and subcontractors in the event the contract is improperly awarded to another bidder.

2. Multi-Party Settlements – What Happens when a co-Defendant Becomes Insolvent and Does Not Pay its Share?

If a Plaintiff settles a tort action for an agreed upon global payment from a group of Defendants, and one of the Defendants is unable or unwilling to make its intended contribution, are the other Defendants jointly and severally liable for the unpaid portion?

In the case of *Budning v. Vinokurov*, [2006] O.J. No. 2001 (Ont. S.C.J.), homeowners brought a motion to enforce minutes of settlement arising from a lawsuit they had commenced against their homebuilder, municipal inspector, and their lawyer for alleged damages arising out of the construction, inspection and provision of legal services in the building and purchase of their new home. The action settled at mediation based on fixed and enumerated contributions from each of the three named Defendants.

The builder did not pay its portion of the settlement, and the Plaintiffs brought a motion to the Court, seeking a ruling that the lawyer and the municipality were jointly and severally liable for the unpaid portion of the settlement proceeds.

The Plaintiffs' motion was dismissed, and the co-Defendants were not found responsible for paying the insolvent builder's share. The motions judge concluded that the settlement agreement was

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a contract. If the contract had merely stated that the Defendants would pay the total amount, with no further or specific allocation, joint liability could have been assumed. Instead, however, the Defendants' promise of a global payment was followed by a detailed itemization of the respective parties' individual contributions. The Court went on to say that if joint liability was intended by the Plaintiffs, their counsel should have made this explicit when negotiating the minutes of settlement.

While this case is good news for Defendants who clearly articulate their individual contributions towards global settlements, it highlights the importance of careful drafting of any minutes of settlement. In particular, when multi-party settlements are being negotiated based on fixed contributions from individual Defendants, the documentation must make it clear that the settlement is being severally and not jointly funded by each Defendant in the individually prescribed amounts set out in the minutes of settlement and no more.

Strategically, some Defendants may wish to keep the amounts of their individual contributions from the Plaintiffs. However, the danger of keeping this information confidential is that those Defendants could be found liable not only for paying their own share of the settlement proceeds, but also the share of a delinquent Defendant, who is unwilling or unable to make its agreed-upon contribution.

3. Civil Litigation – Costs Awards – When Courts can Order Negligent Defendants to pay Costs of Innocent Defendants.

As a Defendant, the decision of whether or not to settle a case or proceed to trial invariably requires a careful weighing of a number of factors, including the risks of a judgment, the size of any potential award, and the legal costs involved. With respect to the latter, some Defendants may overlook the possibility that, if they are unsuccessful at trial, they will not only be responsible for their own costs and in all likelihood a portion of the Plaintiff's, but they could also be ordered to pay the costs of an innocent co-Defendant (or to reimburse the Plaintiff for costs awarded against the Plaintiff to an innocent co-Defendant).

The Manitoba Court of Appeal did just that in a decision released at the end of last month (*Knock v. Dumontier*, [2006] M.J. No. 330). In that case, the Plaintiff had retained an electrical contractor to install wiring in her new home, including electrical receptacles mounted on a kitchen backsplash. Subsequently, the Plaintiff retained a tiler to install ceramic tiles on the backsplash. The work involved removing the electrical cover plates or, at a minimum, loosening the receptacles mounted on the backsplash. More than a year after completion of the electrical work, the kitchen caught fire. The Plaintiff sued both the electrician and the tiler for breach of contract and negligence.

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The trial judge concluded that the installation of the tiles was not the cause of the fire and dismissed the action as against the tiler, with costs payable to the tiler by the Plaintiff. The judge also concluded that, on a balance of probabilities, the fire was caused by the negligence of the electrical contractor, and granted judgment to the Plaintiff accordingly. The Plaintiff was awarded her own costs from the electrical contractor. However, the Court refused to grant her a "Bullock" order (which directs an unsuccessful Defendant to reimburse the Plaintiff for the recovered costs of a successful Defendant).

The electrical contractor appealed the judgment, and the Plaintiff cross-appealed the judge's refusal to grant her a "Bullock" order. On appeal, the Manitoba Court of Appeal dismissed the electrical contractor's appeal and granted the Plaintiff's cross-appeal. In so doing, the Court of Appeal pointed out that it was reasonable for the Plaintiff to have sued both parties, particularly when she was in doubt as to which of the two was responsible for the acts and/or omissions that caused the fire.

The Court of Appeal went on to say that the trial judge had applied the wrong test in determining whether or not it was appropriate to grant a "Bullock" order in this case. The Plaintiff met the threshold test for such an order because it was reasonable for her to join both Defendants in the same action and to keep the innocent Defendant in the action until the judgment was issued. Having met the threshold test, it was in the discretion of the trial judge to order the electrical contractor to reimburse the Plaintiff for the tiler's costs. Such an order was particularly appropriate because the Plaintiff was in doubt as to which of the two parties was responsible for the negligent act or omission that caused her damages.

In Ontario, the Courts also have the discretion in the appropriate case to make "Bullock" orders, as well as "Sanderson" orders (where an unsuccessful Defendant is ordered to pay the costs of a successful Defendant directly). For example, the Ontario Court of Appeal made a "Bullock" order in *Hock v. Hospital for Sick Children*, where the Plaintiffs were in doubt as to which of two persons was responsible for the tort that caused their injuries, and it was reasonable to have included the successful Defendants in the lawsuit.

As trial approaches (and hopefully well beforehand), it is important for defendants and insurers (in conjunction with their legal counsel) to assess not only their own chances of success at trial, but also to carefully consider the positions of their co-Defendants, because they could ultimately wind up paying their co-Defendants' costs (or a portion of them) at trial depending upon the specific circumstances of the case.

4. Civil Litigation – Scale of Costs – Partial Indemnity versus Substantial Indemnity.

In a decision released last week, Justice Lax of the Superior Court of Justice granted a motion by a group of Defendants to strike

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out a Statement of Claim for disclosing no reasonable cause of action (*Manning v. Herb Epp*, 2006 CanLII 35631). The Court awarded costs to the successful Defendants and, in so doing, engaged in an interesting analysis regarding costs awards.

As between litigants, the motions judge made it clear that there are still only two scales of costs – partial indemnity and substantial indemnity, and that a recent amendment to the *Rules of Civil Procedure* did not give rise to a third category characterized as "full indemnity" (notwithstanding that the new *Rules* do permit the Court to make an award in an amount that represents full indemnity).

Awarding costs is a discretionary matter on the part of the trial judge. That discretion is to be exercised in light of the specific facts and circumstances of each case before the Court and in relation to the factors listed in the *Rules of Civil Procedure*, which include: the amount claimed and recovered in the proceeding; the complexity and importance of the issues; apportionment of liability; any conduct of a party that tended to shorten or lengthen the trial; and whether any step taken by a party in the proceeding was improper or unnecessary (Rule 57.01(1)).

In the ordinary course, costs will follow the event, and a successful Defendant will be entitled to his/her costs on a partial indemnity basis. In the appropriate case, costs on a higher scale (substantial indemnity) may be awarded as a form of punishment to signal the Court's disapproval of the Plaintiff's conduct.

For example, unproven allegations of fraud will frequently attract awards on a substantial indemnity basis, as will unproven allegations of conspiracy, misrepresentation, breach of trust, and malice, depending on the circumstances involved. The underlying reason for imposing cost sanctions for these kinds of unproven allegations is because they are rooted in assertions of dishonesty and deceit and go to the very heart of a person's integrity.

Once the Court has determined that an award of costs is appropriate and has determined the proper scale for such an award, the Court must quantify those costs. Previously in Ontario, a costs grid was in place that specifically set out the fees that could be recovered for various steps in a proceeding on a partial indemnity and substantial indemnity basis.

However, as of July 1, 2005, that grid was abolished, and counsel fees for motions, applications, trials and appeals etc. are now to be determined in the Court's discretion in accordance with the factors set out above, as well as the other factors listed in Rule 57.01(1). In simple terms, the Court will examine the counsel fees and hourly rates for the party who is entitled to costs and will determine an amount that the Court considers to be fair and reasonable having regard to all of the circumstances.

An additional factor that the Courts will consider in determining the appropriate scale of costs and in quantifying them is whether the parties have exchanged any offers to settle prior to trial. There are

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special cost consequences that apply with respect to such offers, and we plan to address this topic in our November 2006 edition of Gibbs Law.

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