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exposing the mess swept under the rug: Supreme Court of Canada orders damages for breach of tendering contract

Owners breach their tendering process at their peril and they may now have difficulty relying on a broad exclusion of liability clause following the recent decision by the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*.[1]

the facts

The Province of British Columbia issued a request for proposals (the "RFP") for the construction of a highway. Under the RFP, only six bidders were eligible to submit a proposal. One of the bidders was the plaintiff, Tercon Contractors Ltd. ("Tercon"). A proposal was also submitted by a joint venture between Brentwood Enterprises Ltd. ("Brentwood") and Emil Anderson Construction Co. However, only Brentwood was an eligible bidder.

The Brentwood joint-venture bid and the Tercon bid were the two short-listed proponents. The Province ultimately selected Brentwood for the project. Throughout the bidding process, the Province's agents took steps to hide the ineligibility of Brentwood's joint-venture bid.

When the true nature of Brentwood's bid came to light, Tercon sued the Province for damages. As its primary defence, the Province relied on the following exclusion of liability clause in the tendering documents which provided that:

> …no [bidder] shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a [bid] each [bidder] shall be deemed to have agreed that it has no claim.[2]

The trial judge found that by accepting the Brentwood joint-venture bid, the Province breached its tendering contract with Tercon and that the exclusion clause was not a bar to recovery for the breach. The British Columbia Court of Appeal agreed that the tendering contract was

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1 2010 SCC 4 [*Tercon*].

2 *Ibid.*, at para. 127.

breached, but ruled that the exclusion clause barred compensation for all defaults by the Province. Tercon appealed to the Supreme Court of Canada.

the tendering contract

The Supreme Court of Canada was divided, 5-4, in its decision. Writing for the majority, Justice Cromwell reviewed the principles governing tendering contracts. In short, a compliant bid in response to a tender call may give rise to a contract - called Contract A - depending on the express and implied terms and conditions of the particular tender call.[3] Where Contract A arises, one of its terms is that the successful bidder will enter into a substantive construction contract with the tenderer, referred to as Contract B.

Justice Cromwell agreed with the trial judge that on the evidence, Contract A did arise, and one of its terms was that the Province would only entertain bids from eligible bidders. The majority agreed that by accepting the Brentwood joint-venture bid, the Province "breached not only the express eligibility provisions of the tender documents, but also the implied duty to act fairly towards all bidders."[4]

The dissenting Justices were prepared to assume, without analysis, that the Province had breached the terms of its own RFP when it awarded the contract to Brentwood's joint venture.[5]

the exclusion clause

The Court was divided on the effect of the exclusion clause. The majority was of the view that the clause was ambiguous and, applying the doctrine of *contra proferentum*, should be interpreted in Tercon's favour.

Reading the exclusion clause in its broader context and in light of the commercial context and purposes of the RFP, Justice Cromwell could not accept that the parties intended to exclude a damages claim resulting from the Province unfairly permitting a bidder to participate who was not eligible to do so. In the majority's view, applying the exclusion clause to bar Tercon's claim would render meaningless the eligibility requirements for tendering.[6]

On the other hand, Justice Binnie, writing for the four dissenting Justices, found that the exclusion clause was quite clear, and that the real issue was whether there was any reason not to apply it.

In that regard, Justice Binnie carried out an overview of the doctrine of fundamental breach, considered by the Supreme Court of Canada first in *Hunter Engineering Co.*

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3 *Ibid.*, at para. 17.

4 *Ibid.*, at para. 59.

5 *Ibid.*, at para. 86.

6 *Ibid.*, at para. 78.

v. Syncrude Canada Ltd.[7] He wrote that "[o]n this occasion we should again attempt to shut the coffin on the jargon associated with fundamental breach."[8] Rather, to decide whether to enforce an exclusion clause, a series of three enquiries was necessary. The court should determine:

a. whether as a matter of interpretation the exclusion clause applies to the circumstances;

b. if the clause applies, then whether the clause was unconscionable at the time the contract was made; and

c. if the clause is applicable and valid, whether the court should nevertheless refuse to enforce the valid exclusion clause on the grounds of public policy.

The Court was in agreement with this new approach to enforcing exclusion clauses, thereby laying to rest the traditional fundamental breach analysis.

The dissenting Justices found that the exclusion clause was applicable in this case and was not unconscionable nor void on the grounds of public policy.

In the result, however, the Supreme Court of Canada allowed the appeal and restored the judgment of the trial judge granting an award of damages to Tercon.

the impact of the SCC's decision in *Tercon*

The Supreme Court of Canada's decision in *Tercon* is both helpful and troublesome. The Court agreed unanimously on the analytical approach to be followed when determining whether an exclusion clause should be applied in the face of a breach of contract by a party seeking to rely on the clause. Until *Tercon*, this determination rested in part on whether a breach could be termed "fundamental", and it was difficult to predict which terms of any given contract would be termed fundamental by the courts.

In addition, *Tercon*, from a public policy standpoint, may have the effect of encouraging owners to comply with the terms of Contract A and to honour their duty to act fairly towards all bidders.

However, the majority's decision may have strained traditional principles of contract interpretation. As Justice Binnie wrote in his dissenting judgment (and borrowing from Justice Wilson in *Hunter*), the majority's interpretation of the exclusion clause is a "strained and artificial interpretation in order, indirectly and obliquely, to avoid the impact of what seems to them *ex post facto* to have been an unfair and unreasonable clause."[9]

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[7] [1989] 1 S.C.R. 426 [*Hunter*].

[8] *Ibid.*, at para. 82.

[9] *Tercon*, *supra* note 1 at para. 128.

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a cautionary note