Celebrating Design Services

The Supreme Court of Canada ruled in *Design Services Ltd. v. Canada*[1] that a party issuing a call for tenders owes no duty of care in negligence to a prospective supplier to a bidder, at least where that supplier had decided not to joint venture with a design build contractor on the submission of its bid.

The facts were as follows. The federal government issued a call for bids for construction of a naval reserve building. Joint ventures as well as individual bidders were eligible to submit a bid. As part of a prequalification document submitted, Olympic, an individual bidder, identified various suppliers as part of its intended design build "team". When an allegedly non-compliant bidder was awarded the contract, Olympic and its proposed suppliers, along with a subsidiary of one of the suppliers, sued the government for the loss of profit said to arise from acceptance of a non-compliant bid. Olympic settled its claim but the other plaintiffs continued the lawsuit, alleging negligence on the part of the government. The SCC ruled, first, that the supplier claims did not fit within any of five recognized categories of a negligence "duty of care" for which pure economic loss is recoverable[2] and, second, that creation of a new duty of care could not be justified under the test laid down by the House of Lords in *Anns v. Merton London Borough Council*.[3]

Those who issue calls for tender may be forgiven for wanting to add a bottle of bubbly to their shopping lists after the Supreme Court rejects a negligence claim by suppliers.

The SCC agreed that harm to Olympic's suppliers was a foreseeable consequence of acceptance of a non-compliant bid, but concluded from the fact that the suppliers had declined to joint venture with Olympic, that they had chosen to forego protection against improper bid selection by the owner. The court equated allowing a negligence claim in these circumstance with allowing tort law to be used as "an after the fact insurer."

The SCC also expressed concern that recognizing a negligence claim on these facts presented the problem of indeterminate liability. It noted that since one of the plaintiffs was a subsidiary to a supplier, the class of potential plaintiffs would "seep into the lower levels" of the design build team and each supplier would in turn have employees and sub-suppliers who might wish to advance a claim. The SCC further observed that the "construction contract context" is one where issues of "indeterminacy" can "readily be seen." It regarded recognition of a duty of care in the circumstances as leading to an "undesirable" number of tort actions.

Three criticisms of the ruling might be offered and each is sufficient justification to keep the champagne on ice. First, the finding that the class of prospective plaintiffs was unworkably large is hard to justify given that a much broader class of potential plaintiffs, "inhabitants of a building," was recognized by the Court in *Winnipeg Condominium Corporation No. 36 v. Bird Construction*.[4] Even allowing for the restriction of claims for economic loss in *Bird* to cases involving property damage which posed a danger to health and safety, the number of potential inhabitants of a completed building of any size, and over time, would dwarf the number of suppliers, sub-suppliers and employees of suppliers – named or unnamed to a bidder for construction of that building.

The argument that the suppliers waived protection against an improper award by declining to joint venture with Olympic in its bid is problematic. The interests of suppliers are distinct from and more limited than those of the bidding party. To say that the suppliers could have protected themselves by becoming party to the Olympic bid submission is to say that they could protect themselves as suppliers only by becoming design build bidders. It is more plausible, if harsh, to argue that the suppliers had no "reasonable" expectation of fairness on the part of the owner than it is to say that becoming jointly liable for the design build bid was a reasonable "alternative" remedy available to them.[5]

The deference shown by the SCC to the suggested contract remedy is also unpersuasive. It ignores the fact that that the Contract "A" remedy, which the court saw as the only appropriate remedy, is as much an invention of the courts as any negligence claim. Contract "A" was created to address and redress the reasonable expectations of parties to a tender process. Contract "A" is arguably no less an after-the-fact form of insurance against bad tender behavior than is a negligence claim. Except in a limited sense, Contract "A" is not the result of a *private* ordering of a commercial relationship. Accordingly, it is hard to see why one court-inferred claim, Contract "A," should oust another court-inferred claim, a negligence duty of care. It is a court doing the "ordering" in both cases.

[1] [2008] S.C.J. No. 22

[2] The five recognized categories are: (1) independent liability of statutory authorities; (2) negligent misrepresentation; (3) negligent performance of a service; (4) negligent supply of shoddy goods or structures; and (5) relational economic loss. Of the five categories, only category five garnered any discussion by the Court. The reason cited for not regarding category five as applicable is that no property damage or personal injury was suffered. The Court cited Norsk as the paradigm category five case.

[3] [1978] A.C. 728 (H.L.) The Anns test has two parts: (1) is there sufficient proximity to justify imposing the duty; and (2) are there policy considerations which negate or limit the scope of the duty?

[4] [1995] 1 S.C.R. 85

[5] Another cleaner argument would have been to say that the alternative contract remedy not pursued by the suppliers was a Subcontact "A" claim against Olympic for their *pro rata* share of the settlement monies, if any, which it extracted from the owner for loss of profit arising from acceptance of the non-compliant bid.

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