TREES & THE LAW

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Professional Practice - Part 3.

When is a contract a contract?

In parts 1 and 2 of this series we saw that contracts need to be carefully worded and well thought out before being signed. In this final part we consider a few more aspects.

It is not unusual for tree care companies to provide an estimate of the costs expected to undertake the work requested by the client. But the estimate may become the basis of a contract or contractual 'understanding,' and if the estimate is poorly worded or poorly executed, difficulties may ensue.

In *Arbutus v. Petz, 2014* (*BCPC 120*) the tree service company provided the customer/defendant with an estimate of the costs associated with the work requested. The company claimed that the defendant had accepted the estimate and work commenced. A day later work was stopped because the defendant claimed he had asked for an estimate but had not accepted it and had not authorized the work.

At issue was whether or not the defendant owed the company money for the work already undertaken. Was there or was there not a contract? If there was no contract should the company be paid, since it had undertaken the work in the honest belief that a contract existed? If the company was not paid, had the defendant been unjustly enriched? The court applied the principle of *quantum meruit* (what has been earned) and decided that in the absence of any substantial notes about rates or services only 50 per cent of the claim was payable.

In a similar but unrelated case, *Arbutus v. Taylor, 2014* (*BCPC 121*) the company sought payment for work completed. At issue was the extent of the work undertaken.

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The company claimed the estimate was just an estimate not a fixed price, and additional work had been undertaken, hence the additional cost. The defendant claimed the estimate had been accepted on the expectation that it covered all the work described. The words "time permitting" had been included in the estimate with the company claiming this meant some of the work was optional. The defendant claimed the estimate was accepted on the understanding all work would be completed for the estimated price shown. The court found that the estimate was "…an offer to perform the work described for the price quoted." The claim for additional payment was dismissed.

A more complicated but similar issue arises in *Corsair Field Services Ltd. V. 0787530 B.C. Ltd., 2016* (*BCPC 128*). This case hinges on cancellation of an implied but not well-documented contract and alleged costs incurred as a result of the cancellation. At issue was whether or not the defendant had breached the contract, and whether or not this resulted in costs to the claimant. In the pleadings the claimant cited a passage about contract law extracted from ***Law of Contracts***, G.H.L. Fridman, 5th Edition, 1994, page 15:

It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms.

But as the court noted, "For a contract to exist, there must be offer, acceptance, consideration and certainty of terms." In this case there had been considerable verbal discussions, some text messages, and some expectation that a project would be forthcoming at some point, but nothing definite had been laid out. Both sides, it seems, had some expectations, but neither side had ultimate clarification about the expected work and its ramifications. The defendant argued they had been mislead by the claimant and argued that negligent misrepresentation applied. Citing the case of *Queen v. Cognas Inc., 1993* (*1SCR 87*) it was argued that a test for negligent misrepresentation included:

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1. A duty of care based on a "special relationship" between the person making the representation and the person to whom it was made;
2. That the representation in question is untrue, inaccurate or misleading;
3. That the person making the representation acted negligently in making it;
4. That the person to whom the representation was made relied on it in a reasonable manner; and
5. That the reliance was detrimental in the sense that damages resulted.

The court found that although the two parties had worked together before, this was simply a business relationship, not a "special relationship" and that several actions taken by the defendant were not negligent but deliberate, therefore there was no negligent misrepresentation. Ultimately, the court noted that there was enough evidence to show that the claimant knew it lacked certainty about whether or not the contract, largely based on verbal discussions, would or would not proceed. On that basis the claim was dismissed with both parties paying their own costs.

In all of these, and many similar cases, the central issue is the lack of a well written, clearly defined contract that lays out with certainty:

what does each party expect the scope of work to be?
when, and in what timeframe?
where?
by whom?
at what cost? and,
with what endpoint in mind, including what the final deliverables will be, possibly staged over a period of time with a clearly specified payment schedule as specific stages are accomplished.

The contract should be written and should be signed by both parties, with an acknowledgement that they have read and understood the contract, all of its terms and conditions, and agree to abide by them. In the absence of this, there may be potential for disagreements, non-payment and costly litigation. Understanding the need for a clearly defined contract is a simple way to avoid these issues.

The above guidance is general in nature and is not intended as legal advice. If you need specific guidance consult a lawyer. Dunster & Associates has a set of WORD files available for sale that includes a sample contract, and typical report limitation clauses for general reports, risk assessment reports, and appraisal reports. Contact Dunster & Associates for more information. jd@dunster.ca