TREES & THE LAW

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Professional Practice - Part 2.

The contract — wording is crucial

In the last issue of *TSC* we looked at the need for a well written contract that defined what work was to be done, what products were to be delivered, when, why and by whom.

The details written into a contract need to be very carefully described and thought out well in advance. Once a project is underway there may be times when the original plan no longer seems to suit the client's needs. Perhaps the client has changed their mind in light of what they now see as the work is underway, or maybe new design ideas or materials have come to light that warrant changes in the original plans.

This can be a major headache for clients and contractors alike.

It may be tempting to simply discuss these changes and verbally agree on them. That may work for small projects, but for larger projects it can create enormous problems. Such was the case in *Jurik v. Callan* (*2011 BCSC 300*).

The Juriks commissioned Callan to undertake a landscape installation, based on plans designed by a landscape architect and agreed to in a contract. The contractor (Callan) bid the work based on these plans, but as work proceeded, the clients decided a different approach would work better for them. The contract allowed for payments in installments as stages were completed. The design plans also had a separate page attached with detailed specifications to be followed. The defendant denied ever seeing this page and noted that had he seen it, his bid would have differed.

Problems arose about the timing of work, and when only partial payment was received, work slowed, thus creating a final completion date beyond what was initially envisaged. Both parties claimed various damages from each other, such as failure to complete on time, deliverable not as specified, plants installed not to accepted standards versus failure to ensure timely payments, lack of clear direction when original plans were abandoned, and inconsistent direction as new design ideas arose.

The way to avoid contract troubles after a job has started is to take time to get the wording details right beforehand.

Ultimately the Court found some aspects of the case amounted to a breach of contract, notably deficiencies in the plant materials supplied and installed. However, the damages attached to the breach were offset by their failure to pay for work already completed. The end result was neither side was awarded any compensation for the alleged losses.

The case highlights two key issues:

- Contracts must be carefully thought out and worded. Terms, timelines, deliverables and any anticipated conditions affecting these must be well defined, and should include provision for changes to be made.
- All changes or deviations from the original contract, plans or written intentions must be documented in writing and agreed to by signature of all affected parties.
- Verbal agreements can be problematic.

The last point is critical. *Morrison v. Mar Lado Enterprises* (*2001 BCSC 1032*) gives an example of what can go wrong. Neighbour A sought permission from Neighbour B to cut down some trees to improve their view. Neighbour B gave verbal permission to do that and work commenced. The property came on the market before work was completed and the new owner, being unaware of the verbal agreement, sued A and the estate of B on the grounds that a) the trees were cut down in trespass and b) the property was not in the same condition at the time of occupancy as it was at the time of the agreement to purchase.

The Court noted that while the agreement was clearly binding on the original parties, it made no mention of it being attached to the land title.

The Court found that the verbal agreement between A and B was valid and that A had a licence to go onto B's lands and remove some trees. However, the executor of the estate failed to notify the new owner of the existing arrangements, even as work continued in the time between agreeing to purchase and taking possession of the property. As a result, damages in the amount of $15,500 were awarded against the executor.

Had there been a better defined agreement, in writing, the purchaser could have decided if they wished to continue with the sale, or if they wanted to allow the cutting to continue. The absence of any documentation proved to be an expensive mistake.

In *Qureshi v. Gooch* (*2005 BCSC 1584*) two neighbours had a dispute about a retaining wall and tree heights. The dispute was settled with an agreement that the wall's owner would undertake to rebuild it if it settled, moved, or toppled over, and the owner of the trees agreed to maintain them at an agreed upon height. The owner of the wall decided to sell and move, which triggered a further court action on the basis that this would release the wall owner of any responsibility to honour the agreement. The plaintiff argued that the agreement should run with the title so that it became the responsibility of anyone owning the wall to be responsible for it in subsequent years.

The Court noted that while the agreement was clearly binding on the original parties, it made no mention of it being attached to the land title. It was thus not a restrictive covenant. Moreover, since the wall had at the time shown no signs of moving, and no damage had yet occurred, and potentially might never occur, there was, at the time, no breach of the agreement to enforce, merely a concern that it could occur one day. A request for an injunction against the sale of the property was denied and no breach of contract was established.

Trees were peripheral to this case, but again it shows how important it is to have a contract, or an agreement carefully thought out before it is signed.

In all cases the contract must be thoroughly researched and carefully written. All aspects need to be considered including what happens if one party to the contract does not or cannot deliver, for whatever reason, and how such issues will be resolved.

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 include 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*