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Hand-Written Changes to Simple Contracts –

The Case of *Cariboo-Chilcotin Helicopters Ltd. v. Ashlaur Trading Inc.*

Introduction

The other day I came across the above-referenced decision of our Court of Appeal from last February. Though there is nothing particularly unique about the decision, it deals with a classic law school exam type of question and, therefore, caught my attention. It also provides a simple, though important, lesson in the law of contract for non-lawyers in the forest industry who conduct business with simple forms of contract documents that are often exchanged back and forth between the parties with the addition of hand-written notes. This is common with supply contracts in the forest industry, and even (as in this case) with short-term logging services contracts. The lesson from this case is simple: do not ignore those hand-written notes—they may have significant legal consequences.

Background

In this case, a helicopter logging company (the “Logger”), a holder of timber rights (the “Licensee”) and a log broker (the “Broker”) were parties to a three-way, one-page agreement whereby the Logger would harvest the Licensee’s timber and deliver it to the Broker in exchange for payment from the Broker.

The Logger prepared a one-page form of contract document, signed it, and faxed it to the Licensee who signed it, and returned it to the Logger who turned it around and faxed it to the Broker. The Broker added a hand-written note:

[W]e will be advancing @ 80% estimated yarded Red and Yellow Cedar and pay balance on final scale X[†].

The Broker then signed the document and faxed it back to the Logger. The evidence at trial was that although the Broker did not bring the note to the Logger’s attention, that the Logger did, in fact, see it (how could it not on a one-page document?). The Logger gave the note no consideration, and faxed the document with the three signatures and the note to the other parties as the concluded agreement.

This article provides a general overview and does not constitute legal advice. Persons requiring further information or advice should contact Jeff Waatainen at 250.758.9485 or jeff@bcforestrylaw.com.

The Logger completed the job and delivered all grades and species of the harvested timber to the Broker. Prior to scaling, the Logger submitted two volume-based invoices, and the Broker paid 80% of the invoices (the Logger's unaltered document itself included language regarding the 80% volume-based advance payment). However, when the Logger submitted an invoice after final scale, the Broker refused to pay for anything that was not cedar and that was not X grade or better.

The Logger sued the Broker in BC Supreme Court for the balance, and succeeded. The trial judge ruled that the Broker's additional note did not form part of the contract on the grounds that the Broker had not brought it to the Logger's attention and that, in any event, it was ambiguous. The Broker appealed the trial decision to the Court of Appeal.

The Decision

The Court of Appeal overturned the trial judge's decision. The Court ruled that whether or not the trial judge found the note ambiguous was not the issue. Rather, the issue was whether those in the industry would find the note ambiguous. The expert evidence of both parties at trial suggested that no one in the industry was likely to have any doubt as to note's meaning notwithstanding the difficulties it caused for the trial judge.

The Court of Appeal then held that the question of whether the Logger had, in fact, paid any attention to the Broker's note was irrelevant. At law, the Broker's transmission of the Logger's document back to the Logger with the additional note constituted a counter-offer. The test of whether the Logger accepted the counter-offer is objective, not subjective. In other words, the test is whether the actions of the Logger would cause an impartial bystander to conclude that the Logger had accepted the counter-offer; it is not based on what the Logger was actually thinking.

Accordingly, as the Logger had distributed the contract with the note to the other parties as evidence of a concluded agreement without any comment on the note, and proceeded to perform under the contract, the court concluded that, objectively speaking, the Logger must be taken to have accepted the restrictions contained in the note.

Closing Comment

If one party puts a hand-written note on a proposed contract it receives from another party, signs and returns it, a concluded contract does not exist. All that exists is a counter-offer, and a concluded agreement will not exist until other party evidences an intention to accept the counter-offer. The test of whether the counter-offer is accepted is objective. The best evidence of an intention to accept a hand-written change to a contract document is initialization of the change. But this is not the only evidence that will objectively reflect an intention to accept a counter-offer. As this case demonstrates, performance of the contract accompanied by silence on the proposed variation can also provide objective evidence of an intention to accept the variation. This is regardless of any intention that the party may actually have had in its head. If a party has concerns about a hand-written modification to its originally proposed form of contract, it should not remain silent, and should not begin performance until the matter is sorted out.

There is a grey area with respect to whether formal notice of a hand-written change to a proposed contract document is required under the circumstances. In this case, it was irrelevant given that the document was a one-pager: even if the Logger had claimed that it did not notice the change, the Court of Appeal was unlikely to have accepted the claim given that, objectively speaking, the Logger was unlikely to have missed a handwritten change to a one page document. While it is difficult to identify the line between when notice of a hand written change to a contract document is or is not required, the test, again, is whether the parties have come to an agreement from the perspective of the hypothetical objective bystander.

So, for example, if a party makes a small, hand written change (a counter-offer) to a 50-page agreement it received from another party and does not bring the change to the attention of that other party, and the other party claims not to have noticed the change, the objective bystander may well conclude that the parties did not come to an agreement on the counter-offer. The size of the change, the size of the document, and any evidence of whether a party ought to have noticed the change, will determine whether a concluded agreement exists in respect of a counter-offer resulting from a hand-written change.

Finally, this case is also a good demonstration of how the external context of language used in an agreement is important. The starting point in contract law is that a court must interpret a contract within “the four corners” of the document itself, without reference to external evidence of its meaning. However, if language used in a contract has some sort of specialized meaning, then a court may allow external evidence of that specialized meaning to determine the intention of the parties, usually in the form of an expert opinion. In this case, the trial judge found that the language contained in the note was ambiguous and, therefore, unenforceable. The Court of Appeal noted that this was an error, and that the test was not whether the court or a lay-person would find the words ambiguous, but whether those in an industry with specialized terminology would understand the meaning of the words.

Accordingly, if a party receives a hand-written addition to a contract it proposed to another party, the first party should not simply ignore the addition if it does not understand the words or finds them ambiguous. Rather, the person should determine whether, in the context of the industry at hand, the words have any meaning. If not, or if that party is unwilling to accept the additional words (with or without any specialized meaning), then the party should not, under any circumstances, begin performance, and should immediately notify the other party in writing that hand-written change is unacceptable.