October 12, 2016

The Effect of a 'Whole Agreement Clause' on Pre-Contractual Misrepresentations

By: Evaristus Oshionebo

Case Commented On: *Houle v Knelsen Sand and Gravel Ltd*., 2016 ABCA 247 (CanLII)

This case raises a significant legal question regarding the effect of a 'whole agreement clause' (also referred to as 'entire agreement clause') on pre-contractual misrepresentations. Put differently, does a whole agreement clause in a written contract preclude liability for misrepresentations occurring in the course of negotiating the contract?

Background

The facts of this case are that Wapiti Gravel Supplies (Wapiti) obtained an exploration permit and a surface lease to exploit gravel on a parcel of land. Wapiti engaged Silvatech Resource Solutions (Silvatech) to assess potential gravel deposit in the land. Silvatech reported that there might be an estimated 444,850 tonnes of gravel in the land. Subsequently, Wapiti transferred its lease to the Appellants. Having obtained the lease from Wapiti the Appellants approached the Respondent regarding the gravel deposit. The Appellants furnished the Respondent with the Silvatech data. On the basis of the data the Respondent's manager concluded that the land would yield 457,000 tonnes of gravel. The Respondent agreed to purchase the rights to the gravel deposit for the sum of $800,000 and the parties drew up and executed a formal contract. Under that contract, the purchase price of $800,000 was to be paid in installments such that the sum of $75,497.36 was payable as a deposit, followed by an initial payment of $324,502.64, and a final payment in one year of $400,000.

The contract contains a whole agreement clause which was inserted at the Appellants' request. The clause provides as follows:

> 2. The Purchaser acknowledges that he has inspected the property and that he is purchasing the property as is and that there is no representation, warranty, collateral agreement or condition affecting the property or this offer other than as expressed herein in writing.

Soon after the contract was executed it became evident that the land contained a far smaller quantity of gravel than the parties expected. In fact, the Respondent was only able to extract 74,000 tonnes of gravel from the land, although it was estimated that the land might contain another 25,000 to 30,000 tonnes of gravel. However, extraction of this estimated quantity of gravel would not be economical.

On this basis the Respondent refused to make the final payment of $400,000, prompting the Appellants to sue for breach of contract. The Respondent filed a counterclaim alleging, amongst other arguments, misrepresentation regarding the quantity of gravel in the land.

The trial judge dismissed the Appellants' claim for the unpaid $400,000, but allowed the Respondent's counterclaim on the basis of innocent misrepresentation. The trial judge held that the Silvatech report estimating the quantity of gravel in the land was not merely an opinion but a representation of fact. Thus, the Appellants made "a positive misrepresentation" to the Respondent regarding the volume of gravel in the land (at para 10) Furthermore, relying on *Queen v Cognos Inc*., [1993] 1 SCR 87, 1993 CanLII 146, the trial judge held that the whole agreement clause did not insulate the Appellants from liability for their pre-contractual misrepresentation because there was no contemporaneity between the clause and the misrepresentation. In the end, the trial judge rescinded the contract and ordered the Appellants to refund to the Respondent the amount paid for the estimated gravel, less the value of gravel actually extracted from the land by the Respondent (at para 10-11).

Decision of the Court of Appeal of Alberta

On appeal to the Court of Appeal of Alberta, the issue raised by the Appellants was whether the contract could be rescinded for innocent misrepresentation in view of the whole agreement clause. This issue raised a preliminary question as to whether the Silvatech report was a statement of fact or mere opinion.

On this preliminary question, the Court of Appeal held that the trial judge committed a palpable and overriding error by holding that the Silvatech report is a representation of "fact". The Court of Appeal held further that:

> As the trial reasons recognized, no one knew, or purported to know, how much gravel was actually in the land (see *infra*, para. 19). Neither the appellants, the respondent, Wapiti or Silvatech ever claimed or represented that there were in fact at least 500,000 tonnes of gravel, and it would have been reckless for any of them to do so. …. The Silvatech report can only reasonably be read as stating that, in the opinion of Silvatech and based on its professional analysis, it was more likely than not that there would be about 444,850 tons of gravel in the land. This was clearly an opinion, not a "fact". Neither Silvatech (nor the appellants, vicariously) ever represented as a fact that there was any particular quantity of gravel present. (at para 17)

With regard to the effect of the whole agreement clause, the Court of Appeal distinguished *Queen v. Cognos Inc*. and held that "*Cognos* does not import a general requirement of temporal 'contemporaneity' into the interpretation of whole agreement clauses; there was no whole agreement clause in that case." (at para 22). Furthermore, the Court of Appeal held that the whole agreement clause provided a complete defence to the Respondent's counterclaim because it disclaimed any representation regarding the property (at para 20).

In the ensuing analysis I argue that the decision of the Court of Appeal is on firm ground in terms of its holding that the Silvatech report is a statement of opinion and its conclusion regarding the effect of the whole agreement clause.

Analysis

In determining whether a statement amounts to a statement of fact, Canadian courts apply the objective standard by looking at the circumstances surrounding the making of the statement. In the instant case both parties realized at the time of negotiating the contract that the exact quantity of gravel was unknown and, in fact, the Respondent's witnesses acknowledged at trial that some variability from the estimated quantity of gravel in the Silvatech report could be expected. Furthermore, at the time the Silvatech report was transmitted to the Respondent, both parties knew that the exact quantity of gravel in the land was a matter over which Silvatech had no control. This is a significant observation because, as John McCamus, *The Law of Contracts*, 2nd ed at page 338 points out, if a statement "concerns matters over which the representor obviously has no control, it is unlikely that the statement would be characterized as one of fact." Thus, viewed objectively, the Silvatech report is not a statement of fact but a statement of opinion.

The trial judge may have relied on Silvatech's expertise in remote sensing, digital mapping and exploration to conclude that the data estimating the gravel deposit is a statement of fact which induced the Respondent to execute the contract. To be sure, the expertise of the maker of a statement may give rise to an inference that the maker of the statement implicitly warranted that the statement is true. Thus, in *Dick Bentley Productions v. Harold Smith Motors Ltd*., [1965] 1 WLR 623, a sales person's representation that a car had done 20,000 miles since it was fitted with a new engine when in fact the car had done about 100,000 miles was held to be an implicit contractual warranty because the representor had expertise relative to the car. Apparently, the Appellants in the instant case requested that the whole agreement clause be included in the contract in order to avoid any such inference.

More significantly, the trial judge appears to have misapprehended the Supreme Court of Canada's decision in *Cognos* in at least two ways. First, the trial judge assumed that *Cognos* is indistinguishable from the present case. However, these two cases raise significantly different issues. In *Cognos*, the issue was whether a clause in an employment contract allowing the termination of employment without cause precluded an employee from recovering damages for negligent misrepresentation which occurred during hiring interview, whereas the present case raises the issue of the effect of a whole agreement clause on a misrepresentation arising in the course of negotiating a contract. Thus, whether or not a whole agreement clause precludes liability for pre-contractual misrepresentation was not an issue in *Cognos*.

Second, in *Cognos* the Supreme Court of Canada did not expressly stipulate that there must be contemporaneity between a whole agreement clause and a pre-contractual misrepresentation in order for the whole agreement clause to exclude liability for the misrepresentation. Rather, the "concurrency question" addressed in *Cognos* is "whether there is a specific contractual duty created by an express term of the contract which is co-extensive with the common law duty of care which the representee alleges the representor has breached" (page 113). The Supreme Court of Canada summarized the "concurrency question" in *Cognos* thus:

> Put another way, did the pre-contractual representation relied on by the plaintiff become an express term of the subsequent contract? If so, absent any overriding considerations arising from the context in which the transaction occurred, the plaintiff cannot bring a concurrent action in tort for negligent misrepresentation and is confined to whatever remedies are available under the law of contract. (page 113)

Referencing its earlier decision in *BG Checo International Ltd. v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12, 1993 CanLII 145, the Supreme Court of Canada continued in *Cognos* as follows:

> There lies, in my view, the fundamental difference between the present appeal and *BG Checo*, *supra*. In the latter case, the alleged pre-contractual misrepresentation had been incorporated verbatim as an express term of the subsequent contract. As such, the common law duty of care relied on by the plaintiff in its tort action was co-extensive with a duty imposed on the defendant in contract by an express term of their agreement. Thus, it was my view that the plaintiff was barred from exercising a concurrent action in tort for the alleged breach of said duty, and this view was reinforced by the commercial context in which the transaction occurred. (pages 113-14)

The Supreme Court of Canada then answered the "concurrency question" in *Cognos*:

> In the case at bar, however, there is no such concurrency. The employment agreement signed by the appellant in March of 1983 does not contain any express contractual obligation co-extensive with the duty of care the respondent is alleged to have breached. The provisions most relevant to this appeal (clauses 13 and 14) contain contractual duties clearly different from, not co-extensive with, the common law duty invoked by the appellant in his tort action. (page 114)

The "concurrency question" in *Cognos* does not arise in the instant case; hence the principle in *Cognos* does not apply to the facts of this case.

In addition to misapprehending the decision in *Cognos*, the trial judge appears to have disregarded a cardinal rule of interpretation of contracts. A court must "search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract" (*Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 SCR 888, 1979 CanLII 10 at 901). The trial judge's decision disregarded the express intention of the parties as encapsulated in the whole agreement clause. Through the whole agreement clause the parties expressly and intentionally allocated to the Respondent any risk regarding the quantity of gravel in the land. As observed by the Court of Appeal, "The respondent knew it was buying whatever gravel existed in a particular piece of land, and that is what it got." (at para 22). The trial decision allowed the Respondent to circumvent or avoid the whole agreement clause and, in that sense, deprived "the parties of the certainty the whole agreement clause was intended to deliver." (at para 20) As rightly noted by the Court of Appeal:

> The point of the whole agreement clause is that the obligations of the parties will be determined in accordance with the written terms of the contract, not extraneous negotiations and discussions that have not been reduced to writing, and thus formally acknowledged by the contracting parties. (at para 23)

One further observation ought to be made. Although the whole agreement clause provides that "there is no representation, warranty, collateral agreement or condition affecting the property or this offer other than as expressed herein in writing" (at para 4), it does not refer expressly to pre-contractual representations or warranties. Hence the Respondent argued that the clause is not wide enough to cover a pre-contractual misrepresentation arising from Silvatech's report. The

Court of Appeal acknowledged the Respondent's argument (at para 23), but the Court did not directly address the argument. Rather, it observed simply that a "whole agreement clause, like any other clause in the contract, must be interpreted in accordance with the intentions of the parties as reflected in the words used in their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (at para 23).

The failure of a whole agreement clause to refer expressly to pre-contractual representations does not preclude application of the clause to such representations. In *Essa v Mediterranean Franchise Inc.*, 2016 ABQB 178 (CanLII), at para 174, for example, the Honourable Justice W.N. Renke held that the failure of a whole agreement clause "to refer expressly to negligent misrepresentations would not preclude its application to negligent misrepresentations". Similarly, in *Horizon Resource Management Ltd. v. Blaze Energy Ltd.*, 2013 ABCA 139 (CanLII) at para 47, the Court of Appeal of Alberta held:

> The Master Well Service Contract contained an entire agreement clause. Clause 17.1 provided, "Each Service Agreement shall constitute the entire agreement between Operator and Contractor in connection with the subject matter thereof and shall supersede all prior agreements, arrangements, negotiations, representations or understandings by or between, whether written or otherwise." Blaze submitted that the clause did not exclude liability for the tort of negligent misrepresentation, because it did not expressly address liability for tort. The trial judge concluded that entire agreement clauses need not expressly exclude liability in tort in order to exclude an action in negligence: see *Carman Construction Ltd v. Canadian Pacific Railway*, 1982 CanLII 52 (SCC), [1982] 1 SCR 958, 136 DLR (3d) 193 and *Gainers Inc v. Pocklington Financial Corp*, 2000 ABCA 151 at para 16, 255 AR 373. His conclusion was correct.

That being said, there are specific situations in which a whole agreement clause would not have the usual effect of precluding liability for pre-contractual misrepresentations. For example, a whole agreement clause does not preclude liability for intentional deceit or fraudulent misrepresentation. (See *T.W.T. Enterprises Ltd. v Westgreen Developments (North) Ltd.*, [1991] 3 WLR 80, 1990 CanLII 5599 (ABQB) *affirmed* 1992 ABCA 211 (CanLII);*1052276 Alberta Ltd. v Consultant Feeds Ltd.*, 2007 ABPC 269 (CanLII)). Also, a whole agreement clause is inapplicable where notice of the clause was not given to the representee at the time of the contract (McCamus, at 365-368). However, deceit and fraudulent misrepresentation do not arise in the instant case and, quite obviously, the Respondent was aware of the whole agreement clause at the time of execution of the contract.

This post may be cited as: Evaristus Oshionebo, "The Effect of a 'Whole Agreement Clause' on Pre-Contractual Misrepresentations" (October 12, 2016), on-line: ABlawg, http://ablawg.ca/wp-content/uploads/2016/10/Blog_EO_HoulevKnelsen_Oct2016.pdf