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Recent Decision Confirms that Notices of Claims Do Not Have a 'Standard Form'

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What constitutes a notice of claim? Parties to construction lawsuits often find themselves disputing whether a particular email or letter is a valid notice of a claim that complies with the notice provisions of their contract. While some contracts spell out exactly how a notice is to be prepared, sent and addressed; others are vague or silent on the issue. In light of the recent decision in *Ledore Investments Ltd. v. Ellis-Don Construction Ltd*., 2016 ONSC 5441, parties should be aware that courts are concerned more about whether notice was properly given rather than how it was given.

In *Ledore*, an arbitrator had concluded that the contractor's relatively robust notice of claim to a subcontractor did not satisfy the requirements of the contract, and the contractor appealed to the Court. Specifically, the Court was asked to decide whether the letters sent by Ellis-Don to its subcontractor, Ross Steel, constituted a "claim made in writing". Whether or not the communication was actually a "claim made in writing" was critical, because only "claims made in writing" prior to project completion survived the general waiver of claims that otherwise applied as of the date of the final certificate for payment.

The notice in question was in the form of a letter. Among other things, the letter referred to and listed outstanding issues to be resolved, major factors contribution to site delay and schedule slippages. There was no dispute that Ross Steel received the letter nor was there any dispute that Ellis-Don clearly described the damages that it believed were Ross Steel's fault. Despite this, Ross Steel argued that the notice fell short of being a claim because there was no demand made against Ross Steel. Ross Steel focused on the portion of the letter which stated: "*It is our intention to contest the assessment of liquidated damages by the owner and we will advise you of any further developments in regards to this matter*".

In the initial arbitration decision, the arbitrator looked at the "ordinary meaning" of the wording in the letter and found that Ellis-Don failed to make a demand, or assert a right while seeking consequences or relief. In short, the arbitrator agreed with Ross Steel, and reasoned that Ellis-Don's letter was merely notice of an intention to make a claim, and was never quantified or pursued. In the arbitrator's words: "*Intention to claim is not the same as a claim*".

To many in the construction industry, such a finding is consistent with the commonly-held belief that a notice of claim (about project delay, for example) needs to clearly state that a claim is being made and include the specific amount being claimed. Many also believe that the claimant is restricted to the claim amount stated in a notice letter.

In the *Ledore* appeal, the Court overturned the arbitrator's decision and instead focused on whether "notice" was given, as opposed to whether a demand was made.

Justice Morrissette found that the arbitrator did not apply the key principles regarding notice that were previously established in *Doyle Construction Co. v. O'Keefe Breweries of Canada Ltd*., 27 BCLR (2d) 89 ("*Doyle*"). In *Doyle*, the BC Court of Appeal found that requirements for a proper notice will be satisfied where:

- the complaint goes beyond “grumblings” to display or indicate an “intention to claim”;
- the claimant provides some particulars as to what the complaint is, so that the other party has an opportunity to consider its position and the possibility of taking corrective measures; and
- the complaint is timely; e.g. given “in enough time” to permit the other party to take “guarding measures” if it so desires.

In applying these principles to the Ellis-Don letter, the Court found that the Ellis-Don letter clearly laid out unsettled claims made in writing, and should have been enough to satisfy the contractual provision that would allow it to survive the waiver of claims. In other words: a contractual provision requiring claims to be made in writing should be treated the same way as provisions that require written notice of claims. The Court found that the arbitrator had made an error in treating them as two different types of notices, and in not properly analyzing whether the necessary elements for a proper notice were met.

The finding in *Ledore* represents a good lesson for parties wanting to dispute the validity of a notice or reject a claim. If a contract provides that a notice of claim must be made in writing—to allow it to survive a waiver provision, for example—then any analysis about whether the notice is valid should focus on its merits, and less on its form.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular applications of the law to specific situations, the reader should seek professional advice.

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