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Relying on an exclusion clause in a contract requires a careful approach

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In *1465152 Ontario Limited v. Amexon Development Inc.*, 2015 ONCA 86, a landlord of commercial premises (Amexon) decided to demolish the building and redevelop the property. Amexon was able to negotiate a lease termination agreement with all of the tenants in the building, except one (the "Tenant"). The Tenant's lease had over two years left until the end of its term, with an option to renew for another five-year term. After efforts at negotiations with the Tenant failed, Amexon delivered to it a Notice to Vacate, which gave the Tenant six months to vacate the premises. The Tenant applied to the court for, among other things, a declaration that the Notice to Vacate was void and a permanent injunction prohibiting Amexon from terminating the lease. Amexon argued that the Tenant's remedy was limited to damages pursuant to a provision of the lease that stated in part as follows:

> Whenever the Tenant seeks a remedy in order to enforce the observance or performance of one of the terms, covenants and conditions contained in this Lease on the part of the Landlord … the Tenant's only remedy shall be for such damages as the Tenant shall be able to prove in a court of competent jurisdiction...

At first instance, Justice Myers rejected this position and found in favour of the Tenant, holding that the above remedy clause did not apply to the situation before him, where the landlord was "walking away from its fundamental promise." Justice Myers accordingly granted the Tenant the requested remedies.

On appeal, Amexon argued that Justice Myers erred both in interpreting the remedy clause and in granting a permanent injunction. The appeal was dismissed by Justice Brown, writing for the Court. He held that Justice Myers' interpretation of the remedy clause accorded with the approach to exclusion clauses in *Tercon Contractors Ltd. v. British Columbia (Minister of*

Transportation & Highways), 2010 SCC 4. *Tercon* instructs that, where a party to a contract invokes an exclusion clause, a court must first determine whether the clause applies to the circumstances at all. Justice Brown held that it was reasonable to conclude that the remedy clause did not apply to Amexon's breach of the lease, in light of the fact that the lease contained provisions stipulating when Amexon may re-enter the leased premises, and none of them entitled it to do so for the purpose of demolishing the building. Thus, as Justice Myers found, Amexon acted arbitrarily and without lawful authority in issuing the Notice to Vacate. If the remedy clause were to be read as limiting the Tenant's remedy to damages, the Tenant would be unable to prevent Amexon from acting in that manner. Such a commercially unreasonable result, Justice Brown held, could only be achieved by much clearer language than was contained in the remedy clause. Justice Brown also found no reason to disturb the issuance of a permanent injunction.

Amexon is an important reminder that a party to a contract desiring to rely on an exclusion clause must first conduct a careful analysis and determine whether the clause can reasonably be read as extending to the circumstance at hand. This exercise requires interpreting the clause in the context of the contract as a whole and considering whether the result the party aims to achieve in reliance on the clause is a commercially reasonable one. As *Amexon* illustrates, generally, in the absence of clear language to the contrary, an exclusion clause would likely be found not to excuse a party from the consequences of a breach that goes to the heart of the contract.