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Case Comment: Weakening Disclaimers *Micron Construction Limited v. Hong Kong Bank of Canada* (2001), 184 D.L.R. (4 Th) 75 (B.C.C.A.)

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This case represents an evolution of negligence law in the area of disclaimers. During the tendering phase for a major project, the plaintiff contractor (“Micron”) sought information from the defendant bank (“HSBC”) concerning the financing of the project and the credit worthiness of the developers. HSBC sent a letter to Micron confirming that a loan had been authorized on a secured basis to finance the work. In fact, it was found that HSBC had made no firm commitment to provide financing. Following the collapse of the project, Micron brought a claim against the bank for negligent misrepresentation.

The primary issue in the litigation was the effect of the disclaimer that the bank had written in its letter to Micron:

“This bank reference is given at the request of captioned and
without any responsibility on the bank and its signing officers.”

The Court held that although the bank intended to absolve itself of any liability by using the disclaimer, it was both reasonable and justifiable for Micron to rely upon the representations. In reaching this conclusion, the Court referred to five general indicators of reasonable reliance:

- (1) the defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made;
- (2) the defendant was a professional or someone who had possessed special skill, judgment, or knowledge;
- (3) the advice or information was provided in the course of the defendant’s business;



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- (4) the information or advice was given deliberately, and not on a social occasion;
and
- (5) the information or advice was given in response to a specific enquiry or request.

As these indicia were all met, the Court found Micron's reliance on the statement reasonable. The crucial element was that there was no alternative source of information available to Micron and there was nothing that Micron could have done to protect its position other than to rely on the bank's statement.

The purpose of a disclaimer is to limit the liability of the party who makes a statement. In the context of a misrepresentation, they are used by those making the representation to preclude a party's reliance on the representation. Historically, courts have been quick to recognize disclaimers as completely absolving the representor of liability. However, this case reveals that this trend may be changing.

Potentially, this new direction may capture circumstances where a contractor submits a tender based upon information provided by the developer or its consultants. Often the information provided by an owner cannot be verified by bidders due to tight time constraints or the bidders' inability to investigate the facts prior to tender. Where such circumstances arise, the Micron decision may mean that the contractor has an alternative remedy against the owner where the information proves to be incorrect, even in the face of a strongly worded disclaimer clause.