Commercial Litigation

Canada's Highest Courts Deliver a Series of Landmark Decisions on Contract Law

While COVID-19 forced us to work under lockdown last year, Canada's court system continued to conduct hearings electronically. In doing so, the highest courts in the land delivered a number of precedent-setting decisions which have changed the way that we view written contracts under the law. While these decisions have been praised as positive developments, they have also been met with controversy, in that there is some concern that they may compromise the sanctity of written agreements.

Unconscionability and Contractual Enforcement

Last June, the Supreme Court of Canada handed down a long-awaited decision which held that a term in a standard form contract cannot be enforced if it unfairly deprives the weaker party of its right to pursue a dispute remedy against the stronger party.

In *Uber Technologies Inc. v. Heller*, a driver who worked for Uber Eats had to accept a standard form employment contract when he signed-on with the company. The contract contained a term which stated that any disputes that he had with his employer were to be resolved through mediation and arbitration, which had to take place in the Netherlands. The driver commenced a class action lawsuit against Uber in 2017, where he alleged that the company had violated employment standards legislation. Uber moved to stay the action on the basis that the dispute raised must be dealt with by arbitration in the Netherlands, as per the terms of the employment agreement.

In response, the plaintiff argued that the arbitration clause was not enforceable on the basis that it was unconscionable. Specifically, he stated that being required to follow the arbitration clause in this employment contract would cost him most of his annual income just to address the dispute. As such, he took the position that the clause unfairly deprived him of a realistic means of pursuing any dispute against his employer.

Uber's motion reached the Supreme Court, where the majority held the arbitration clause was indeed unconscionable and therefore unenforceable. The court explained that the doctrine of unconscionability is particularly applicable to standard form contracts, which often create an imbalance of bargaining power and give a stronger party an unfair advantage over its weaker counterpart. In this case, the plaintiff was clearly the weaker party to the employment agreement and the clause at issue imposed a grave financial and logistical burden on him to be able to exercise his right to resolve a dispute against his employer. Accordingly, the clause could not be reasonably enforced.

Prior to this decision, unconscionability was often raised in the contractual context by parties who did not want to live up to their end of the agreement. But courts seldom accepted that argument. Even where contracts were deemed to be exploitative and unfair, they very rarely reached the level of unconscionability.

The *Uber* decision overcame this obstacle and it has been hailed as an important victory, as it meant that stronger parties (employers in particular) could not necessarily impose unfair terms on weaker parties to a contract. However, there have been concerns raised about the potential implications of this decision, as people became worried that litigants would follow its lead to try and invalidate terms in standard contracts.

The early subsequent judicial treatment of the *Uber* decision has allayed these concerns. In particular, a recent decision of the Ontario Superior Court of Justice has confirmed that courts will not be quick to allow unconscionability arguments to invalidate standard contractual clauses just because a weaker party claims that they are unfair. It will be interesting to see the effect that Uber will have in the years to come.

Invalidating Contracts based on Misrepresentations

While *Uber* dealt with invalidating specific contractual terms, the Ontario Court of Appeal took things a step further with a recent ruling which held that a party can rescind a contract entirely if they were lured into it based on oral misrepresentations.

In *Issa v. Wilson*, a first-time homebuyer entered into an agreement of purchase and sale to purchase a home after being told by the

homeowner and the real estate agent that the size of the property was about 2,000 square feet. The buyer was given the chance to carry out his own due diligence and verify the accuracy of these representations before executing the agreement. During a visit to the property, the buyer was again informed that the home was about 2,000 square feet and he executed the agreement of purchase and Sale and provided a deposit in reliance on these representations. The agreement did not mention the size of the property.

The buyer later pulled out of the transaction before it closed after he obtained an appraisal which confirmed that the property was actually about 1,450 square feet. He then successfully sued the real estate agent and vendor and obtained a judgment that the agreement was null and void and his deposit was returned.

The judgment was upheld by the Ontario Court of Appeal, where it was ruled that if a party makes a false statement which (a) is material; and (b) induces another party into entering a contract, then the agreement may be rescinded on the basis of misrepresentation. In this case, the representations regarding the size of the property were deemed to be material to the buyer's decision to purchase it. In ruling that the buyer was permitted to rescind the agreement of purchase and sale on this basis, the court also considered other factors, such as the buyer's age and inexperience, as well as the discrepancy between the size of the property as represented and its actual size.

The *Issa* decision has caused quite a stir, particularly among the real estate community. People have taken issue with the court's ruling that a buyer is permitted to back out of an agreement of purchase and sale at a late stage of the transaction based on a prior representation; especially given the fact that he had the opportunity to verify the representation before the agreement was executed. As such, there is concern that *Issa* may create a slippery slope, with parties attempting to get out of valid written contracts on the basis of alleged misrepresentations.

The Expanded Duty of Honesty in Contractual Performance

In *C.M. Callow Inc. v. Zollinger*, the Supreme Court expanded on the duty of honesty that parties owe to each other in contractual performance. In that case, the plaintiff entered into a snow-clearing contract with a group of condominium corporations. The defendants decided to terminate the contract in early 2013 and did not inform the plaintiff of this decision until several months later. Also, after deciding to terminate the contract, the defendants actively led the plaintiff to believe that it would be renewed.

The matter made it to the Supreme Court, where it was ruled that the defendants owed the plaintiff a duty to perform the contract honestly and in good faith. The court noted that, while the duty of honest performance is not equivalent to a duty of disclosure, parties still may not "knowingly mislead" one another. In this case, it was held that the defendants breached this duty by actively deceiving the plaintiff into believing that the contract would be renewed.

Many have praised *Callow* as an important (and overdue) expansion of the duty of honest performance in contract law, while others are concerned that it has taken this duty too far, which may compromise the certainty contained in commercial transactions.

These decisions, while controversial, all represent positive developments in contract law, as they challenge the notion that contractual obligations are limited to written documents. As the high courts have demonstrated, the enforceability and performance of contracts can come down to the parties' rights and behavior and are not necessarily confined to the document itself.

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