

Unconscionability in Real Estate Transactions Post-Uber

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In *Forest Hill Homes (Cornell Rouge) Limited v. Wei*, 2020 ONSC 5060 (CanLII), Justice F.L. Myers applied the Supreme Court of Canada's recent review of the doctrine of unconscionability in *Uber Technologies Inc. v. Heller*, 2020 SCC 16 (CanLII) to a residential real estate purchase transaction.

The Defendant, Wei, had agreed to purchase a home in a subdivision from the Plaintiff, Forest Hill Homes (Cornell Rouge) Limited ("Forest Hill"). The transaction was aborted because Wei was not able to obtain sufficient financing to close the sale and the Plaintiff refused to decrease the purchase price. Forest Hill sold the home to another buyer for a lower amount and sued Wei for the difference.

Wei defended Forest Hill's claim for damages on the basis that she had not been advised that the offer was irrevocable for 10 days. Wei took the position that the irrevocability clause was unconscionable.

As noted by Myers J., irrevocability clauses are an anomaly in contract law since, despite the use of the word "irrevocable," an offer that has not yet been accepted to form a binding contract is in fact "revocable." Accordingly, for an offer to purchase to be truly "irrevocable" there must be some other independent agreement made between the seller and the buyer.

In the circumstances, Forest Hill took the property off the market as soon as Wei made the offer and it declined to seek competing offers or to try to create an auction. Accordingly, it took a step to its own detriment which was sufficient in law to create a mutually binding agreement.

As to whether the irrevocability clause was unconscionable, Justice Myers reviewed the two-step test outlined by the Supreme Court of Canada in the *Uber* decision:

First, the judge should consider whether there was an inequality of bargaining power between the parties. If so, the judge will then consider whether that inequality resulted in an improvident bargain. An improvident contract entered into between parties of unequal bargaining power will be found to be unconscionable and will not be enforced.

Justice Myers had no difficulty agreeing that there was an inequality of bargaining power between Wei and Forest Hill. Although nobody had forced Wei to make an offer to buy the house, and there were plenty of other houses on the market, Forest Hill as the builder had the ability to dictate its terms. This was manifestly evident in Forest Hill's use of a standard form contract with schedule upon schedule of fine print.

Conversely, other than a 20% interest charge buried in the fine print (which Forest Hill conceded was unenforceable), Myers J. found that there was nothing improvident or unusually onerous about agreeing to a period of irrevocability in a residential real estate transaction. In the case at hand, Forest Hill had specifically agreed not to look for competing offers during the irrevocability period. Further, there was no evidence that when Wei signed the offer, she had any reasonable expectation that there would be any type of "cooling off" period. In Justice Myers' words: "Considering the surrounding circumstances at the time, the price, and the commercial setting, there is nothing improvident in the bargain. It was a standard purchase of the type that happens every day all over the province."

In the result, Wei was liable to Forest Hill for the sum of almost \$180,000 resulting from her failure to complete the purchase of the property.

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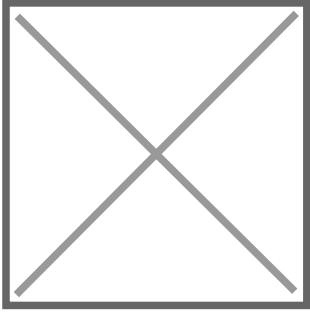
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