Unconscionable Transactions

Disclaimer

This snippet is meant to introduce the legislation and cases relating to its subject, not to provide an authoritative summary of all the law of unconscionable transactions. Readers must still conduct research in order to provide a considered opinion on a case-by-case basis.

Ontario guards against commercial transactions that are so one-sided as to offend the courts' sense of equity. The Unconscionable Transactions Relief Act is the vehicle for this protection. It is little-known and less used, for it is a branch of the courts' jurisdiction in equity that has been narrowed over time to apply to only the most clear cases of unconscionable transaction.

The legislation

The *Unconscionable Transactions Relief Act* is remedial legislation designed to expand a court's already significant equitable powers (pursuant to sub-section 96(2) of the *Courts of Justice Act*, RSO 1990, c. C-43). The Act allows the Court to take accounts for any debt, re-open any settlement, order the repayment of excess, and/or revise any contract that deals with debt (UTRA, s. 2). This broad discretion must be exercised in the light of the aims of the Act and upon some rational basis.

The case law

The UTRA aims to relieve a party to a contract from his obligations where the contract was made absent his informed consent or in circumstances of unequal bargaining power. In *Ontario (Attorney General) v. Barfried Enterprises Ltd.*,1963 CanLII 15 (SCC), Justice Judson said that:

> The theory of the legislation is that the Court is enabled to relieve a debtor, at least in part, of the obligations of a contract to which in all the circumstances of the case he cannot be said to have given a free and valid consent.

Similarly, the court in *Trans Canada Credit Corp. v. Ramsay*, 1980 CanLII 3857 (PE SCTD), commenting on the purpose of the equivalent P.E.I. Act, said, at p. 154:

> This legislation was obviously passed for the protection of persons urgently in need of money but not skilled in the practice of borrowing it and who are thereby more or less defenceless in the hands of lenders, professional or otherwise, who seek to take advantage of them … The intent and purpose of the legislation is to give relief only … where it is obvious that an unfair advantage has been taken of the borrower.

The essential elements of the test for relief under section 2 of the UTRA are stated in *McPherson v.*

Napior (2017 ONSC 5934):

1. To establish that the loan is excessive:

(i) The debtor must show that the cost constitutes a criminal rate of interest; or

(ii) The debtor must show that the cost of the loan is excessive having regard to the risk and all of the circumstances.

2. To establish that the transaction is harsh and unconscionable:

(i) The debtor must show that either the terms are very unfair or that the consideration is grossly inadequate; or,

(ii) The debtor must show that there was an inequality of bargaining power between the parties and that one of the parties took advantage of this.

The Court considers all of the circumstances pursuant to the UTRA, which means that it looks to the lender's risk in making the loan as well as the debtor's circumstances when agreeing to the loan (e.g. *Bhanwadia et al. v. Clarity Financial Corp.*, 2012 ONSC 6393, paras. 53-9).

Strategic considerations

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