Onerous Contract

Requires Special Attention

Understanding That Contracts Containing Heavily Weighted Terms May Be Unenforceable

In day-to-day business, people of varying levels of sophistication are called upon to enter into contracts during the process of an apparently routine transaction. Sometimes these contracts are truly quite simple and at other times contracts may be extensively detailed. Often contracts are pre-printed and the party who pre-printed the contract offers very little, if any, opportunity for negotiation by the party seeking to enter into the contract. For example, when a party is buying a ticket into a special event, or for a parking space, the attendant is usually without any authority or qualification to negotiate alterations to the terms pre-written on the back of the ticket. Often, the length of the line up to purchase a ticket also prompts the buyer of the ticket to promptly pay for the ticket and move forward without a reasonably opportunity to review the pre-written terms and determine whether the terms are truly acceptable.

Contracts of Adhesion

These contracts known as 'contracts of adhesion', which allow for very little negotiation, often contain onerous terms, or clauses, that limit the rights of the purchaser. Thankfully, the law, generally, disallows the enforcing of onerous terms where a reasonable opportunity to review such terms or clauses was lacking or where the party providiing the contract document failed to call extra-special attention to the onerous terms or clauses. Accordingly, a party entering into such a contract may be able to successfully argue against enforceability of the contract, or at least, the onerous terms. As was said by the Court of Appeal in ***Tilden Rent-A Car Co. v. Clendenning,*** 1978 CanLII 1446:

> In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or *non est factum*.

> In the case at bar, Tilden Rent-A-Car took no steps to alert Mr. Clendenning to the onerous provisions in the standard form of contract presented by it. The clerk could not help but have known that Mr. Clendenning had not in fact read the contract before signing it. Indeed the form of the contract itself with the important provisions on the reverse side and in very small type would discourage even the most cautious customer from endeavouring to read and understand it. Mr. Clendenning was in fact unaware of the exempting provisions. Under such circumstances, it was not open to Tilden Rent-A-Car to rely on those clauses, and it was not incumbent on Mr. Clendenning to establish fraud, misrepresentation or *non est factum*. Having paid the premium, he was not liable for any damage to the vehicle while being driven by him.

> As Lord Denning stated in *Neuchatel Asphalte Co. Ltd. v. Barnett*, [1957] 1 W.L.R. 356 at p. 360: "We do not allow printed forms to be made a trap for the unwary."

As above, the Court of Appeal declined to enforce terms within a 'contract of adhesion' where opportunity to negotiate was lacking. This issue seems to arise somewhat regularly with the Court of Appeal returning to repeat the Tilden principle as such occurred in ***Beer v. Townsgate I Ltd.***, 1997 CanLII 976:

> As this was a standard form contract and the clause was in fine print, in the frenzied atmosphere described above, it was not drawn to the attention of these respondents, the contract was signed in haste with no opportunity for them to read it, there can be no reasonable expectation they were assenting to the clause: see *Tilden Rent-A-Car Co. v. Clendenning (1978)*, 1978 CanLII 1446 (ON CA), 18 O.R. (2d) 601, 83 D.L.R. (3d) 400 (C.A.); *Zippy Print Enterprises Ltd. v. Pawliuk*, 1994 CanLII 1756 (BC CA), [1995] 3 W.W.R. 324, 100 B.C.L.R. (2d) 55 (C.A.).

And again, very recently, the Divisional Court followed the ***Tilden*** principle in the case of ***Balagula v. Ontario Consumers Home Services***, 2018 ONSC 5398 where it said:

> [10] The trial judge's finding that these were onerous terms and not those that a consumer might reasonably expect was a factual finding that was open to him on the record and reflects no palpable and overriding error. Further, he properly applied the legal principles in *Tilden* to conclude that OCHS failed in its obligation to bring these onerous contractual terms to the attention of Mr. Balagula.

Summary Comment

It appears that where a party proffers a 'contract of adhesion' and fails to alert the other party to any onerous clauses, and faiils to allow reasonably opportunity for review, the contract or clauses or terms may indeed be unenforceable to the favour of the proffering party. Instances of these 'onerous term contracts' included those commonly used in door-to-door sales for household improvement items such as a new furnace, air-filters, water filter systems, among other things, where the terms for the item itself may appear relatively straightforward; however, the payment terms may be confusing and perhaps, unenforceably onerous. Accordingly, where a dispute arises involving a contract that appears unfair, the contract may be legally unenforceable and an opinion from an experienced legal advisor should be sought.