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COLUMN: BANKING ON CORPORATE

Read this carefully or else

A recent decision highlights the pitfalls of signing business contracts, or reading this column, in a hurried manner

FOR THOSE OF you who have read my previous columns, you will likely expect no meaningful insights or clever humour in this one. Others, however, will not have read these columns or will not recall them so as to condition their expectations. For the latter group, I will commence with a caution that there is little to be learned, and the likelihood of amusement is remote. I say this not because I've been paying attention to my family's repeated recommendations for accelerated courses in humility (I think I'm doing well at this, without any sense of irony), but because, based on recent jurisprudence, I have to give this warning. This way, if you're not educated or entertained, it's your fault.

In its recent decision in *MacQuarie Equipment Finance Ltd. v. 2326695 Ontario Ltd. (Durham Drug Store)*, the Ontario Court of Appeal dealt with the question of the limits of enforceability of an onerous contractual provision that was not brought to the specific attention of the counterparty at the time of contract. The issue will sound familiar to most past and present law students. In that court's seminal decision in *Tilden Rent-A-Car Co. v. Clendenning*, it refused to enforce a limitation of liability provision in a car rental agreement. That contract provided insurance coverage for collisions, but in faint and illegibly small type limited the liability where the driver had consumed alcohol.

The court emphasized the nature of a rental agreement: a contract of adhesion, with fixed, non-negotiated terms typically signed quickly at a rental counter without review. The court concluded that reasonable measures must be taken to bring clauses of significance to the attention of a counterparty in such cases, which spawned a red ink phenomenon in contracts and a slowdown in rental car lines as representatives review the key provisions to impatient travellers. An extension of this principle, the need to bring onerous provisions to the attention of a contractual counterparty, particularly to contracts between sophisticated parties, could clearly have significant implications.

In the MacQuarie case, MedviewMD Inc. agreed to supply Durham Drug Store in Pickering, Ont. with a telemedicine studio to provide remote medical services, and Medview sent along its form of service agreement to memorialize the business arrangement. The Medview agreement gave Durham Drug the right to terminate at any time. Medview sent a Mr. Johnson to meet with Ms. Abdulaziz, the principal of Durham Drug Store, to discuss a credit application, and later sent him back, it appeared, to get the service agreement signed. But Mr. Johnson was not a representative of Medview, as Ms. Abdulaziz assumed; rather, he worked for Leasecorp Capital Inc., an equipment lease broker, and he arrived not with the Medview service agreement but with a MacQuarie equipment lease. The equipment lease included a term that purported to invalidate Durham Drug's right to terminate the lease.

It turned out that Medview's telemedicine services lacked the necessary regulatory approvals. Medview had neglected to disclose that information to Ms. Abdulaziz, and, when she learned that, Durham Drug terminated the service agreement and stopped making lease payments for the equipment it no longer required. MacQuarie, however, sought to enforce the lease by its terms.

The MacQuarie court confirmed that non-cancellation clauses are not per se harsh or oppressive and that a party need not have read an agreement to have it be enforceable against that party. The court noted, too, that neither MacQuarie nor the lease broker sought to take advantage of Ms. Abdulaziz; it was Medview that had misled her.

However, the court determined that the circumstances made the provision unenforceable on the basis of the hurried manner in which it was signed, the absence of any opportunity to negotiate or consult with counsel, the deviation of that key provision from the cancellation clauses of the service agreement, the extremely small font size and the resulting failure of communication. The court emphasized that the facts were "highly unusual," but it nevertheless opened the door to an extension of the rule in *Tilden*.

The court determined that the circumstances made the provision unenforceable on the basis of the hurried manner in which it was signed.

All of this will ideally explain why I warned you about this column. But I didn't use red ink, bolded text or an oversized font. That may result in some uncertainty such that, even if you expected to be informed and/or entertained and were not, I may decide not to enforce this column against you. CL

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