

Shielding from Borrower's Remorse

Consciously protecting yourself from claims of unconscionability

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ISSUE

A somewhat desperate borrower wants you to broker a mortgage. Her dire financial circumstances make her susceptible to accepting extremely unreasonable terms from a predatory lender. How careful do you need to be in protecting the borrower client from, in the circumstances, a very bad deal? What can you do to protect yourself when the client later blames you for her very bad deal?

The Saskatchewan Court of Queen's Bench January 2019 decision in *Primewest Mortgage Investment Corporation v Azimi*, 2019 SKQB 37 provides some guidance.

WHAT HAPPENED?

A mortgage broker arranged a mortgage for a borrower of \$197,400, with an annual interest rate of 13% and a one-year term. The borrower defaulted on payments; the lender brought foreclosure proceedings.

The borrower claimed the mortgage contract was unconscionable and asked to be relieved of all obligations under it. He said the broker was disreputable and blamed the broker for inducing him to enter into an improvident agreement. He also claimed the broker and the lender had conspired to coerce him to accept the mortgage.

LEGAL REQUIREMENTS

Courts can release borrowers from unconscionable contracts if:

- there is significant inequality in bargaining power between the parties due to ignorance, need or distress;
- the stronger party used its position of power in an unconscionable manner to achieve a material advantage over the weaker party, and
- the bargain achieved is grossly unfair to the weaker party.

Inequality of Bargaining Power Criterion
There was significant difference of bar-



gaining power between the lender and the borrower.

The borrower had limited English skills and he reasonably used a mortgage broker to negotiate with potential lenders. He was in a difficult position because, as told to him by the mortgage broker, he would forfeit the \$40,000 deposit he'd made toward the purchase if he did not conclude this mortgage.

Most significantly, the borrower did not receive independent legal advice. He knew nothing of the terms of the mortgage until he attended at the lawyer's office. The lawyer advised him that he acted for the lender and the borrower. The lawyer was in a conflict of interest and should have referred the borrower to another lawyer; independent legal advice typically overcomes inequality of bargaining power, although the lack of it does not automatically make the bargain unconscionable. The other two criterion must also be met for the bargain to be unconscionable.

Unconscionable Use of Power Criterion

The Court did not have enough evidence that the lender used its superior position in an unconscionable way to force the weaker party into an improvident arrangement. The

borrower baldly alleged that:

- the broker and the lender arranged the mortgage and persuaded him to agree to it, and
- the then-president of the corporate lender later left his position due to mortgage and lending irregularities.

Ambiguous and bald allegations without supporting facts are not enough to prove this criterion. (Of note is that the borrower was not represented in court by a lawyer. It may be that, assuming the needed facts were available, the lack of litigation skills caused the borrower to not properly present his case.)

Grossly Unfair Bargain Criterion

The Court did not have enough evidence that the mortgage was grossly unfair to the borrower or that it was different from community standards of commercial morality. The Court said that the mortgage terms agreed upon appear to be consistent with terms found in most mortgages in Saskatchewan.

OUTCOME

The Court struck down the borrower's defence as not being reasonable and being doomed to fail. The mortgage was upheld as being valid.

Surprisingly, the Court explained that this is not to say that the borrower had no reason to feel aggrieved, however any further legal actions should be against the mortgage broker.

TAKEAWAYS

Be wary of advising desperate clients to accept onerous mortgage terms.

If a client wants to, contrary to your advice, accept a "bad" deal then provide your recommendation and the client's instructions in writing.

Ensure the client receives independent legal advice. ☐