

Equitable Rescission

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The recent Court of Appeal decision in *TTC v. Gottardo* [2005] O.J. 3689 deals with the concept of equitable rescission. While not completely closing the door on such a plea in the absence of fraud or induced mistake, the Court very clearly lays down the rule that equitable rescission will seldom be available.

The defendant responded to a call for tenders by the plaintiff. The tender agreement provided that the Commission could accept any tender bid from the time it was opened until 120 days later. The defendant was the lowest bidder and was awarded the contract; here the problem arose. The defendant's bid was too low because of a mistake made by the defendant. The plaintiff did not cause the error in any way. The mistake was unilateral and there was no fraud. The mistake was honestly made and inadvertent. The defendant refused to sign a contract for the amount originally tendered. The plaintiff then accepted the next lowest bidder and sued the defendant for the difference between its original bid and the amount it had to pay the second lowest bidder.

At trial the Court found, in obiter, that because of the serious, inadvertent and honest mistake, the contract (if formed) would be subject to being set aside on the basis of equitable rescission. The Court of Appeal disagreed holding that a unilateral mistake does not give rise to equitable rescission. That said, and here may be a key reservation, the Court did note "the enforcement of the contract freely entered into is not so grossly disproportionate so as to make enforcement of it by the courts unconscionable." It may be that this last reservation gives the Court the opportunity to use equitable rescission even in the context of unilateral mistake where the error leads to a grossly inequitable result. Of course, what is grossly inequitable is not always immediately obvious.

The passages of the case dealing with equitable rescission are set out below:

Was rescission available to Gottardo on the facts of this case?

29 The trial judge said, in obiter, that if she had found that Contract A had been formed, she would then have granted rescission in light of the financial hardship that this mistake would cause to Gottardo.

30 It is well established that rescission may only be granted in cases of unilateral mistake when the unmistaken party engaged in fraud or some other unconscionable conduct or where the unmistaken party contributed to the mistake. As set out in G.H.L. Friedman, *The Law of Contract in Canada*, 4th ed. (Toronto: Carswell, 1999), at 273-274:

As long as the unmistaken party knows of the mistake, without having caused it, the party cannot resist a suit for rectification on the grounds of mistake. The same will apply if the other party had good reason to know of the mistake and to know what was intended. The converse of the proposition as to knowledge of the other party's mistake is that if the unmistaken party is ignorant of the other's mistake, the contract will be valid and neither rescission nor rectification will be possible.

31 In the case of tenders, the rights of the parties crystallize and Contract A is formed upon the opening of the tenders. Nothing on the face of the documents then in existence, including the form of tender, suggested that the tender amount was in error. At that point in time no one was aware of an error and the tender was compliant and capable of acceptance.

32 The trial judge's reasons make it clear that the mistake was unilateral and that there was no fraud.

The trial judge, however, found that since the mistake was honestly made and inadvertent and because enforcement would cause Gottardo financial hardship, she would grant rescission. With respect, I do not agree. In my view, there are no unique circumstances in this case which distinguish it from Ron Engineering and which would operate so as to entitle the tenderer to have the contract rescinded. While it is conceded that some financial hardship will flow from enforcement of the contract, this is not sufficient to warrant rescission. The burden imposed on Gottardo by the enforcement of the contract freely entered into is not so grossly disproportionate so as to make enforcement of it by the courts unconscionable. In the circumstances, there are simply no grounds for equitable intervention.

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