

**ONTARIO
SUPERIOR COURT OF JUSTICE
Small Claims Court**

BETWEEN:

SHEILA DUNCAN

Plaintiff

Langer, M., *Counsel*

– and –

ONTARIO HOME SERVICES INC.
and UTILEBILL CREDIT CORP.

Defendants

Chand, P., *Counsel*

HEARD in Toronto:

April 5, 2019 and June 25, 2019

JUDGMENT

Overview

- [1] Relying on the “unfair practices” provisions of the *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A (“Act”)¹, the plaintiff, Sheila Duncan (“Duncan”), seeks relief from a contract that she entered into with the defendants, by way of rescission or cancellation of that contract. She also seeks the discharge of a lien on her property arising from the contract, plus general damages of \$15,000, and punitive damages of \$15,000.
- [2] The defendants, Ontario Home Services Inc. (“OHS”) and Utilebill Credit Corp. (“UCC”), deny that they engaged in any unfair practices, asserting that Ms. Duncan is a “grown woman” and “not an adolescent”. Having entered into a valid and enforceable agreement, she has a responsibility to comply with it, and cannot simply decide to have a case of “buyer’s remorse”. Instead, they have brought their own defendants’ claim for \$15,082.79, inclusive of HST, for breach of contract.

¹ This would be the applicable version of the *Consumer Protection Act*, 2000 and Ontario Regulation 17/05, as it existed as up to October 19, 2017.

Decision

- [3] Having heard and reviewed the evidence and the submissions of counsel, I have concluded that Ms. Duncan is entitled to a statutory rescission of the contract under the Act. The defendants' claim is dismissed. Brief reasons follow.

Evidence of Plaintiff

- [4] Ms. Duncan is a 65-year old woman, who has owned her home for 37 years. At the relevant time in 2017, she had retired from working as a nurse, and was receiving disability benefits, due to unresolved asthma and a pulmonary embolism. She had also been taking care of a sick parent out of town, and was worried about a water leak in her basement.
- [5] There is no dispute that in October 2017, Ms. Duncan signed a document entitled HVAC Rental Agreement (the "Agreement") with the defendant OHS for a water filter and an electronic air cleaner (the "Equipment"). There is dispute about her understanding of the Agreement, and its terms and conditions, and therefore the enforceability of the Agreement. Ms. Duncan says that she was induced into this Agreement, based on misrepresentations made by the defendant OHS' agents.
- [6] A copy of the Agreement that Ms. Duncan received was entered in as an exhibit. It is a one sheet yellow form, a carbon copy, on the front of which, under "Customer Equipment Information", is the following:
- a) Under "Equipment", the words "EAC / Carbon Filter" are handwritten;
 - b) Under "Rental Payment (Plus HST)", the numbers "49.99/59.99" are written; and
 - c) Under "TERM 120 Months" there are two boxes ticked, one for "FREE INSTALLATION" and the other showing "o" for the installation fee.
- [7] In the next section, there is nothing written beside: "Total Monthly Rental Rate (Including HST) \$". Further down the front of the Agreement, the following words are written in bold:
- Your "Consumer's Rights" are outlined in Section 17 of the terms and conditions of this Agreement".
- [8] The reverse side of the Agreement contains the terms and conditions. The

writing is hard to read against the yellow background. However, it is clear that the terms and conditions end at Section 16, and there is no Section 17. The bottom right of the form shows “T&C – page 1 of 2”. There was no second page introduced into evidence by either party.

- [9] Section 16 of the Agreement is a “whole agreement” clause, providing:

Miscellaneous – This is the entire agreement between us and you and may be varied only by written documentation signed by both parties. This Agreement is binding upon you and your permitted successors and assigns. Time is of the essence of this Agreement. This Agreement will be governed by and construed in accordance with the laws of the Province of Ontario and laws of Canada applicable therein. Information requests by any person(s) other than you shall be verified and are subject to administration charges as set from time to time by us.

- [10] Ms. Duncan gave evidence about how she ended up signing the Agreement. She stated that it started with someone calling her on or about October 12, 2017, to offer an annual furnace inspection. Ms. Duncan believed the call was from Enercare, with whom she had a protection plan for plumbing and drainage. Since she had a water leak in her basement at the time, she thought that Enercare was arranging for someone to come to her home.
- [11] On or about October 17, 2017, two gentlemen attended at her home, one of whom later identified himself as Mr. Wagas. Because she thought they were from Enercare, she told him about the water leak in the basement. He proceeded to inspect the furnace and pipes in the basement. Mr. Wagas told her that the pipes were turning green, and warned her that the pipes turning green on the outside meant they were also turning green on the inside of the pipes, and that was cause for concern about pipe breakage. He also told her that this was an urgent reason for her to install a water filter to prevent pipe breakage, as the carbon water filter would clear the problem of the pipes turning green and breaking.
- [12] During the course of their discussion, Mr. Wagas became aware of Ms. Duncan’s disability and respiratory issues. He then also urged her to install an electronic air cleaner, claiming that it would be healthier and better for her. She stated that she was under a great deal of stress at the time, and she fell into trusting everything that Mr. Wagas told her. She trusted and believed him.
- [13] On cross-examination, Ms. Duncan stated that Mr. Wagas filled out the forms for her, including the date. She testified that he told her more than once that there would be “no charge” to her for the water filter and air cleaner. He did not go through the form with her at all, nor did he point out any of its terms and conditions to her.

- [14] Wagas gave her the filled-in Agreement, and told her to sign “here”. He then said he would get the order in for her, after which she would receive a phone call to verify the work to be done. He specifically told her not to say anything during the call about him staying there with her.
- [15] The call to Ms. Duncan came from a woman who said she would confirm the Agreement with her. The recording of this call was played during trial.
- [16] The verification call agent confirmed Ms. Duncan’s name and address, and that she had a copy of the Agreement. She then asked Ms. Duncan to confirm that the agent was no longer at the home with her. Ms. Duncan did not answer immediately, and when she did, she said “uhhum”. When the verification call agent asked Ms. Duncan to confirm the installation date the next day, there is a pause in the recording and then, Ms. Duncan says “sorry, can you hang on for a moment”. Immediately after, there is an audible sound of someone’s voice, muffled in the background. Ms. Duncan testified that at this point in the call, she put her hand over the receiver, and she looked towards Mr. Wagas. She testified that he then put his hand in the air, and waved, and said he would take care of things. She continued to speak to the verification call agent. The verification call agent went on to inform Ms. Duncan of a ten-day cooling off period; that for Ms. Duncan’s convenience, the water filter and air cleaner would be billed on her usual Enbridge bill, under UCC’s name; and that the water filter and air cleaner were not owned by or affiliated to Enbridge. The verification call agent then thanked Ms. Duncan for choosing Ontario Home Services.
- [17] Ms. Duncan’s uncontradicted evidence is that Mr. Wagas was with her throughout this verification call. It is also evident from listening to the recording that there was at least one other person with Ms. Duncan during the call.
- [18] Notwithstanding the verification call, Ms. Duncan testified that she was not given any notice of the onerous provisions of the Agreement. She did not understand anything that was said in the verification call, as Mr. Wagas was right beside her; significantly, Ms. Duncan said she did not understand what the woman said about the ten-day cooling off period. She testified that she relied on the fact that Mr. Wagas said he would take care of everything. She testified that he said there would be “no charge” for the water filter and air cleaner, and she believed that she had just signed a work order in order to have a warranty over the items.
- [19] After the verification call, Mr. Wagas ripped apart the copies of the Agreement, and gave her the yellow copy, which, as described above, did not contain all the terms and conditions on the reverse. She said that he wrote

his number down for her on back of the yellow copy, and told her to call him if there were any problems. An examination of the original yellow copy of the Agreement shows handwriting in ink on the back.

- [20] The next day, an OHS technician came to instal the water filter and air cleaner, which took about three to four hours. He signed his name as “Milad” on the Completion Certificate, a yellow copy of which was also given to Ms. Duncan after she signed it. This yellow copy of the Completion Certificate was also produced to the court as an exhibit. Ms. Duncan stated that the date on the Completion Certificate, which shows “10/17/17” is wrong, and that the installation happened on October 18, 2017.
- [21] The Completion Certificate shows “EAC and Carbon Filter” as the new equipment installed. The Installation Checklist has ten spots that can be checked off, but there is nothing checked off. The technician wrote in his name as “Milad”.
- [22] Ms. Duncan’s handyman, Mr. Elias, came to her home on or about October 31, 2017, to inspect the leak in the basement. Mr. Elias noticed rental stickers on the water filter and the electronic air cleaner. When she told him that she was told there was no “charge” for the water filter and air cleaner, he urged her to look into this further.
- [23] Ms. Duncan testified that it was only at this time, at the urging of Mr. Elias, that she had a good look at the Agreement, and realized that the water filter and air cleaner might not be “no charge”. That same day, she promptly called Mr. Wagas, at the number he had given her, and confronted him with his representation that there would be “no charge”. She said that Mr. Wagas denied he had told her it would be no charge, but did say he would see what he could do, and he would call her back the next night. He did not.
- [24] Ms. Duncan testified that she also spoke with a certified HVAC specialist, who advised her that the electronic air filter was not better for her respiratory illness, and that the green colouration on the pipes was due to oxidation of the pipes and did not mean that there is any increased risk of breakage or any other increased health risks of consuming the water.
- [25] From October 31, 2017 onwards, Ms. Duncan tried several times to cancel the Agreement with OHS. Her attempts to get an answer from OHS were ignored or met with indifference.
- [26] On or about November 4, 2017, Ms. Duncan sent a letter by registered mail to OHS stating that she wanted to cancel the Agreement. Her evidence at trial was consistent with what she wrote in that letter. She received no

response to her letter.

- [27] After receiving a bill from Enbridge showing the UCC charges for the water filter and air cleaner, Ms. Duncan also alerted Enbridge to the payment dispute with OHS. Enbridge assured Ms. Duncan that no further payments for either OHS or UCC would be collected by Enbridge.
- [28] Soon after, on or about November 10, 2017, Ms. Duncan was shocked to discover that Home Trust had placed a lien on her property in the amount of \$9,430.
- [29] From on or about March 12, 2018 and continuing monthly thereafter, UCC mailed letters to Ms. Duncan requesting past due payments for the equipment.
- [30] Ms. Duncan stated that on or about April 17, 2018, within one year of entering into the Agreement, she delivered a second notice, pursuant to section 18(3) of the Act, to OHS and UCC in letter form by fax and email, asking to rescind the Agreement under section 18(1) of the Act.
- [31] Ms. Duncan admits that she has not made a single payment towards the water filter and air cleaner, neither of which she wants, but she denies receiving any benefit from their installation.

Evidence of Defendants

- [32] The evidence from the defendants' witnesses, while helpful to understanding UCC and OHS' general business operations and usual business practices and processes, had limited value in terms of the facts of this particular case.
- [33] John Nasser, President of UCC, was the first witness for the defendants. He testified about UCC's primary business, as a third-party financing company. OHS is one of the dealers with which UCC conducts business, by purchasing their lease agreements and the underlying assets, and profiting from the interest charged to the customers. Because OHS contracts are assigned to UCC, UCC is referenced in their contracts with consumers. This is evidenced from reviewing the front page of the Agreement.
- [34] Mr. Nasser says that UCC has been working with OHS since 2013. Once an agreement is received from OHS, the UCC staff vet the agreement, and then book the lease agreement into their billing system, which then generates monthly recurring billings, and are added to Enbridge gas bills.

- [35] Mr. Nasser also testified about the verification call process, and what the verification call agents have to confirm.
- [36] When asked to explain what the damages would be for termination of the Agreement 17 days after it was entered into, Mr. Nasser replied that it would be all the monthly payments to the end of the 10-year term of the Agreement. Mr. Nasser pointed out section 9(c) of the Agreement, under “Remedies upon Default”, one of the terms that would have been mentioned by its agent, which provides that upon a default, payment could be required immediately upon demand for the damages suffered by UCC. Reviewing the Agreement, section 9(c) speaks to a “genuine pre-estimate of liquidated damages for loss of a bargain and not as a penalty, equal to the Casualty Value, as defined below”. To figure out the “Casualty Value”, the consumer must then read down to section 13 of the Agreement, which is headed “Equipment Risks”, and, in the middle, reads:
- “The Casualty Value shall be equal to the total present value of all unpaid and future Payments under this Agreement plus the present value of the estimated fair market value of the Equipment at the end of the Term. The present value will be calculated by discounting at the rate per annum equal to 3%.”
- [37] Under cross-examination, Mr. Nasser stated that UCC would not permit a customer to cancel an agreement even one day after the 10-day cooling off period under the Act. After the 10 days expires, then the customer is bound by the executed agreement. Ms. Duncan’s letter of November 3, 2017 was 17 days after the Agreement was executed, and in UCC’s view, she was bound by it and could not cancel.
- [38] Section 11 of the Agreement provides for a “Buy Out”, which the consumer can elect to do provided they pay “fair market value, plus all remaining payments under the Agreement and applicable taxes”. He stated that the buy-out for the water filter and air cleaner is the total of all the monthly payments for the term of the Agreement.
- [39] When asked about the role of Home Trust and its lien on Ms. Duncan’s property, Mr. Nasser explained that Home Trust provides UCC with capital, and in return UCC provides Home Trust with the leases. Home Trust took it upon themselves to register a security interest on Ms. Duncan’s property. He pointed to section 14 of the Agreement as the basis for OHS and then UCC being able to assign and create a security interest at their “sole discretion”, without Ms. Duncan’s consent or notice to her.
- [40] Mark Fraser, the defendants’ second witness, was called as the founder and President of OHS, a home servicing company. He testified that OHS is involved in the rental, lease, finance and purchase of HVAC equipment,

including furnaces, air conditioning, water tanks, and water filtration. He confirmed that OHS is funded by UCC, and they have been affiliated for about 9 years.

- [41] He explained that his agents educate customers on the benefits of installing certain equipment. His agents are supposed to be in uniform, and should follow a script. When asked if they receive any training on completing forms, he responded with “I am sure it is part of it”, but he admitted that he is not sure how the training is done specifically.
- [42] When asked why Mr. Wagas was not called to testify at trial, Mr. Fraser said that Ms. Duncan had executed the agreement, so could not deny that she knew there would be charges for the water filter and air cleaner. Also, in his view, the verification call recording was conclusive, since the verification call agent went through and confirmed the contract with Ms. Duncan.
- [43] Mr. Fraser said that Ms. Duncan had the choice of saying “yes” or “no” when the verification call agent asked if anyone was in the room. If the OHS representative was still in the room, then Ms. Duncan would have lied during the course of the third party call.
- [44] According to Mr. Fraser, Ms. Duncan accepted the terms of the Agreement when she indicated her acceptance of the terms and conditions during the verification call, and she did not cancel the Agreement within 10-days receipt of the Agreement and installation, as provided under the Act. She signed, and they rely on the good faith of the customer who has signed.
- [45] He went on to say that the third party verification team is supposed to go through a script, and follow it during the call. The script may have changed over the years, but their role remains to verify customer’s name, address, postal code and other basic information, including confirming the installation of the equipment, the monthly rate, the term. These are the instructions given to the third party verification call agents, but he admitted that he was not part of the specific call with Ms. Duncan.
- [46] However, having listened to the call, Mr. Fraser stated that he had no concerns. Mr. Fraser stressed that the third party verification call process is important to OHS, as it is important to the company that its customers are protected. It is during this third party verification call that any customer with concerns, or who is uncomfortable, can ask questions.
- [47] He also stated that if Ms. Duncan tried to cancel in 17 days, she would be past the rescission period of 10 days. They have seen many customers get “buyer’s remorse”. Mr. Fraser emphasized that customers know what they are getting into when they sign and go through the verification call

procedure, but then some people change their minds. He compared it to his having a vehicle lease that he also would love to get out of, but knows he cannot.

- [48] Mr. Fraser confirmed that Ms. Duncan had not made any payments on the Agreement. She did not pay for the equipment, or its installation.
- [49] He confirmed under cross-examination that he did not know if Mr. Wagas went over the terms as he was not there, but that it is OHS' expectation of its agents that they should go through the terms with the consumer.
- [50] In summary, the defendants' evidence is essentially that Ms. Duncan entered into a valid contract, but later regretted it, and is just seeking to rescind or cancel the Agreement. They deny that there is any basis for doing so, and that the verification call definitively shows that she is not entitled to resile from the Agreement. They allege that Ms. Duncan is in breach of contract.
- [51] Neither Mr. Nasser or Mr. Fraser explained the discrepancy between the different copies of the Agreement and the Completion Certificate that were produced as exhibits by the plaintiff and the defendants. The Agreement the defendants produced shows a "Total Monthly Rental Rate (including HST) \$" of "124.28", whereas the original yellow copy produced by Ms. Duncan has nothing in that spot.
- [52] Further, the Completion Certificate produced by the defendants is markedly different from Ms. Duncan's copy. The defendants' copy has the EAC and the carbon filter listed with their full serial numbers, and it also has the technician name as "moe". Ms. Duncan's original yellow copy only has "EAC and Carbon Filter" listed, and has the technician name as "Milad".
- [53] Nonetheless, the defendants both asserted that the Agreement complied with the Act and its regulations, and they both denied the use of any unfair practices as defined by sections 14 and 15 of the Act. They both insist that the third party verification call is definitive to show that there were no unfair practices, and that Ms. Duncan is merely experiencing buyer's remorse.
- [54] The defendants further assert that Ms. Duncan has failed to plead sufficiently any facts supporting an entitlement to punitive damages, and alternatively that their conduct did not merit an award of punitive damages.
- [55] By way of Defendants' Claim, the defendants also claim that they have suffered damages in the amount of \$15,082.79, inclusive of HST, for breach of contract. They claim that Ms. Duncan has benefited from the use and

enjoyment of the water filter and air cleaner, and also realized a corresponding increase in the value added to her property due to the installation of the equipment.

- [56] Because Ms. Duncan has made no payments pursuant to the Agreement, and has also declared her intention not to honour her obligations under the Agreement, the defendants claim an entitlement to treat the Agreement as at an end, and to seek recovery of all accelerated payments due to them.

Analysis and Findings

Plaintiff's Claim

- [57] The plaintiff seeks the following:

- i) Statutory rescission of a contract as a result of “unfair practices” on the part of the defendants, pursuant to section 14(2)(10) and 15(2)(e), (f) and (g) of the Act;
- ii) Alternatively, that the plaintiff is entitled to rescind the contract as a result of “unfair practices” on the part of the defendants, pursuant to section 14(2)(10) and section 15(2)(e), (f), and (g) of the Act;
- iii) That the court find that the plaintiff is entitled to cancel the Contract pursuant to section 43 of the Act because the plaintiff did not receive a copy of the contract that meets the requirements outlined in section 42 of the Act;
- iv) That the lien on the plaintiff's property for \$9,430 be discharged by Home Trust;
- v) General damages of \$15,000;
- vi) Punitive damages of \$15,000;
- vii) Pre and post judgment interest, plus costs.

Rescission of Agreement

- [58] The plaintiff's counsel referred me to the “unfair practices” provisions of the Act, subsection 14(2)10 and 11.
- [59] The Agreement between Ms. Duncan and OHS was a consumer agreement within the meaning of the Act. Part III of the Act deals with Unfair Practices. Pursuant to Section 17(2), anyone who performs an act referred to in Sections 14, 15 or 16 is deemed to be engaging in an unfair practice.
- [60] Section 18(1) provides that an agreement entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer, and the consumer is entitled to any remedy that is available in law, including damages.

- [61] Ms. Duncan's evidence regarding the formation of the Agreement was credible and, significantly, undisputed. The only other evidence of what happened during the OHS representatives' visit to Ms. Duncan is the recording of the third party verification call, but the call itself does not contradict Ms. Duncan's version of events.
- [62] The defendants' witnesses were also credible, but both admitted they were not actually present when the Agreement was executed or when the verification call occurred. Neither could contradict Ms. Duncan's evidence that she felt coerced by the representations of Mr. Wagas, about her need for the water filter and air cleaner; that Mr. Wagas failed to explain the terms and conditions of the Agreement or her consumer rights; that he only gave her the yellow copy of the Agreement, without Section 17 of the terms and conditions; or that he remained in the room with her when she confirmed the Agreement over the phone.
- [63] It is notable that the defendants did not or were unable to call Mr. Wagas to the witness stand, since he would have had direct knowledge of relevant information to possibly contradict Ms. Duncan's evidence. As such, the evidence of Ms. Duncan is uncontradicted that Mr. Wagas made certain representations that she relied on in entering into the Agreement, and that his actions fall into the "unfair practices" provisions of the Act.
- [64] I find that Mr. Wagas, OHS's sales representative, for whom OHS is vicariously liable, engaged in the following unfair practices, as referenced below:
- a) He engaged in the following false, misleading or deceptive representations (subsections 14(2)10. and 11.):
 - (i) he represented to Ms. Duncan that she required a water filter because it would fix the damage caused by the oxidation (green) on her water pipes, which would otherwise lead to her pipes breaking, which Ms. Duncan later found out to be false;
 - (ii) he represented to Ms. Duncan that there would be "no charge" for the water filter and air cleaner. The fact that Mr. Wagas also gave Ms. Duncan a copy of the Agreement that did not have any number beside "Total Monthly Rental Rate (Including HST) \$" created ambiguity that supports Ms. Duncan's understanding and belief that there was "no charge";

(iii) the third party verification call, with Mr. Wagas present throughout the call, does not clear Mr. Wagas of having made false, misleading or deceptive representations or his role in pressuring Ms. Duncan by staying with her during the verification call.

b) He and/or OHS engaged in unconscionable representations that made the consumer transaction excessively one-sided in favour of OHS and were so adverse to the consumer as to be inequitable (subsections 15(2)(e) and (f)):

(i) Mr. Wagas represented to Ms. Duncan that there would be “no charge” to her, and yet, in addition to the monthly payments, the Agreement contained other provisions that are excessively one-sided and onerous, and also confusing. For instance, the liquidated damages payable on a default or termination of the Agreement, or on a “Buy Out” at any time during the Agreement, is essentially an acceleration of all unpaid payments under the Agreement, *plus* the fair market value of the equipment. Yet, when Mr. Nasser was asked at trial about the “fair market value”, he stated this was the accelerated payment of all the payments under the Agreement.

In the absence of evidence that Mr. Wagas brought these liquidated damages and buy out provisions to Ms. Duncan’s attention, and obtained her clear consent to the specific terms, the terms are onerous and excessively one-sided in favour of OHS. There is no evidence of clear consent to these onerous terms.

(ii) In addition, Mr. Wagas represented to Ms. Duncan that there would be “no charge” to her, and yet there were also provisions in the Agreement on assignment rights creating a security interest that could be, and was, registered against Ms. Duncan’s property. These provisions should also have been clearly brought to Ms. Duncan’s attention, but there is no evidence that Mr. Wagas brought them to her attention. There is also no evidence of clear consent to these onerous terms.

[65] I find that Ms. Duncan provided the appropriate notice of rescission, with her reasons for doing so, pursuant to section 18(3), with her letter of November 3, 2017 to OHS. OHS also received notice that Ms. Duncan intended to rescind the Agreement when it received from the Better

Business Bureau Serving Central Ontario a copy of Ms. Duncan's complaint. Ms. Duncan indicated in her complaint that she wanted the contract with OHS rescinded immediately, and she offered to pay \$500 for the air cleaner and \$100 for the water filter. Although OHS's response was not introduced as evidence, the Better Business Bureau Serving Central Ontario's letter to Ms. Duncan enclosing the OHS response was introduced in evidence.

- [66] I have also reviewed the plaintiff's submission of the following cases, *Balagula v. Ontario Consumers Home Services*, 2018 ONSC 5398; *Tilden Rent a Car v. Clendenning*, 1978 CanLII 1446 (ONCA)s; and *Peter Polito v 1201553 Ontario Ltd.*, 2007 CanLII 54969 (ONSC – Div) as well as *Peter Polito v 1201553 Ontario Ltd.*, Reasons for Judgment – DJ Breithaupt (Small Claims Court), and also reviewed the defendants' submissions respecting these cases.
- [67] In light of the above factual findings and review of relevant law, I find that OHS, through Mr. Wagas, engaged in unfair practices contrary to section 17 of the Act and that Ms. Duncan was entitled to rescind the agreement pursuant to section 18(1) of the Act.

Cancellation of Agreement

- [68] Even if I had not found that the Agreement is rescinded on the basis of the unfair practises provisions of the Act, I find that Ms. Duncan is entitled to cancel the Agreement on the basis that she did not receive a copy of the Agreement meeting the requirements for direct agreements, in section 42 of Ontario Regulation 17/05, General, under the Act.
- [69] This Agreement also qualifies as a direct agreement. Subsection 42(1) of the Act provides that direct agreements "shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements". Subsection 35, in the Direct Agreements section of Ontario Regulation 17/05, General, sets out the requirements for a direct agreement, which includes a requirement for a "total amount payable", as well as a substantial section on consumer rights which should have been included in the Agreement. Ms. Duncan's evidence was uncontradicted: the copy of the Agreement she received was one sheet, with a front page and back page, and the relevant section on consumer rights, which should have been section 17 of the terms and conditions as referenced on the front of the Agreement, is not included in the copy actually given to Ms. Duncan.
- [70] The third party verification call might have provided a verbal description of what should have been in the consumer rights section, that is the missing Section 17 of the Agreement, but there is a reason that the Act requires the consumer rights provisions to be in writing. The passing nature of a verbal

conversation with descriptions of Ms. Duncan's consumer rights does not cure the failure of OHS to comply with the strict prescribed disclosure requirements for direct agreements. On a balance of probabilities, I find that Ms. Duncan did not receive notice as required of her consumer rights.

Discharge of lien on the plaintiff's property

- [71] I will not deal with Ms. Duncan's claim for a discharge of the lien on her property.
- [72] I do say that, Section 18(14) of the Act provides that when a consumer rescinds an agreement, that rescission operates to cancel, as if they never existed, the agreement in question, all related agreements, all guarantees given in respect of money payable under the agreement, and all security given by the consumer or a guarantor in respect of money payable under the agreement.

General Damages

- [73] Apart from having the Agreement rescinded, I agree with the defendants' submission that the Plaintiff has failed to show any damages. Since the Agreement is rescinded and she made no payments on the Agreement, she has suffered no damages.

Punitive Damages

- [74] Defendants' counsel submitted that I do not have the jurisdiction to award punitive damages. I disagree. The Small Claims Court may award punitive damages, subject to the limit of its monetary jurisdiction.
- [75] In *Honda Canada Inc. v. Keays*, 2008 SCC 39 (CanLII), [2008] 2 S.C.R. 362, Bastarache J. wrote at page 63:

...punitive damages are restricted to *advertent* wrongful acts that are so malicious that they are deserving of punishment on their own. This distinction must guide judges on their analysis.
[emphasis added]

- [76] The Plaintiff has not shown that the defendants committed any advertent wrongful acts.

Defendants' Claim

- [77] Given my findings and conclusion regarding the plaintiff's claim, the Defendants' Claim is dismissed.
- [78] The defendants asserted that this is a straight-forward breach of contract, and that Ms. Duncan, being a grown woman, should be held to her contractual obligations.
- [79] However, because of the particular nature of this contract, there must be compliance with the strict requirements of the Act. Since there was no strict compliance, and Ms. Duncan has proved on a balance of probabilities that she is entitled to have the contract rescinded, or at least cancelled, there is no basis for the defendants' breach of contract claim.

Order

- [80] I thank both counsel for their spirited advocacy on behalf of their clients.
- [81] I find in favour of the plaintiff, and order that the Agreement is rescinded, as if it had never existed.
- [82] The Defendants' Claim is dismissed.
- [83] Costs awards are a discretionary matter. I would allow for costs payable by both defendants to the plaintiff in the fixed amount of \$3,500.00, inclusive of disbursements, for her success in the Claim and Defendants' Claim.
- [84] Costs will be ordered on this basis, unless at least one of the parties, by no later than Friday, October 18, 2019, informs this court that they wish to schedule a hearing before me to make costs submission.

Released: October 5, 2019

Hum, D.J.

Schedule “A”

Consumer Protection Act, 2002, **S.O. 2002, c. 30, Sched. A**

False, misleading or deceptive representation

14 (1) It is an unfair practice for a person to make a false, misleading or deceptive representation. 2002, c. 30, Sched. A, s. 14 (1).

Examples of false, misleading or deceptive representations

(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations:

[...]

10. A representation that a service, part, replacement or repair is needed or advisable, if it is not.

11. A representation that a specific price advantage exists, if it does not.

[...]

Unconscionable representation

15 (1) It is an unfair practice to make an unconscionable representation. 2002, c. 30, Sched. A, s. 15 (1).

Same

(2) Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know,

[...]

(e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;

(f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;

[...]

[...]

Unfair practices prohibited

17 (1) No person shall engage in an unfair practice. 2002, c. 30, Sched. A, s. 17 (1).

One act deemed practice

(2) A person who performs one act referred to in section 14, 15 or 16 shall be deemed to be engaging in an unfair practice. 2002, c. 30, Sched. A, s. 17 (2).

Advertising excepted

(3) It is not an unfair practice for a person, on behalf of another person, to print, publish, distribute, broadcast or telecast a representation that the person accepted in good faith for printing, publishing, distributing, broadcasting or telecasting in the ordinary course of business. 2002, c. 30, Sched. A, s. 17 (3).

Rescinding agreement

18 (1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages. 2002, c. 30, Sched. A, s. 18 (1).

Remedy if rescission not possible

(2) A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible,

- (a) because the return or restitution of the goods or services is no longer possible; or
- (b) because rescission would deprive a third party of a right in the subject-matter of the agreement that the third party has acquired in good faith and for value. 2002, c. 30, Sched. A, s. 18 (2); 2004, c. 19, s. 7 (6).

Notice

(3) A consumer must give notice within one year after entering into the agreement if,

- (a) the consumer seeks to rescind an agreement under subsection (1); or
- (b) the consumer seeks recovery under subsection (2), if rescission is not possible. 2002, c. 30, Sched. A, s. 18 (3).

Form of notice

(4) The consumer may express notice in any way as long as it indicates the intention of the consumer to rescind the agreement or to seek recovery where rescission is not possible and the

reasons for so doing and the notice meets any requirements that may be prescribed. 2002, c. 30, Sched. A, s. 18 (4).

Delivery of notice

(5) Notice may be delivered by any means. 2002, c. 30, Sched. A, s. 18 (5).

When notice given

(6) If notice is delivered other than by personal service, the notice shall be deemed to have been given when sent. 2002, c. 30, Sched. A, s. 18 (6).

Address

(7) The consumer may send or deliver the notice to the person with whom the consumer contracted at the address set out in the agreement or, if the consumer did not receive a written copy of the agreement or the address of the person was not set out in the agreement, the consumer may send or deliver the notice,

(a) to any address of the person on record with the Government of Ontario or the Government of Canada; or

(b) to an address of the person known by the consumer. 2002, c. 30, Sched. A, s. 18 (7).

Commencement of an action

(8) If a consumer has delivered notice and has not received a satisfactory response within the prescribed period, the consumer may commence an action. 2002, c. 30, Sched. A, s. 18 (8).

Same

(9) If a consumer has a right to commence an action under this section, the consumer may commence the action in the Superior Court of Justice. 2002, c. 30, Sched. A, s. 18 (9).

Evidence

(10) *In the trial of an issue under this section, oral evidence respecting an unfair practice is admissible despite the existence of a written agreement and despite the fact that the evidence pertains to a representation in respect of a term, condition or undertaking that is or is not provided for in the agreement.* 2002, c. 30, Sched. A, s. 18 (10).

Exemplary damages

(11) *A court may award exemplary or punitive damages in addition to any other remedy in an action commenced under this section.* 2002, c. 30, Sched. A, s. 18 (11).

Liability

(12) *Each person who engaged in an unfair practice is liable jointly and severally with the person who entered into the agreement with the consumer for any amount to which the consumer is entitled under this section.* 2002, c. 30, Sched. A, s. 18 (12).

Limited liability of assignee

(13) If an agreement to which subsection (1) or (2) applies has been assigned or if any right to payment under such an agreement has been assigned, the liability of the person to whom it has been assigned is limited to the amount paid to that person by the consumer. 2002, c. 30, Sched. A, s. 18 (13).

Effect of rescission

(14) *When a consumer rescinds an agreement under subsection (1), such rescission operates to cancel, as if they never existed,*

- (a) the agreement;*
- (b) all related agreements;*
- (c) all guarantees given in respect of money payable under the agreement;*
- (d) all security given by the consumer or a guarantor in respect of money payable under the agreement; and*
- (e) all credit agreements, as defined in Part VII, and other payment instruments, including promissory notes,*
 - (i) extended, arranged or facilitated by the person with whom the consumer reached the agreement, or*
 - (ii) otherwise related to the agreement. 2002, c. 30, Sched. A, s. 18 (14).*

Waiver of notice

(15) If a consumer is required to give notice under this Part in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so. 2002, c. 30, Sched. A, s. 18 (15); 2008, c. 9, s. 79 (5).

Section Amendments with date in force (d/m/y)

[2004, c. 19, s. 7 \(6\)](#) - 30/07/2005

[2008, c. 9, s. 79 \(5\)](#) - 01/07/2009

O. Reg. 17/05: GENERAL

under *Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A*

Requirements for direct agreements

35. (1) Subject to section 35.1, for the purpose of subsection 42 (1) of the Act, a direct agreement shall be signed by the consumer and the supplier and shall set out the following information:

1. The name and address of the consumer.
2. The name of the supplier and, if different, the name under which the supplier carries on business.
3. The telephone number of the supplier, the address of the premises from which the supplier conducts business, and information respecting other ways, if any, in which the supplier can be contacted by the consumer, such as the fax number and e-mail address of the supplier.
4. The names of,
 - i. the person, if any, who solicited the consumer in connection with the agreement,
 - ii. the person, if any, who negotiated the agreement with the consumer, and
 - iii. the person who concluded the agreement with the consumer.
5. The date on which and the place where the agreement is entered into.
6. A fair and accurate description of the goods and services to be supplied to the consumer, including the technical requirements, if any, related to the use of the goods or services.
7. The total amount payable by the consumer under the agreement or, if the goods and services are to be supplied during an indefinite period, the amount and frequency of periodic payments.
8. The terms of payment.
9. An itemized list of the prices at which the goods and services are to be supplied to the consumer, including taxes and shipping charges.
10. If the agreement includes a trade-in arrangement, a description of the trade-in arrangement and the amount of the trade-in allowance.
11. A statement containing the text set out in subsection (2) and, if applicable, the additional text set out in subsection (3),

- i. which shall be in at least 10 point type, except for the heading which shall be in at least 12 point bold type, and
 - ii. which shall appear on the first page of the agreement, unless there is a notice on the first page of the agreement in at least 12 point bold type indicating where in the agreement the statement appears.
12. As applicable, the date or dates on which delivery, commencement of performance, ongoing performance and completion of performance are to occur.
13. The rights, if any, that the supplier agrees the consumer will have in addition to the rights under the Act and the obligations, if any, by which the supplier agrees to be bound in addition to the obligations under the Act, in relation to cancellations, returns, exchanges and refunds.
14. The currency in which amounts are expressed, if it is not Canadian currency.
15. Any other restrictions, limitations and conditions that are imposed by the supplier. O. Reg. 17/05, s. 35 (1); O. Reg. 4/15, s. 2.

(2) The statement mentioned in paragraph 11 of subsection (1) shall set out the following:

Your Rights under the *Consumer Protection Act*, 2002

You may cancel this agreement at any time during the period that ends ten (10) days after the day you receive a written copy of the agreement. You do not need to give the supplier a reason for cancelling during this 10-day period.

If the supplier does not make delivery within 30 days after the delivery date specified in this agreement or if the supplier does not begin performance of his, her or its obligations within 30 days after the commencement date specified in this agreement, you may cancel this agreement at any time before delivery or commencement of performance. You lose the right to cancel if, after the 30-day period has expired, you agree to accept delivery or authorize commencement of performance.

If the delivery date or commencement date is not specified in this agreement and the supplier does not deliver or commence performance within 30 days after the date this agreement is entered into, you may cancel this agreement at any time before delivery or commencement of performance. You lose the right to cancel if, after the 30-day period has expired, you agree to accept delivery or authorize commencement of performance.

In addition, there are other grounds that allow you to cancel this agreement. You may also have other rights, duties and remedies at law. For more information, you may contact the Ministry of Consumer and Business Services.

To cancel this agreement, you must give notice of cancellation to the supplier, at the address set out in the agreement, by any means that allows you to prove the date on which you gave notice. If no address is set out in the agreement, use any address of the supplier that is on record with the Government of Ontario or the Government of Canada or is known by you.

If you cancel this agreement, the supplier has fifteen (15) days to refund any payment you have made and return to you all goods delivered under a trade-in arrangement (or refund an amount equal to the trade-in allowance).

However, if you cancel this agreement after having solicited the goods or services from the supplier and having requested that delivery be made or performance be commenced within ten (10) days after the date this agreement is entered into, the supplier is entitled to reasonable compensation for the goods and services that you received before the earlier of the 11th day after the date this agreement was entered into and the date on which you gave notice of cancellation to the supplier, except goods that can be repossessed by or returned to the supplier.

O. Reg. 17/05, s. 35 (2).

(3) If the consumer is to receive goods under the agreement, the statement mentioned in paragraph 11 of subsection (1) shall also set out the following:

If the supplier requests in writing repossession of any goods that came into your possession under the agreement, you must return the goods to the supplier's address, or allow one of the following persons to repossess the goods at your address:

The supplier.

A person designated in writing by the supplier.

If you cancel this agreement, you must take reasonable care of any goods that came into your possession under the agreement until one of the following happens:

The supplier repossesses the goods.

The supplier has been given a reasonable opportunity to repossess the goods and twenty-one (21) days have passed since the agreement was cancelled.

You return the goods.

The supplier directs you in writing to destroy the goods and you do so in accordance with the supplier's instructions.

O. Reg. 17/05, s. 35 (3).

(4) The supplier may meet the requirements of paragraph 11 of subsection (1) by providing a statement that is required under legislation of another province or territory of Canada that is enacted for the protection of consumers, if,

(a) the statement is required in connection with agreements that are substantially equivalent to direct agreements; and

(b) the statement is substantially equivalent to the statement requirement by paragraph 11. O. Reg. 17/05, s. 35 (4).