CITATION: Utilebill Credit Corp. v. Apex Home Services Inc., 2021 ONSC 4633
COURT FILE NO.: DC-20-00008 (Brampton)
DATE: 2021 06 28

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:

UTILEBILL CREDIT CORP.

Appellant

-and-

APEX HOME SERVICES INC. and LAURIE STEVENSON

Respondents

Jessica L. Kuredjian, for the Appellant
Laurie Stevenson, self-represented

Heard: February 19, 2021 by video conference

Chown J.

REASONS FOR DECISION

[1] After a solicitation at her door the respondent Laurie Stevenson had a furnace and air conditioner installed in her home. From her perspective, the installation was pursuant to a purchase agreement involving monthly payments with no interest, totalling $7,335. From the appellant Utilebill's perspective, it was 10-year rental agreement with a payment stream totalling more than $20,000.

[2] Before signing the pre-printed agreement for the transaction, Ms. Stevenson wrote “Total $7,335.00 0% int.” on the face of the pre-printed form. This was consistent with her understanding of the agreement based on what she had been told. However, her handwritten note was completely inconsistent with the other terms of the contract, including its title: “HVAC Rental Agreement.”

[3] The small claims court trial judge had plenty of evidence to support her conclusion that Ms. Stevenson’s handwritten note governed. Despite the pre-printed terms in the contract, she found that “the agreement was a lease to purchase agreement limited to $7,335 without interest.” She was incensed by the defendants’ conduct and the one-sided nature of pre-printed form. She found that there had been a fraud on Ms. Stevenson in her own home. She awarded $10,000 in punitive damages.

[4] The defendants were Apex and Utilebill. Under the arrangement between the defendants, Apex would sign up customers for these rental agreements and would assign the agreements to Utilebill. Apex is said to be insolvent and did not participate in the trial. The defendant Utilebill defended the trial and is the only appellant. It does not appeal the trial judge’s findings that the handwritten note governed and the pre-printed provisions did not. It only appeals the award of punitive damages.

[5] The grounds that Utilebill advances for the appeal evolved between its notice of appeal and its factum. In its factum, it argues that: (1) the trial judge erred in finding that Utilebill committed civil fraud, which was not pleaded; (2) the trial judge erred in ordering Utilebill to pay punitive damages when it was not found liable for general or special damages; (3) the trial judge made palpable and overriding errors in certain findings of fact which led to her finding of fraud; and (4) the trial judge’s reasons were inadequate.

[6] Some of the trial judge's findings are not supported in the evidence. However, the result is justified. The appeal is dismissed.

STANDARD OF REVIEW

[7] Utilebill acknowledged that the standard of review for this appeal is correctness on pure questions of law, and that findings of fact or mixed fact and law are reviewable only for palpable and overriding error.

WITNESSES

[8] The only witnesses at trial were Ms. Stevenson and John Nassar, the President of Utilebill.

THE PRE-PRINTED FORM

[9] The pre-printed form that Ms. Stevenson signed has Apex's name and logo at the top. The form states that Apex's charges:

> will appear in the name of Utilebill Credit Corp in the Other Companies section of your Enbridge Gas Distribution bill. These offers and claims are made by APEX Home Services Inc. and Utilebill Credit Corp alone. APEX Home Services Inc. or Utilebill Credit Corp is not owned by or affiliated with Enbridge Inc. or Enbridge Gas Distribution.

[10] Despite this, Mr. Nassar testified that the relationship between Utilebill and Apex was an arm's length relationship. The trial judge said:

> Although Mr. Nassar made a valiant effort to distance himself from Apex Home Services it is clear that Mr. Nassar or someone in his

company created this pre-printed form contract. The contract is to the benefit of Utilebill and Utilebill alone.

[11] The form itself was adequate evidence for the trial judge to conclude that Utilebill either drafted it or played a large part in doing so.

[12] Utilebill argues that it was wrong for the trial judge to find there was not an arm's length relationship between Utilebill and Apex. It notes that Mr. Nassar testified that Utilebill and Apex had an arm's length relationship and there was no evidence to the contrary. That argument is disingenuous. Based on the pre-printed form itself, it is not reasonable to suggest that Utilebill and Apex were arm's length entities – at least as far as their dealings with Ms. Stevenson are concerned.

[13] Mr. Nassar's position during his testimony was that Utilebill was only an assignee of the contract and not a party to the contract. However, the form says, "<u>These offers</u> and claims <u>are made by</u> APEX Home Services Inc. and <u>Utilebill Credit Corp</u>. alone." From the emphasized words, and the rest of the arrangement, one must conclude that Apex and Utilebill were <u>both</u> parties to the contract. Other circumstances which support this conclusion include:

a. There was no evidence that Apex might assign such contracts to anyone other than Utilebill.

b. There was no evidence that Apex ever act as lessor or that Utilebill ever did not accept a contract for assignment.

c. The form says the charges *will* appear in the name of Utilebill. This suggests exclusivity between Apex and Utilebill.

d. The back of the pre-printed form refers to "we" and "us" without defining those terms.

e. Mr. Nassar testified that there was a master assignment agreement between Utilebill and Apex (although few details of the contract were provided).

f. Utilebill did not provide as to the compensation scheme between Utilebill and Apex.

g. There was no evidence of any other business line or business activity that Apex may have engaged in.

[14] Utilebill and Apex were closely aligned in this arrangement and by its own words in the contact, Utilebill has made itself a party to the contract, not merely an assignee of it.

[15] There may have been an arm's length relationship between the two companies as far as their dealings with each other are concerned, but in their dealings with Ms. Stevenson, the two companies were both parties to the agreement and they acted in unison. The trial judge was justified in concluding that Utilebill and Apex worked together and not at arm's length.

JOINT VENTURE

[16] The question was not dealt with by the trial judge, but it appears the relationship between Utilebill and Apex met many of the common criteria for a joint venture. It is a fair inference from the evidence that Utilebill and Apex carried on the business of installing and renting HVAC with a common view to profit. The evidence adequately establishes that they intended to associate for this specific purpose. Mr. Nassar described Apex as part of Utilebill's "network" of "approved dealers." They each contributed money, property, effort, knowledge, or skill to the common undertaking. They shared a property interest in the subject matter of the venture – the rental contracts. The full extent of mutual control or management of

the enterprise is unclear, but Mr. Nassar did describe that when Utilebill received rental contracts from its dealers under a master assignment agreement, they would also receive: a certificate of completion for the installation; a credit bureau report; proof that the customer holds title to the property where the equipment was installed; and a recorded call with the customer.

[17] Courts have held that joint venturers may share liability to third parties for the subject of the joint venture. For example, in *Central Mortgage & Housing Corp. v. Graham*, (1973), 13 N.S.R. (2d) 183, 1973 CanLII 1244 (NS SC), a mortgagee was held to be a joint venturer of a general contractor due to the arrangement between them, and both the mortgagee and the builder were held to be jointly liable for construction deficiencies. However, I am aware of criticism of this case: R. Flannigan*, The Legal Status of the Joint Venture*, (2009) 46:3 Alberta Law Review 713.

[18] Further, I have not seen any case in which one joint venturer has been held liable for punitive damages because of the conduct of its co-venturer.

[19] Because of the complexity of the issue, and because it was not addressed by the trial judge or by the parties in the appeal, I will make no further comment on Utilebill's potential liability for punitive damages as a joint venturer.

THE DECEPTION

[20] Ms. Stevenson was told by Apex or its agents that she could purchase a furnace and air conditioner for $7,335 at zero percent interest. She understood based on what she was told that she would be making monthly payments towards the purchase of the equipment. The trial judge accepted Ms. Stevenson's evidence in this regard and was justified in doing so.

[21] What Ms. Stevenson was told, and her understanding of the agreement, is not consistent with the pre-printed form she was asked to sign and did sign. The pre-printed terms and conditions on the front and back of the form are clearly terms for a rental agreement. On the front of the document, it had a column for "Equipment" and listed "High Efficiency Furnace" and "High Efficiency Air Conditioner." Beside these in a column for "rental payment" it said, in handwriting, $89.99 for the furnace and $89.99 for the air conditioner. It showed the term was 120 months. It then had a place for the Total Monthly Rental Rate" which was blank when Ms. Stevenson signed. Right under that, the form has a space for "Notes." In that space, Ms. Stevenson wrote "Total $7,335.00 0% int." She then signed the agreement below her handwritten addition. Someone named Steve signed on behalf of Apex without changing or deleting the note "Total $7,355.00 0% int." (On another version of the contract Ms. Stevenson wrote "Total Cost $7,335.00 0% int.")

[22] Mr. Nassar had "no idea" who Steve was.

[23] Ms. Stevenson's handwritten note is incongruent with much of the rest of the agreement, including the total rental payments. If the agreement were a rental agreement for 10 years, the rental payments would total $20,997.60 plus HST.

[24] The terms on the back of the form say that, "APEX Home Services Inc. specifically reserves the right to adjust the monthly rental payments to reflect increased service cost, such increases shall not exceed 4.99% per annum." If the annual increases are applied, the total cost of the contract would exceed $26,000 plus HST over 10 years.

[25] Given Ms. Stevenson's evidence, which the trial judge accepted, it was appropriate for the trial judge to conclude that Ms. Stevenson's addition in the space for "notes" represented the contract, notwithstanding that this addition was

inconsistent with much of the content in the rest of the pre-printed form. As indicated, Utilebill does not appeal this aspect of the ruling.

[26] I should add that the trial judge had good reason to accept Ms. Stevenson's evidence. Her evidence was consistent with the documentation and internally consistent.

THE VERIFICATION CALL

[27] At trial, Utilebill relied on a recording of a conversation between Ms. Stevenson and an unspecified representative who called her after the contract was signed. Ms. Stevenson testified that the recording was incomplete and an earlier portion of the call, not on the recording, included her confirming that there was an agreement for the $7,335 price. The trial judge accepted this evidence. I have listened to the recording. There is no question that the recording does not begin at the start of the call. The trial judge's conclusion is grounded in her reaction to the recording as well as Ms. Stevenson's evidence about it, and is entitled to deference.

[28] In the portion of the call that was recorded, the caller said that Apex was offering:

> a brand new furnace for the total monthly rental amount of $89.99 plus HST for a term of 10 years and a brand new air conditioner at the total monthly rental amount of $89.99 plus HST for a term of 10 years, is this correct?

[29] Ms. Stevenson answered affirmatively to this question. The caller asked the question quickly and by rote, as if memorized or read. There was no substantive discussion about the terms of the agreement. The caller did not raise or question Ms. Stevenson's handwritten addition to the contract although it is

likely he had a copy of it, in that he references her name and address. There is no version of the agreement that was signed by Ms. Stevenson which did not contain her handwritten note regarding the total cost and zero percent interest.

[30] In cross examination, when asked if she confirmed in the conversation that she would be renting the equipment, Ms. Stevenson said:

> As I mentioned, that's what I just assumed his wording was. I didn't really listen — that I didn't really take it as renting the equipment. I thought that's just how he was speaking because I had already just, like, agreed that it was 7,335 and the monthly payments were 89.99 per unit.

[31] The trial judge's reaction to this evidence is reasonable. Indeed, it would be unfair to read what Ms. Stevenson wrote on the contract and to listen to the recording and to then conclude that Ms. Stevenson in fact thought she had rented the equipment for 10 years. This position is inconsistent with the notation "Total $7,335.00 0% int.," which cannot be explained as an agreement to rent the equipment for 10 years. This is so despite the affirmative answer which Ms. Stevenson gave in error. Like the trial judge, I view it as completely unfair to suggest that the recording proves Ms. Stevenson understood and agreed to the terms of the pre-printed form and simply had buyer's remorse, as was suggested by Utilebill's trial counsel.

FAILURE TO PLEAD FRAUD

[32] Utilebill argues in its factum that the trial judge erred in finding that Utilebill committed civil fraud when it was not pleaded. There is some irony in this complaint; Utilebill's notice of appeal does not raise this as a ground of appeal

but rather it only raised the argument in its factum. Utilebill never sought to amend its notice of appeal.

[33] In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, it was argued that the statement of claim had not pleaded the factual basis for an independent actionable wrong. Like here, the statement of claim did claim punitive and exemplary damages. Justice Binnie said at para. 89 to 90 that “if the respondent was in any doubt about the facts giving rise to the claim, it ought to have applied for particulars and, in my opinion, it would have been entitled to them.” He said that there was no surprise except as to the quantum of punitive damages and noted that the plaintiff had pleaded a breach of the duty to deal fairly and in good faith in handling the plaintiff’s insurance claim.

[34] Here, Ms. Stevenson claimed aggravated, exemplary and punitive damages. She pleaded breaches of the CPA in detail. She describes the story of what happened in detail. She was self-represented, and this was a small claims court action.

[35] Small Claims Court rule 7.01(2) 1. ii. states that the claim shall contain, “in concise and non-technical language … The nature of the claim, with reasonable certainty and detail, including the date, place and nature of the occurrences on which the claim is based.”

[36] Section 25 of the *Courts of Justice Act*, R.S.O. 1990, c. C43 states: “The Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience.”

[37] The small claims court rules have no equivalent to rule 25.06 of the Rules of Civil Procedure.

[38] Utilebill argues that “A defendant cannot be found liable for a cause of action it was unaware it was defending.” But Utilebill knew from the pleading that it faced a claim for punitive damages, and it knew Ms. Stevenson’s story in detail. The pleading is sufficient for a small claims court action.

[39] In addition, during her cross examination, Ms. Stevenson was asked to justify the $25,000 amount she claimed for aggravated, exemplary and punitive damages, and she said, “I think I should be awarded [this amount] for being scammed, basically.” She added:

> People shouldn’t be put in these situations where, you know, companies are joining together to scam consumers sort of thing, you know. It’s not right, and they should be punished, basically.

[40] Later, just after the lunch break during Ms. Stevenson’s cross examination, the trial judge said to trial counsel for Utilebill that, going over the evidence during the break, she could see there was “a larger issue of, of a civil fraud here,” and she could see that that’s where the evidence was going. Trial counsel for Utilebill noted that fraud had not been pleaded. The trial judge agreed with him but said, “you do have to go down that road,” by which she clearly meant that counsel did need to address fraud.

[41] Utilebill had the opportunity to address fraud in its defence. This ground of appeal must fail.

FINDING OF FRAUD

[42] Utilebill argues that it was intellectually inconsistent and a clear error of law for the trial judge to find that the contract was valid and then order Utilebill to pay punitive damages for civil fraud in respect of that legally valid contract.

[43] I have concluded that the finding of fraud as against Apex is justified, but the finding of fraud as against Utilebill cannot stand based on the evidence at trial. However, Utilebill remains liable for punitive damages for the reasons set out below.

[44] Ms. Stevenson was told she was purchasing the unit for $7,335 at 0% interest. The pre-printed form she was asked to sign was completely inconsistent with what she was told. The terms on the pre-printed form were misrepresented to her. Any potential innocent explanation for this is unlikely. Rather, the appropriate conclusion is that the individuals who dealt with Ms. Stevenson actively misled her and were indifferent to problems that would follow for her.

[45] The problems which Ms. Stevenson encountered included the persistent claim by Utilebill that it was entitled to payment of $22,000; difficulties refinancing her home because of the security interest registered against it by Utilebill or its assignee, including the cost of hiring a lawyer to assist her with this issue; and the need to pursue a small claims court action to vindicate her position.

[46] Ms. Stevenson could have avoided the problem by reading the contract and striking out all the terms that were inconsistent with what she had been told. But her failure to do so was a normal human reaction to the circumstances, bearing in mind what she was told.

[47] All the elements of fraud as described in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21 are met: (1) a false representation was made by the representatives of Apex (that she was buying, not renting the equipment); (2) some level of knowledge of the falsehood of the representation on the part of the Apex; (3) the false representation caused Ms. Stevenson to act (she signed the contract); and (4) the defendant’s actions resulted in a loss.

[48] Although Ms. Stevenson never paid more than she agreed to pay, given the problems she encountered, it cannot be fairly said that Ms. Stevenson did not sustain a loss. In any event, Ms. Stevenson was the victim of an attempted fraud and would be entitled to punitive damages against Apex on that basis.

“Elaborate Scheme” Unsupported by the Evidence at Trial

[49] Utilebill strongly objects to the following passage in the trial judge’s reasons:

> This was a fraud on the consumer in their own home. This was a scheme perpetrated but (*sic*) Mr. Nassar and Utilebill. I find that it is highly probable that “Georgio” from Supreme Energy was also involved in this scheme. By having the consumer call someone more affordable on their own initiative Mr. Nassar is able to avoid certain sections of the *Consumer Protection Act*. I find that Apex was a tool of Mr. Nassar to enter the plaintiff’s home and hook her into a contract. I find it likely that the protocol of a “call” was instituted by Mr. Nassar along with the form of the contract. Common sense dictates that a local company as described by Mr. Nassar would not have a “call centre” to make such confirmation calls. This was not an arms length agreement. This was an elaborate scheme to scam consumers concocted by Mr. Nassar. This conduct was both planned and deliberate. The plaintiff is one of Ms. Nassar’s 9000 victims. There is no doubt when reviewing this contract and the facts of this case that the intent was to mislead homeowners into an unconscionable contract.

[50] To some extent, Utilebill’s objection to this passage is valid.

Ms. Stevenson did not initiate any call to Apex

[51] The sentence “By having the consumer call someone more affordable on their own initiative Mr. Nassar is able to avoid certain sections of the *Consumer Protection Act*” cannot be reconciled with the evidence. As the trial judge herself stated at paragraphs 3 and 4 of her decision, Ms. Stevenson was approached at her door by “Georgio” and later received a call from Apex. Ms. Stevenson did not make a call to Apex on her own initiative.

It was a “direct agreement”

[52] It is not clear, but when the trial judge indicated that part of the scheme was to avoid certain sections of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A (CPA), she may have been alluding to the protections afforded to a consumer if the consumer enters into a “direct agreement.” A consumer agreement that is “negotiated or concluded in person” at the consumer’s home would be a direct agreement under s. 20(1) of the CPA. A consumer agreement that is negotiated and concluded over the phone is not. In theory, to avoid the implications of a direct agreement, a supplier could arrange to have itself introduced to the consumer by a door-to-door solicitation but negotiate and conclude the agreement over the phone.

[53] However, that is not what happened here. Ms. Stevenson’s evidence was that Georgio attended her home on March 23, 2017. She then received “a call from a somebody at Apex,” and on March 26, 2017, someone from Apex came to her home with the contract. She signed the contract on that day after adding the note “Total Cost $7,335.00 0% int.” As the contract was “negotiated or concluded in person” at the consumer’s home, it was a direct contract within the meaning of the CPA.

Attempted systematic use of assignment to minimize liability

[54] I have also considered the possibility that the trial judge was concerned by Utilebill's systematic use of an assignment to take advantage of the limited liability of an assignee under s. 18(13) of the CPA. The way Utilebill structured things, the consumer contracted with Utilebill's dealer, and the contract was assigned to Utilebill. This may have been designed by Utilebill to take advantage of s. 18(13) of the CPA, which states:

> 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.

[55] Subsection 18(1) allows a consumer who has entered into an agreement "after or while a person has engaged in an unfair practice" to rescind the contract, "and the consumer is entitled to any remedy that is available in law, including damages." An assignee avoids most of this exposure under s. 18(13).

[56] Subsection 18(2) allows the consumer to recover "the amount by which the consumer's payment under the agreement exceeds the value that the goods … have to the consumer." Again, an assignee avoids potential exposure under s. 18(13).

[57] In his testimony, Mr. Nassar was not confronted with a suggestion that this was the intent of the arrangement. This is not surprising as Ms. Stevenson was self-represented. Therefore, there was no evidence on this point and the trial judge did not directly articulate this as a concern. The issue also was not addressed in the appeal. On the available record, it is not appropriate to assess whether the systematic use of an assignment in this fashion is illegal.

[58] Also, as I have found at paragraph [13] above, Utilebill was a party to the agreement, so the effort to avoid liability by assignment would have been ineffective, despite Mr. Nassar's testimony that Utilebill was only an assignee of the contract.

[59] If the trial judge considered that systematic assignment was an element of a scheme to scam consumers, she did not adequately articulate this. Again, this issue was not addressed by the parties. It would not be appropriate to ground any conclusion about fraud or punitive damages on Utilebill's attempt to structure its relationship with consumers as mere assignee.

Extent of evidence of scheme to scam consumers

[60] It is clear that the trial judge felt that Georgio was never there to sell on behalf of Supreme Energy but was part of a scheme to conduct solicitations at the door yet at the same time avoid certain provisions of the CPA. The evidence to support this conclusion is very thin. The conclusion is supported by the strangeness of Georgio's approach with Ms. Stevenson. Georgio gave Ms. Stevenson a flyer from Supreme Energy. He was wearing a badge that said Supreme Energy. Why would he come to Ms. Stevenson's door on behalf of Supreme Energy, but then refer the prospective sale to Apex? Why would Georgio say that Apex would give her a good deal? This might be explained if Supreme was also a Utilebill dealer, but the transcript reveals no evidence to this effect.

[61] There was no other evidence about Georgio's connection to Apex, and no evidence of any direct connection between Georgio and Utilebill. In any event, if Georgio was in on some scheme, it did not work as intended because, as indicated, ultimately the arrangement *was* a direct agreement under the CPA.

[62] The trial judge's finding that "Apex was a tool of Mr. Nassar to enter the plaintiff's home and hook her into a contract" is on a similar footing. I can find no evidence in the record that suggests Mr. Nassar or Utilebill intended for Apex to lie to Ms. Stevenson.

[63] The trial judge's statement, "I find it likely that the protocol of a 'call' was instituted by Mr. Nassar along with the form of the contract," is a reference to the confirmation call made to the consumer. Mr. Nassar's evidence was that Utilebill would "receive a recorded call with the customer essentially verifying that they entered into the agreement and understand what they've … done." The trial judge's finding that Utilebill instituted this protocol is a reasonable inference from the evidence. In his testimony, Mr. Nassar described that Apex was a dealer among Utilebill's dealer network. He described the Utilebill enters into master assignment agreements with its dealers. He described that Utilebill's "sole business" is "to put out capital" and "get a return for it." He described that they do due diligence to avoid delinquencies.

[64] The trial judge's suggestion that Apex did not have a call centre is neither an appropriate nor a necessary conclusion on the evidence. Apex did not need to have a call centre to make a recorded call. Having said that, the finding that Utilebill *set the protocol* is a strongly supported inference from the evidence. But this detracts from the assertion that Utilebill wanted Apex to get customers to sign contracts by any means necessary. If Utilebill wanted this, it would not have instituted any protocol for a recorded verification call.

[65] It was not open to the trial judge to find, on the evidence before her, that all 9,000 of Utilebill's Ontario customers are victims of a fraud. There was no evidence detailing the experience of any other customer. There was no evidence that any other consumer was misled as to what the pre-printed terms said. Some consumers may prefer to spread the cost of a furnace and air conditioner over 10

years by making monthly payments, and they may be willing to pay a very high effective interest rate. Some consumers may have few other options.

[66] In result, there was *some* evidence from which it might be inferred that there was a "scheme" to avoid the impact of certain provisions of the CPA, but the evidence is thin. It consists mainly of the strangeness of Georgio's solicitation and referral to Apex and unexplored evidence regarding the nature of the relationship Utilebill tried to create with consumers.

[67] The Supreme Court of Canada held in *F.H. v. McDougall*, 2008 SCC 53 at para. 73:

> [A]n appellate court is only permitted to intervene when "the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence." [Citations omitted.]

[68] In this same case, the Supreme Court found that there was only one standard of proof in civil cases: proof on a balance of probabilities. At para. 39 to 40, the court rejected previous statements that there was a heightened standard of proof in civil cases where morally blameworthy conduct is alleged, which would include fraud.

[69] The Supreme Court also said at para. 54 to 55:

> Where the trial judge does not express a particular standard of proof, it will also be presumed that the correct standard was applied. … Whether the correct standard was expressly stated or not, the presumption of correct application will apply unless it can be demonstrated by the analysis conducted that the incorrect standard was applied. However, in determining whether the correct standard

> has indeed been applied, an appellate court must take care not to substitute its own view of the facts for that of the trial judge.
>
> …[W]here there is some evidence to support an inference drawn by the trial judge, an appellate court will be hard pressed to find a palpable and overriding error. [Citations omitted.]

[70] The trial judge misstated the evidence by stating that Ms. Stevenson's called Apex on her own initiative and by suggesting that the verification call came from a Utilebill call centre, not Apex, when there was no evidence to this effect. Based in part on this evidence, she made a serious finding: that there was "an elaborate scheme to scam consumers concocted by Mr. Nassar." It is not safe to allow this finding to stand.

Vicarious Liability for Punitive Damages

[71] As already discussed, the trial judge's findings justify awarding punitive damages against Apex. Also, clearly Apex was the agent of Utilebill in connection with its relationship to Ms. Stevenson.

[72] A principal can be held liable for the fraud of its agents in the right circumstances. In *Bazley v. Curry*, [1999] 2 SCR 534, 1999 CanLII 692, the Supreme Court of Canada provided guidance on the determination of vicarious liability of an employer for the intentional acts of an employee. The same test would appear to be applicable for vicarious liability in any principal-agent relationship. However, the test in *Bazley* was not canvassed in the appeal and, from what I can tell, was not canvassed in argument before the trial judge.

[73] Furthermore, the question of whether a principal can be held vicariously liable for punitive damages is a difficult one. (See, for example, *Peeters v. Canada*, [1993] F.C.J. No. 1146, [1994] 1 F.C. 562 (F.C.A.) and Professor

Waddams criticism of it: S.M. Waddams, *The Law of Damages*, loose-leaf ed. (Aurora, Ont.: Canada Law Book, 2010), at para. 1.420, "*Waddams on Damages*.") Again, this issue was not canvassed in the trial judge's reasons and was not raised in the appeal.

[74] I therefore do not decide whether Utilebill is vicariously liable for punitive damages attributable to the conduct of its dealer/agent, Apex.

Utilebill's Direct Liability for Punitive Damages

Unconscionable transaction

[75] The trial judge said that if she had found in Utilebill's favour with respect to the interpretation of the contract, she would have found the agreement to be an unconscionable transaction. She found that the lease price grossly exceeded the price of similar products on the market. She found that the lease costs were not indicated in the agreement. (I will say more about this later.) She noted that Utilebill can raise the price "indiscriminately once a year and she found that this can be done "for no reason at all at the whim of Mr. Nassar with no recourse to the consumer." (She noted earlier in her reasons that the price increase was limited to 4.99% per year so did not misunderstand this evidence.)

[76] She said, "Once a security interest is placed on the property of the consumer, they are at the mercy of Utilebill when dealing with their own residential interests." Ms. Stevenson ran into difficulty renewing or refinancing her mortgage, and Utilebill's security interest remained on title at the time of trial.

The buy out provision

[77] Adding to these concerns, the buyout provision is outrageously one-sided. Written in mice type in the general terms and conditions, it calls for the consumer

to pay the fair market value of the equipment *plus all remaining payments under the agreement*.

[78] When Ms. Stevenson sought to buy out her contract after making payments for 17 months, which should have reduced the amount owing from $7,335 by the amounts she had paid, she was told the buy out was $22,000. Ms. Stevenson testified, “I never would have agreed to pay $22,000 for a furnace and air conditioner.” Ms. Stevenson was justified in feeling that the buy out was “astronomical,” and the trial judge obviously felt the same.

[79] Before the trial, Ms. Stevenson researched the price of a similar furnace and air conditioner. Her research was given to the defendant in advance of the trial and was appropriately allowed into evidence. This evidence was not refuted, and it was accepted by the trial judge. It showed that the cost for purchasing and installing similar equipment “ranged from $6,267 plus HST to $8,700.”

[80] One of the justifications given for the over $20,000 total cost to the consumer was that Utilebill has its capital tied up and paid out over 10 years under the arrangement. However, this justification is not available when a buy out occurs after only 17 months.

Unconscionable representation

[81] The trial judge also found that “The contract is excessively and grossly one-sided to the point of being inequitable.” Although the trial judge did not mention s. 15(2) of the CPA, this comment is a seeming reference to it. That section says:

> 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. …

[82] The representation made by Apex to Ms. Stevenson that she was purchasing the furnace and air conditioner, not renting them, was an unconscionable representation.

Relying on fraudulently obtained contract

[83] Assuming Utilebill was initially unaware of the conduct of Apex towards Ms. Stevenson, once it investigated the matter, Utilebill should have recognized that the agreement with Ms. Stevenson was a $7,355 purchase contract and not a rental contract. It should not have continued to maintain it had a valid rental agreement with Ms. Stevenson based on its pre-printed form. Utilebill should not have told Ms. Stevenson, and persistently maintained, that the buyout was $22,000.

[84] Utilebill would have needed some time to learn the details of the contract it had assumed. The precise way that the contract was purchased from Apex was not in evidence, but Mr. Nassar did say these contracts were bought in bulk under a master assignment agreement. It may have been unexpected to Utilebill that it had not been assigned what it thought it was assigned. But after a reasonable time to investigate and appreciate that it had not received from Apex a contract in the format it expected based on the pre-printed form, Utilebill's

continued insistence that it had a valid 10-year lease on its usual terms was unreasonable.

[85] There is no doubt that the pre-printed form was carefully drafted with the CPA in mind. Utilebill can be taken to have known that under s. 11 of the CPA, any ambiguities in a consumer agreement "shall be interpreted in favour of the consumer." The prominent handwritten terms on the face the contract, "Total Cost $7,335.00 0% int." go beyond an ambiguity. At some point well before the action was commenced, Utilebill should have known that it had not purchased the contract it thought it had purchased. It should have known that it was not entitled to ten years of rent or a $22,000 buy out. Utilebill should have recognized almost immediately upon looking at the contract that Ms. Stevenson was lied to by its dealer, Apex. It had insufficient reason for failing to accept her side of the story. As already discussed, the recorded confirmation call cannot be fairly considered as confirmation that Ms. Stevenson agreed to the terms of the pre-printed form. In any event, the call does not override the obvious implications of what Ms. Stevenson wrote on the contract.

[86] Utilebill led no evidence at trial of any investigation it may have done with Apex. It did not lead any evidence that it received any reassurances from Apex as to the agreement it reached with Ms. Stevenson or that it even asked Apex about the handwritten amendment of the contract.

[87] The circumstances called for Utilebill to investigate. There were two versions of the contract with different numbers on them. (Both contained Ms. Steven's handwritten change.)

[88] On one of the versions of the contract, after it was signed by both Ms. Stevenson and Apex, someone added the name "Robert Portelance" under "co-customer" and added that he was Ms. Stevenson's brother. A date of birth and signature for Mr. Portelance appears on the document. But Ms. Stevenson does

not know anyone named Robert Portelance. Mr. Nassar could not explain this and Utilebill did not call any witness who could.

[89] In all the circumstances, Utilebill's insistence that it had a valid rental contract with Ms. Stevenson was unreasonable and unacceptable.

Intimidation

[90] The trial judge found that Utilebill attempted to intimidate Ms. Stevenson by arbitrarily raising her monthly payments. The first time the payments were increased was in March of 2018 after Ms. Stevenson hired a lawyer to deal with the security interest against her home resulting from her purchase. The second time was in October of 2018 after she filed her statement of claim. As indicated, under the pre-printed form Utilebill had a right to increase the payments by up to 4.99% per annum. However, the total increase slightly exceeded 4.99%. During cross examination, Mr. Nassar could not explain why Ms. Stevenson faced two increases within the same year. The trial judge's conclusion that it was an effort at intimidation is entitled to deference.

Breaches of the CPA

[91] The trial judge held that, because Ms. Stevenson's interpretation of the agreement was correct, "the *Consumer Protection Act* does not apply here." This is not correct. The CPA still applied to the transaction. Section 2(1) of the CPA says that, subject to certain exceptions which are inapplicable, "this Act applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place." Ms. Stevenson was a "consumer" within the meaning of the action. The transaction was a "consumer transaction." And the consumer was located in Ontario.

[92] Ms. Stevenson's pleaded in detail that Apex and Utilebill committed "unfair practices" under the CPA and addressed this in her opening statement. The trial judge did not specifically address this issue; however, she in effect found that the nature of the form Ms. Stevenson signed was misrepresented to her. Under s. 14 of the CPA, it is an unfair practice to make a "false, misleading or deceptive representation" including:

> 15. A representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer.

[93] At minimum, Apex's representatives misrepresented the purpose of the solicitation and the purpose of the pre-printed form, which were efforts to get Ms. Stevenson to sign up for a 10-year rental and not a sale for monthly payments at zero percent interest. This would justify the punitive damages award against Apex.

[94] I note as well that the list in s. 14(2) is not a closed list. This is emphasized by the opening words of that section: "Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included …"

[95] Utilebill's insistence to Ms. Stevenson that it was entitled to a $22,000 buy out was a false, misleading or deceptive representation. This representation was made by Utilebill, not Apex.

[96] The trial judge also noted that "The contract lacks the identifying party who solicited and/or negotiated the agreement." This is required by s. 35(1) of the regulation so is also a breach of the CPA. She found that the contract did not, as required by the CPA, identify who solicited or negotiated the agreement, but only used the name "Steve," who was not identified in the evidence.

No statement of consumer's rights

[97] The pre-printed contract is on legal-sized paper. On the front page in large bold font, the document reassuringly states, "Your 'Consumer's Rights' are outlined in Section 17 of the terms and conditions of this Agreement." The second page, which I assume is the back of the form, is headed "General Terms and Conditions." It is written in densely packed mice type. At the bottom of the page, it says "T&C-page 1 of 2." But the second page of the terms and conditions was not given to Ms. Stevenson and was not included in the evidence.

[98] The general terms and conditions on the back page contain 16 sections and do not contain the statement of consumer rights that was said to be outlined in section 17. The trial judge appropriately concluded that Ms. Stevenson was not given a copy of her consumer rights.

[99] As the agreement was a direct agreement, s. 35(1) of O. Reg. 17/05 applies, making it mandatory that the statement of consumer's rights be included in the contract. Under s. 42(1) of the CPA, every direct agreement "shall be made in accordance with the prescribed requirements."

Inadequate disclosure statement

[100] Under s. 89 of the CPA, every lessor is required to deliver to the consumer a disclosure statement for the lease. The required content of the disclosure statement is set out under s. 74(2) of O.Reg. 17/05. It includes, "The implicit finance charge for the lease," "The annual percentage rate for the lease," and "The total lease costs."

[101] As indicated above, the trial judge found that the lease costs were not indicated in the agreement. The trial judge did not mention, and may not have been aware, that the total lease costs are described in the mice type on the back of the agreement. However, the information is not presented in an

understandable manner and is not specific to the agreement with Ms. Stevenson. The text in the mice type includes this passage (reproduced here verbatim with punctuation and parentheses as in the original):

The Total Lease Costs for the Equipment, (the Total Monthly Payments and [Capitalized Amount] based on the 9% APR for a:			
Rental Rate	CoB	TLC	CP

[102] A table of values follows, including values for a rental rate of $89.99. This was the monthly payment for each unit. However, values for the total lease costs based on the total monthly rate of $179.98 are not stated. The meaning of the acronyms APR, CoB, TLC and CP are not described anywhere in the agreement.

[103] This does not represent an adequate disclosure statement within the meaning of s. 89 of the CPA and s. 74(2) of the regulation. This is especially so when Ms. Stevenson wrote “Total $7,335.00 0% int.” on the front of the form. The intent of the disclosure statement is, in part, to bring home to the consumer how much the consumer is effectively paying in interest and the total cost of the rental. Where it is a 10-year lease, the disclosure statement takes on added significance.

Conclusion on Utilebill’s Liability for Punitive Damages

[104] The court may award punitive damages in an action commenced under s. 18 of the CPA. Ms. Stevenson did make claims under s. 18.

[105] Under s. 100 of the CPA, if a consumer is successful in an action, the court may order exemplary or punitive damages.

[106] The CPA does not limit the exposure of a principal for punitive damages arising from the conduct of its agents. For the CPA to be effective, employers

and principals must face the possibility of punitive damages for the conduct of their employees and agents. Here, for example, it would be inadequate if the only consequence that Utilebill faced was to have the contract enforced based on Ms. Stevenson's handwritten terms rather than on the terms of the pre-printed form. If it faces no consequences for improper conduct by its agents, Utilebill would have no incentive to ensure its dealers or other agents act with integrity.

[107] The circumstance might be different if Utilebill had acknowledged the fraud of its agents and honoured the contract that it in fact had with Ms. Stevenson. Instead, Utilebill attempted to take advantage of its dealer's fraud.

[108] In combination, all the above concerns readily justify the $10,000 punitive damages award against Utilebill.

AWARDING PUNITIVE DAMAGES BUT NOT COMPENSATORY DAMAGES

[109] Utilebill relies on *Pinks v. Bhatia*, 2017 ONSC 3742 at para. 31 for the proposition that a defendant cannot be ordered to pay punitive damages in the absence of being found liable to pay general or special damages based on a primary cause of action. *Pinks* arose from a mortgagee's unreasonable actions in sale proceedings. Among other concerns, there were excessive and erroneous charges in the mortgage discharge statement. The mortgagee, Bhatia, and the mortgagee's lawyer, Silver, were found jointly liable for punitive damages by the small claims court trial judge.

[110] Justice Kiteley said at para. 34:

> In the absence of a contractual relationship or other relationship that gave rise to a duty of care, there is no basis for finding Silver liable for any damages, and in the absence of a finding of primary liability, he cannot be found liable for an independent actionable wrong.

[111] Here, Ms. Stevenson's position regarding the contract was vindicated. Utilebill's effort to rely on the contract as an assignee to a rental agreement completely failed. Further, as I stated in paragraph [13] above, Utilebill was a party to the contract. Silver was neither an assignee nor a party to the contract. The circumstance is not equivalent to *Pinks*.

[112] Also, *Waddams on Damages*, *supra*, at 11.370 contains this passage on this issue:

> The amount of punitive damages is unrelated to the actual loss suffered by the plaintiff, *and it has, indeed, been held that exemplary damages may be awarded where the plaintiff has suffered no loss at all*. It is, however, essential that the plaintiff has an independent cause of action against the defendant, or else a person entirely unaffected by the defendant's conduct could sue for exemplary damages. Lord Devlin said on this point: "the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence." [Emphasis added, footnotes omitted.]

ADEQUACY OF THE TRIAL JUDGE'S REASONS

[113] Utilebill argues that the trial judge's reasons are inadequate. In *R. v. R.E.M.*, 2008 SCC 51, at para. 37, the Supreme Court of Canada said:

> The sufficiency of reasons is judged not only by what the trial judge has stated, but by what the trial judge has stated in the context of the record, the issues and the submissions of counsel at trial. The

> question is whether, viewing the reasons in their entire context, the foundations for the trial judge's conclusions – the "why" for the verdict – are discernable. If so, the functions of reasons for judgment are met.

[114] Apart from what I have discussed above, the reasons readily meet this standard.

DISPOSITION

[115] The appeal is dismissed. If costs are sought by Ms. Stevenson, she may provide written submissions on costs within 14 days. Utilebill may respond within 10 days of receiving her submissions.

"Justice R. Chown"

Released: June 28, 2021