CITATION: Evans v Mattamy Homes Limited 2019 ONSC 3883
COURT FILE NO.: CV-18-597180
MOTION HEARD: 20190515

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Claudia Evans, Kamalnain Bindri, Manoj Arora, Bholanathsingh Ramnarain, Tianxiao Li, also known as Tim Li, Yezijin Qi, Qing Ye, Veena Kapoor Khatri, Rakibul Hasan, Ning Xu, Sima Annan, Rajesh Pattni, Kiran Pattni, Huai Zhong Yuan, Mini Weng, Shawn Lao, Muhammad Shahid, Xiao Long Wang, Mustafa Ahmed Khan, Naurren Khan, Monir Iskarous, Naseem Qadir, Ning Li, also known as Brian Li, Karran Singh, Sonia Chandani Singh, Vikas Sachdeva, Balwinder Kaur, Shahini Khan, Asif Khan, Muneeza Masood, Syed Masood Hussain, Xiang Liu and Priyanka Kumar, Plaintiffs

AND:

Mattamy Homes Limited and Mattamy (Preserve) Limited, Defendants

BEFORE: Master Jolley

COUNSEL: Crawford G. Smith and Michael A. Currie, Counsel for the Moving Party Defendants

Jameel Madhany, Counsel for the Responding Party Plaintiffs

HEARD: 15 May 2019

REASONS FOR DECISION

A. Introduction

[1] The defendants seek an order staying this action pursuant to subsection 7(1) of the *Arbitration Act, 1991*, S.O. 1991, c.17 (the "*Act*"). The parties agree that the nature of the dispute falls within the challenged arbitration agreement. However, the plaintiffs argue that the arbitration agreement is invalid as unconscionable and obtained as a result of undue influence and that the court should therefore exercise its discretion to refuse the stay pursuant to subsection 7(2) of the *Act*.

[2] In February and March 2017, the plaintiffs entered into agreements with the defendants (hereinafter "Mattamy") for the purchase and sale of pre-construction homes scheduled to close in April 2018. Most of the plaintiffs did not close and on 3 May 2018 they commenced this action against Mattamy claiming rescission of the agreements or damages in the alternative. They allege that Mattamy exercised undue influence over them through unfair sales methods and other tactics to induce them to enter into the agreements. They also argue that there was an inequality of bargaining power between them and Mattamy and that Mattamy took advantage of its position of dominance, resulting in the plaintiffs

entering into grossly improvident and unfair agreements of purchase and sale, which they now allege are unconscionable.

[3] These issues concerning the validity of the agreements of purchase and sale remain to be decided as part of the ultimate hearing of this dispute and are not before me. The narrow issue before me is whether the plaintiffs' disputes will be dealt with by arbitration or by litigation. That will turn on whether the arbitration agreement is itself invalid.

[4] For the reasons set out below, the defendants' motion is granted and the action stayed.

B. Summary of the Law

[5] The relevant sections of the *Act* are as follows:

> 7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.
>
> 7(2) However, the court may refuse to stay the proceeding in any of the following cases:
>
> 2. The arbitration agreement is invalid.

[6] In summary, a stay of an action is mandatory unless one of the exceptions in subsection 7(2) of the *Act* applies, in which case the court has discretion to refuse the stay.

[7] The enactment of the *Act in 1991* represented a policy shift that encouraged parties to resort to arbitration where they had contractually agreed to do so by directing the court generally not to intervene and by establishing a presumptive stay of court proceedings in favour of arbitration (*Ontario Hydro v. Denison Mines Ltd.* 1992 CarswellOnt 3497, referenced in *Telus Communications Inc. v. Wellman* 2019 SCC 19 ("*Wellman*") at paragraph 49). The plaintiffs do not challenge the legislative policy but argue that it is premised on there being a valid agreement to arbitrate to which the parties should be held. The plaintiffs have the onus under subsection 7(2) of demonstrating that the arbitration provision is unconscionable or procured as a result of undue influence and therefore invalid, and of demonstrating that the court should exercise its discretion to refuse to stay the action as a result.

C. Overview

[8] In February and March 2017 the plaintiffs attended at a sales site operated by Mattamy in Oakville and signed pre-construction agreements of purchase and sale for new homes. Each of the agreements of purchase and sale contained the following arbitration clause (the "Arbitration Agreement"):

> "The Purchaser and the Vendor agree that any claim, dispute, or controversy (whether in contract, tort, or otherwise, whether pre-existing, present or future,

> and including statutory, common law, intentional tort and equitable claims) that the Vendor may have against the Purchaser or that the Purchaser may have against the Vendor, its agents, employees, principals, successors, assigns, affiliates arising from or relating to this Agreement, its interpretation, or the breach, termination or validity thereof, the relationships which result from this Agreement (including, to the full extent permitted by applicable law, relationships with third parties who are not signatories to this Agreement), the Purchaser's purchase or use of the Real Property and/or the Dwelling or related purchase or the subdivision services (and any of the foregoing being a "Claim") SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION pursuant to the *Arbitrations Act, 1991* (Ontario), as amended or replaced from time to time. Such arbitration shall be the exclusive forum for the resolution of any Claim by the Purchaser against the Vendor, and the Purchaser hereby agrees that it will not bring or participate in a Claim in any court whether directly, indirectly, by counterclaim or otherwise. In addition, THE PURCHASER SHALL NOT BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS BY OTHER PURCHASERS, OR ARBITRATE A CLAIM AS A REPRESENTATIVE OF A CLASS ACTION OR PARTICIPATE AS A MEMBER OF ANY CLASS ACTION WITH RESPECT TO ANY CLAIM."

[9] The plaintiffs' position is that the agreements of purchase and sale and the Arbitration Agreement are unconscionable and were obtained by Mattamy as a result of undue influence.

D. Unconscionability

[10] *Wellman, supra* at paragraph 85 stated in *obiter*,

> "... Mr. Wellman has not argued, either before this Court or in the courts below, that the standard form arbitration agreement in question was unconscionable, which if proven would render it invalid and thereby provide a basis for refusing a stay pursuant to subsection 7(2)2 of the *Act*."

[11] What is required to prove that a standard form arbitration agreement is unconscionable and therefore invalid? The court in *Huras v Primerica Financial Services Ltd.* 2000 CarswellOnt 1429 ("*Huras*"), quoting from *Harry v. Kreutziger* (1978) 95 D.L.R. (3d) 231 (B.C.C.A.), held that the single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded.

[12] The existence of a standard form contract and inequality of bargaining power are not uncommon and, by themselves, do not render an arbitration provision contained in the standard form agreement unconscionable. (See paragraph 18, *infra* and *Huras, supra* at paragraph 39).

[13] In *Heller v. Uber Technologies Inc.* 2019 ONCA 1, leave to appeal granted 2019 CanLII 45261 (SCC) ("*Uber*"), Heller brought a proposed class proceeding on behalf of Uber

drivers alleging that he and his proposed class members were employees of Uber and subject to the provisions of the *Employment Standards Act, 2000*. Uber brought a motion to stay the proceeding on the basis of an arbitration agreement entered into by it and the drivers. The plaintiff argued, first, that the clause was illegal as it amounted to an illegal contracting out of the *Employment Standards Act* and, second, that it was unconscionable.

[14] The agreement between Uber and its drivers contained the following arbitration clause:

> "Governing Law; Arbitration. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws. ... Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules ("ICC Mediation Rules"). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules"). ... The dispute shall be resolved by one (1) arbitrator appointed in accordance with the ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands...."

[15] The evidence before the *Uber* court was that the up-front administrative/filing-related costs for a driver to participate in the ICC mediation-arbitration process mandated by the arbitration clause was USD $14,500. This did not include the costs of travel to Amsterdam, accommodation and retaining counsel to participate in the arbitration. The court contrasted these costs with Heller's claim for minimum wage, overtime and vacation pay brought by a person earning $400-$600 per week.

[16] After finding that the arbitration clause was invalid as constituting a contracting out of the provisions of the *Employment Standards Act, 2000*, the court went on to consider in the alternative whether the clause was invalid on the basis of unconscionability. An agreement must be more than foolhardy, burdensome, undesirable or improvident to be held to be unconscionable (*Titus v. William F. Cooke Enterprises Inc.* 2007 ONCA 573 at paragraph 36). Counsel are agreed that the following four part test must be met to prove unconscionability:

1. A grossly unfair and improvident transaction;

2. A victim's lack of independent legal advice or other suitable advice;

3. An overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or other similar disability; and

4. The other party's knowingly taking advantage of this vulnerability.

[17] I have considered each of these elements in the context of the Arbitration Agreement between the plaintiffs and Mattamy.

Element 1: Does the Arbitration Agreement represent a grossly unfair and improvident transaction?

[18] The plaintiffs argue that the Arbitration Agreement was not brought to their attention but was embedded in a standard form contract, which was not open for negotiation in any event. Addressing arbitration agreements in standard form contracts, the majority in *Wellman, supra,* stated at paragraph 84:

> "while my colleagues maintain that the *Act* was designed with "freely negotiate[ed]" arbitration agreements in mind, nothing in the *Arbitration Act* suggests that standard form arbitration agreements, which are characterized by an absence of meaningful negotiation, are *per se* unenforceable. Indeed, this Court's decision in *Seidel* – as well as its predecessors *Dell, Rogers,* and *Desputeaux* – confirm that the starting presumption is the opposite."

[19] In considering arbitration agreements in the context of real estate transactions, I note that the *Consumer Protection Act, 2002,* S.O. 2002 c.30, Sch. A was enacted to provide that arbitration agreements contained in certain types of consumer contracts would not be binding on consumers. However, the legislature in section 2(f) of that Act specifically excluded real estate transactions from that exception. In doing so, one can infer that the legislature endorsed arbitration as an appropriate dispute resolution forum in the context of real estate transactions.

[20] Of further support is the similar policy decision of the legislature made in respect of the adjudication of disputes concerning the construction of new homes. The *Ontario New Home Warranties Plan Act,* R.S.O. 1990, c.O.31, subsection 17(4) provides that:

> "Every agreement between a vendor and prospective owner shall be deemed to contain a written agreement to submit present or future differences to arbitration, subject to appeal to the Divisional Court, and the *Arbitration Act, 1991* applies."

[21] In *Huras, supra,* the plaintiff commenced a class proceeding claiming damages as a result of the defendant's failure to pay minimum wage to class members during their sales representative training period. Having found a standard form contract and unequal bargaining power insufficient to render the arbitration agreement unconscionable, the court reviewed the additional factors required. It found the arbitration provision to be one-sided. The arbitration clause gave Primerica but not the plaintiffs the option of commencing legal proceedings without having to resort to arbitration. The court stated that:

> "I infer from the evidentiary record that the individual claims of the plaintiff and similarly-situated class members would be for very small amounts of money, probably a few hundred dollars each.... Very few, if any, of the putative class members would even consider proceeding to an arbitration of a dispute with Primerica given the cost of paying for one's own arbitrator in the first instance and the risk of substantial costs in the event of failure. The arbitration clause

> mandates a three person arbitration panel. There are cost sanctions if the plaintiff is unsuccessful at arbitration." (see paragraphs 40-42).

[22] The court concluded that the arbitration provision would have the opposite effect of the purpose of arbitration, namely to resolve disputes expeditiously and cost effectively. It stated that:

> "Thus, the provision inhibits and effectively frustrates aggrieved individuals from being able to obtain any resolution of disputes through a neutral, independent adjudicator.... The existence of the arbitration clause in Primerica's contractual documents gives a superficial appearance of fairness to the unsophisticated. In reality, the arbitration clause serves to prevent any resolution of a dispute other than upon the terms dictated by Primerica. The existence of the arbitration clause is unfair. It would be perverse and in conflict with the normative purposes of an arbitration clause to enforce the one at hand. The arbitration clause in the case at hand, if enforceable, would defeat the public policy inherent in the [*Class Proceedings Act]*. (paragraphs 43, 45)"

[23] Following similar reasoning, the Court of Appeal in *Uber* found that arbitration agreement represented a substantially improvident or unfair bargain, holding at paragraph 68:

> "It requires an individual with a small claim to incur the significant costs of arbitrating that claim under the provisions of the ICC Rules, the fees for which are out of all proportion to the amount that may be involved. And the individual has to incur those costs up-front. Uber's submission that the individual might recover those costs, if successful, does not change the impact that flows from the fact that these costs must be paid up-front. Further, it should be self-evident that Uber is much better positioned to incur the costs associated with the arbitration procedure that it has chosen and imposed on its drivers. Additionally, the Arbitration Clause requires each claimant to individually arbitrate his/her claim and to do so in Uber's home jurisdiction, which is otherwise completely unconnected to where the drivers live, and to where they perform their duties. Still further, it requires the rights of the drivers to be determined in accordance with the laws of the Netherlands, not the laws of Ontario, and the drivers are given no information as to what the laws of the Netherlands are."

[24] The facts in *Uber* and *Huras* are markedly different from the facts before me. Unlike *Huras* and *Uber*, the plaintiffs' claims are substantial. The purchase price set out in the 25 agreements of purchase and sale range from $1,152,990 to $2,230,990, prior to upgrades, with the average price being roughly $1,500,000. The damages claimed in the statement of claim are $50,000,000, in addition to punitive and aggravated damages claims of $10,000,000 each. I do not find that requiring these plaintiffs to have their dispute determined by arbitration in Ontario under the provisions of the *Act* represents a substantially improvident or unfair bargain.

[25] As to the improvidence of the Arbitration Agreement, the plaintiffs' main argument is that it removes from them the right to have their cases heard together, which would be a substantial costs savings. The court was persuaded by this factor, among others, in *Huras*. There, the court stated at paragraphs 4 and 49:

> "In the situation at hand the arbitration provision would require each claimant to pursue her/his own arbitration notwithstanding that the grievance advanced involves issues that *prima facie* are common to all grievors. The central issue in the class proceeding is whether or not Primerica is obliged by statute to pay the minimum wage during the training period of the class members.... I conclude from the evidentiary record that the sole and real purpose of the arbitration clause in the case at hand is to prevent a resolution of disputes with Primerica and its sales representatives other than on terms dictated by Primerica. In my view, and I so find, the arbitration clause is unconscionable and, accordingly, void."

[26] The facts before me are not analogous to *Huras* or *Uber* where the plaintiffs were either all subject to the provisions of the *Employment Standards Act* or were all not. Here each plaintiff alleges undue influence. Each plaintiff will likely be required to separately testify about the circumstances of his or her attendance at the sales site, the choice of home, the presentation of the agreement of purchase and sale and their individual discussions with the Mattamy sales representatives before, during and after the signing of the agreement. Their cases may not all rise and fall together. An arbitrator may find undue influence was applied in one case and not in another.

[27] Further, given the size of each plaintiff's claim in this instance, unlike the case of *Huras* or *Uber*, I do not find that requiring the plaintiffs to try their cases separately makes the Arbitration Agreement a substantially improvident or substantially unfair bargain.

[28] There is little evidence before me about the costs of an arbitration in Ontario, other than evidence from Evans and the plaintiff Kiran Pattni ("Pattni") about what their counsel told them about the costs of arbitration vs litigation. Evans deposed that the cost of arbitration would deter her from pursuing her claim. Pattni deposed that the financial burden of proceeding civilly would make it difficult for her to pursue her claim. The information in her affidavit was that it would likely cost twice as much to arbitrate as to pursue a civil claim because being part of a group allows the plaintiffs to share the costs of various steps in the litigation process, which would not be possible in private arbitrations. Mattamy attempted to question Evans about this portion of her affidavit, but privilege was claimed over the advice she was given. I do not put much weight on this assertion, given the inability of Mattamy to cross examine Evans on the statement. It is further weakened by my finding that the plaintiffs' claims turn on their own unique facts and likely need to be individually proven in any event.

[29] In summary, I do not find on these facts that the Arbitration Agreement represents a grossly unfair or improvident transaction.

Element 2 – Did the plaintiffs obtain independent legal advice or other suitable advice?

[30] The evidence on the motion was that the plaintiffs were advised in numerous emails or brochures in advance of attending at the site and, again at the site, that "All Purchases Are Firm & Legally Binding" once they were signed. This was contrasted with sales releases from earlier years where the agreements of purchase and sale were conditional for a period of time that allowed the purchasers to obtain legal advice before they became "Firm & Legally Binding".

[31] Mattamy provided brochures, floor plans, site plans, pricing information, deposit structures and payment information with the pre-sale registration and sales event invitations and again at the sales site. However, a copy of the agreement of purchase and sale was not on display in the sales tent when the plaintiffs purchased their homes. The plaintiff Naseem Qadir ("Qadir") testified that he tried to get a copy of the agreement of purchase and sale in 2017 before the sales date but the sales centre was always closed. Mattamy tendered evidence that template copies of the agreements of purchase and sale were available upon request at any time after the registration process opened. Mattamy's sales representative deposed that copies were available to all staff and would be provided at the sales centre, if requested. This is confirmed by the experience of the plaintiff Muhammad Shahid ("Shahid"), discussed below.

[32] The court in *Uber* also found there was no evidence that Heller had obtained any legal or other advice prior to entering into the services agreement nor was it realistic to expect that he would have. It also held that he had no reasonable prospect of being able to negotiate any of the terms of the agreement, even if had obtained legal advice. In this instance, Mattamy admitted that if a purchaser wanted a lot in the first quarter of 2017, he or she would have to execute the agreement of purchase and sale in the sales centre and the terms were not negotiable.

[33] On the issue of the ability to obtain legal advice, the evidence before me was that none of the plaintiffs had a lawyer attend with them at the sales site to review the Arbitration Agreement before they signed it. There was contradictory evidence as to whether a lawyer would be allowed to attend and review the agreement with his or her client. While Evans deposed that she was not permitted to have a lawyer with her in the sales centre, Mattamy's deponent stated that potential purchasers are not restricted as to who may accompany them to the sales centre and lawyers do attend the sales event with prospective purchasers from time to time. To the best of the deponent's recollection, Evans did not request to have a lawyer present. Had she asked, she would have been permitted to have a lawyer attend with her. Evans further deposed that she was told that if she wanted to take the time to review the agreement of purchase and sale, she would have to step aside and risk losing the lot she had selected. Mattamy disputed this evidence, stating that once a prospective purchaser selected a lot, Mattamy would not offer that lot to others as long as a sale was in progress.

[34] Pattni deposed that she asked to consult a lawyer before signing the agreement of purchase and sale and was told that there was no time and she would lose her lot if she consulted a lawyer. Again, Mattamy disputed this version of events. The Mattamy sales representative

who worked with the Pattnis stated that she spent two hours with them and had no recollection of them asking during that time if they could consult a lawyer. Shahid also stated that he was told that he had to sign the agreement right then and could not have a lawyer review it.

[35] It can be said that none of the plaintiffs obtained independent legal advice or other suitable advice on the Arbitration Agreement in the 2017 agreements of purchase and sale before signing them. However, I do not find that to be conclusive on this issue as some of the plaintiffs obtained legal advice historically on this exact Arbitration Agreement with Mattamy.

[36] By way of example, Evans signed an agreement of purchase and sale with Mattamy in 2013, which contained the same Arbitration Agreement. Evans had a lawyer review that agreement of purchase and sale and, after review, raised no issue that the Arbitration Agreement represented a grossly unfair or improvident bargain or otherwise objected to it. Evans deposed that she was unaware that the 2017 agreement of purchase and sale contained the Arbitration Agreement as she was not given an opportunity to read the agreement before she signed it. However, she also deposed that she was told the agreement she was signing was the same as the 2013 agreement. If this statement is true, then Evans would have been aware that the 2017 agreement of purchase and sale contained the Arbitration Agreement.

[37] I find it is a reasonable assumption that had Evans taken the agreement of purchase and sale to a lawyer in 2017 and asked him or her to comment on the Arbitration Agreement, Evans would have raised no objection to the clause with Mattamy, consistent with her behaviour in 2013. I also find it a reasonable inference that Evans would not have terminated the agreement of purchase and sale on the basis that it contained the Arbitration Agreement, as she had already accepted an agreement with the same term in 2013.

[38] This was also the case for Shahid. He purchased a Mattamy pre-construction home in 2010. The agreement of purchase and sale was conditional for a five day period and contained the same Arbitration Agreement as in the 2017 agreement in question. Shahid took the 2010 agreement to a lawyer for review and, after receiving legal advice, was satisfied that the agreement was acceptable. Shahid closed that house purchase in December 2011 and immediately resold it.

[39] In February 2014 Shahid bought a second pre-construction Mattamy home. This agreement did not have a five day conditional period, so Shahid went to the Mattamy sales centre in advance of his purchase and obtained a copy of the agreement, which included the Arbitration Agreement, in order to obtain legal advice on it. After obtaining that advice, Shahid signed the agreement of purchase and sale and purchased the property, which closed in or around January 2015.

[40] The plaintiff Qadir purchased both a Mattamy pre-construction condominium and a Mattamy pre-construction townhouse in 2010. Both agreements contained the Arbitration Agreement. Qadir did not obtain legal advice on either 2010 agreement and it is a

reasonable assumption that he would not have done so in this instance even had he had the agreement in advance or seen that it contained the Arbitration Agreement.

[41] In summary, of the five plaintiffs about whom evidence was tendered on this motion, two obtained legal advice on this exact Arbitration Agreement when it was contained in earlier agreements of purchase and sale they had signed with Mattamy. One had the opportunity to obtain legal advice on the Arbitration Agreement on two earlier occasions and never did. There is no information from plaintiff Asif Khan ("Khan") on this issue and Pattni indicated that she was told she would lose her chosen lot if she took the time to obtain legal advice. I find some of the plaintiffs then had legal advice on the Arbitration Agreement. For those who did not obtain legal advice, the evidence of Shahid demonstrated that legal advice could have been obtained in advance of signing the Arbitration Agreement.

Element 3 – Was there an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or other similar disability?

[42] Uber acknowledged that there was a significant inequality of bargaining power between it and Heller. This was also found to be the case in *Huras*. Unlike *Uber*, there is no evidence of ignorance of business, illiteracy or disability on the part of the plaintiffs as it pertains to the Arbitration Agreement. To the extent the plaintiffs allege ignorance of the language of the bargain, at least Evans and Shahid had actual legal advice on the Arbitration Agreement historically. As for an overwhelming imbalance in bargaining power, the most that can be said is that the plaintiffs wanted to purchase properties being sold by Mattamy, of which there were a finite number and which were subject to ongoing sales efforts to other prospective purchasers.

[43] In the months after signing the Arbitration Agreement, no plaintiff alleged that he or she did not understand the Arbitration Agreement or suffered from a disability that demonstrated there was an overwhelming imbalance of bargaining power. For instance, in Rajesh Pattni's email of 1 March 2017 asking Mattamy to release him from the agreement on personal grounds, he acknowledged that he fully understood that the deal was firm and binding upon signing, and requested the "release on an exception and compassion basis, as the onus is 100% on you to allow it or not." Neither here nor in his subsequent emails of 18 December 2017 and 3 January 2018 requesting concessions with regard to the house purchase did Pattni raise any issue with respect to the Arbitration Agreement.

[44] Khan wrote a similar email to Mattamy on 1 December 2017 asking for a solution concerning the purchase by him and his wife, the plaintiff Shahina Khan. In that email, he stated: "Whilst I fully respect the position Mattamy is in, and realize that closing my home is the responsibility solely of myself and my wife, I feel we are at a cross roads with regards to the decisions we need to continue to make."

[45] While Khan and others complained about the changes in the Canadian housing market, it is instructive for the purposes of this motion that when the plaintiffs contacted Mattamy to attempt to be released from their agreements of purchase and sale, none of them took the

position that the Arbitration Agreement was a grossly unfair bargain or that they had been ignorant of what the Arbitration Agreement meant.

[46] In summary, I find with respect to the Arbitration Agreement, there was no overwhelming imbalance of bargaining power caused by the plaintiffs' ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility or other similar disability.

Element 4 – Did Mattamy knowingly take advantage of the plaintiffs' vulnerability?

[47] The *Uber* court held that, given the answer to the first three elements, it could be safely concluded that Uber chose the Arbitration Clause in order to favour itself and thus take advantage of its drivers, who were clearly vulnerable to the market strength of Uber. It found a reasonable inference that Uber did so knowingly and intentionally.

[48] On this motion, at least, there is no evidence that the plaintiffs were vulnerable in relation to their signing the Arbitration Agreement and no evidence that Mattamy took advantage of any vulnerability.

E. Undue Influence

[49] The plaintiffs allege that Mattamy exerted undue influence in the manner in which it induced the plaintiffs to execute the Arbitration Agreement.

[50] To succeed on such a claim, the plaintiffs must demonstrate that they were coerced by Mattamy or that Mattamy abused its power to compel the plaintiffs to sign the Arbitration Agreement. They must show they had "no realistic alternative" but to submit to this coercion. Further, even if the plaintiffs meet this high hurdle, the defendants argue that relief is not available to them because most, if not all, of the plaintiffs affirmed the Arbitration Agreement at a time when they were no longer under undue influence by signing various amending and upgrade agreements with Mattamy, each of which by its terms affirmed the original Arbitration Agreement. (see *Royal Bank v. 131864 Ontario Ltd.* 2003 CarswellOnt 3290, affirmed 2003 CarswellOnt 3239 (C.A.) If a plaintiff establishes circumstances to trigger the presumption of undue influence, the defendant may show that no actual influence was deployed.

[51] The Supreme Court in *Geffen v. Goodman Estate* [1991] 2 S.C.R. 353 set out the test for undue influence as follows:

> "It seems to me rather that when one speaks of "influence" one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power.... When dealing with commercial transactions, I believe that the plaintiff should be obliged to show, in addition to the required relationship between the parties, that the contract worked unfairness either in the sense that he or she was unduly disadvantaged by it or that the defendant was unduly benefited by it. From the court's point of view this added requirement is justified when dealing with commercial transactions because, as already mentioned, a court of equity, even while tempering the

> harshness of the common law, must accord some degree of deference to the principle of freedom of contract and the inviolability of bargains. Moreover, it can be assumed in the vast majority of commercial transactions that parties act in pursuance of their own self-interest."

[52] What is the evidence of such undue influence by Mattamy over the plaintiffs with respect to the signing of the Arbitration Agreement? Evans deposed that she was "forced to sign [it] in a pressure-packed environment with no time to actually review the agreement. The sales representatives did not draw my attention to the clause concerning resolution of disputes, let alone any terms of the agreement."

[53] The plaintiffs argue that the pressure in relation to the Arbitration Agreement stems from the fact that they were obliged to pick a lot and give their deposit cheques before they were even able to see the agreement of purchase and sale with the Arbitration Agreement. They were also told that they would miss their chance to get into the market if they did not buy during that release, as the prices had escalated from the first release to the second and were expected to increase again for the third release. Pattni deposed that "Had I been aware at the sales centre that the agreement of purchase and sale was a firm contract, I likely would not have entered into the agreement at that time. I already felt uncomfortable making a decision on an almost two million dollar purchase in a matter of minutes but felt that I had to in order to be able to purchase a house in the Preserve." Mattamy denies these allegations but takes the position that, even if they were true, this "pressure" was market driven and caused by the plaintiffs' desire to purchase a home, not by pressure brought to bear by Mattamy, as it had significant demand for its homes at that time.

[54] I note that both Evans and Pattni were aware of the dynamics of the sales office as both attended on Day 1 and were not reached and chose to come back on Day 2 and participate in the sale process.

[55] For the reasons noted above, and in relation to the Arbitration Agreement only, the plaintiffs have not demonstrated that they were dominated by the will of Mattamy and that the Arbitration Agreement worked an undue disadvantage on them. Further, there is no evidence that any of the plaintiffs objected to the Arbitration Agreement once they were removed from the scene that caused the alleged undue influence.

Conclusion

[56] Mattamy is presumptively entitled to a stay. I find the plaintiffs have not demonstrated that the Arbitration Agreement is invalid, either as a result of unconscionability or undue influence. Having not come within the exception set out in subsection 7(2) of the *Act*, there is no discretion to refuse the stay.

Costs

[57] The parties have agreed that the unsuccessful party shall pay costs to the successful party in the amount of $35,000. As the defendants have succeeded on their motion to stay this action, the plaintiffs shall pay the defendants the sum of $35,000 within 30 days of the release of this decision.

Master Jolley

Date: 21 June 2019