CITATION: Dufault v. Toronto Dominion Bank, 2022 ONSC 2397
COURT FILE NO.: CV-21-656203-CP
DATE: 20220506

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

TYLER DUFAULT

Plaintiff
(Respondent on the Motion)

- and -

THE TORONTO-DOMINION BANK and THE CANADA TRUST COMPANY

Defendants
(Moving Parties on the Motion)

Proceeding under the *Class Proceedings Act*, 1992

BEFORE: Justice Edward Belobaba

COUNSEL: *Christine Lonsdale, Adam Ship and Adriana Forest* for the Defendants

Celeste Poltak, Adam Tanel and Elie Waitzer for the Plaintiff

HEARD: April 19, 2022 via Zoom Video

Pre-Certification Motion for Summary Judgment

[1] Tyler Dufault opened a savings and a chequing account with the TD Bank in 2009. He was a teenager at the time but understood that if his cheque bounced or a payment that he made was rejected because of insufficient funds, the Bank could charge an NSF service fee for the bounced cheque or rejected payment.

[2] Indeed, the NSF Provision in the Bank's standard-form consumer banking agreement, made this clear:

> If you do not have overdraft protection service and you issue a cheque or make a payment without sufficient funds in your account [TD may charge] $48 if TD does not approve the cheque or payment.

[3] What Mr. Dufault did not expect is that the Bank would charge a second $48 NSF fee in circumstances that did not fall within the plain language of this provision. In other words, that one rejected NSF payment could result in a $96 NSF charge.

Background

[4] On December 2, 2020, the plaintiff made a $19.49 purchase using PayPal, an online payments service that was funded from his savings account via a Pre-Authorized Debit ("PAD") process. As it turned out, he only had $19.04 in his account and he didn't have overdraft protection. PayPal's request for payment was rejected by the Bank and the plaintiff was charged the $48 NSF fee.

[5] Four days later, on December 7, 2020, PayPal resubmitted the same transaction for payment as was their right under their user agreement. The plaintiff's account balance hadn't changed. TD Bank rejected PayPal's resubmission and charged the plaintiff a second $48 NSF fee. In other words, says the plaintiff, he was charged $96 in NSF fees for a single rejected payment — contrary to the banking agreement and in contravention of provincial consumer protection legislation, resulting in the Bank's unjust enrichment.

[6] As the plaintiff explained in his affidavit:

> When I made the [PayPal] Transaction, I understood it was a single, one-time payment. From my review of [the Agreement] I understood that if I had insufficient funds in the Savings Account to cover the amount of the Transaction, TD Bank could charge me at most a single NSF fee if it decided to reject the payment. I was not aware that if PayPal unilaterally resubmitted the Transaction for payment that TD Bank would charge a second NSF Fee in relation to the same attempted payment.

[7] The plaintiff may or may not have known this but PayPal was authorized under its User Agreement to resubmit or re-present its request for payment if the initial transfer request was rejected by the user's bank:

> When you use your bank account as a payment method, you are allowing PayPal to initiate a transfer from your bank account to the recipient …You authorize PayPal to try this transfer again if the initial transfer is rejected by your bank for any reason.

[8] Federal banking rules, which are discussed in more detail below, require that any such resubmission or re-presentment by a third-party-payee, such as PayPal, must be made within 30 days of the initially rejected payment and can only be made once. The banking rule in question provides as follows:

> *Re-presentment:*
>
> Each Payee Letter of Undertaking shall provide that upon the return of a PAD for reason of "Non-Sufficient Funds" or "Funds Not Cleared", the Payee may

> re-present the PAD electronically on a one-time only basis for the same amount as the original debit and such item may only be re-presented within 30 days. The Payee Letter of Undertaking shall specifically state that a re-presentment shall not contain interest, NSF charges or any other charges in addition to the original PAD amount.[1]

[9] The issue here is not whether PayPal was wrong to re-present the rejected payment (it wasn't) or whether the Bank was wrong, in theory, to charge a second $48 NSF fee for the additional expense of processing the re-presentment (it wasn't) — the issue is whether the Bank fully and fairly disclosed the possible imposition of this second NSF fee in the Fee Schedule of its consumer banking agreement.

[10] Both sides agree that the 2020 version of the banking agreement is the version that applies herein. There are two parts to the agreement, a 9-page Financial Services Terms document and a 13-page Fee Schedule that sets out the service fees (together, "the Agreement").

[11] Given the standard-form nature of the Agreement and the likelihood that other customers had also been charged an additional NSF fee in similar circumstances, the plaintiff filed a proposed class action on behalf of:

> Every person resident in Canada who is or was a personal deposit account holder with TD Bank since January 1, 2010, and whose personal deposit account has been charged multiple NSF fees by TD Bank on a single payment made or cheque issued.

[12] The plaintiff alleges that charging an additional and undisclosed NSF fee for processing a resubmission or re-presentment of a rejected payment on the facts herein is in breach of the plain language in the Agreement and provincial consumer protection law (false, misleading or deceptive representations, including the failure to disclose a material fact). The plaintiff also alleges breaches of the disclosure obligations under federal banking law[2] but these are not being advanced as a stand-alone cause of action — only breach of contract, contravention of consumer protection law and unjust enrichment.

[13] The Bank submits that there is no cause of action in contract, under provincial consumer protection law or in unjust enrichment and asks that the proposed class action be summarily dismissed.

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[1]Rule H-1, Appendix 1, s. 18 of the *Automated Clearing and Settlement System Rules and Standards* ("ACSS Rules") prescribed by Payments Canada.

[2] *Disclosure of Charges (Banks) Regulations* S.O.R./92-324 , ss. 3-4, and also see the *Bank Act*, S.C. 1991, c. 46, ss. 446-47 and 980.

[14] In a sequencing motion under s. 4.1 of the amended *Class Proceedings Act*[3] the Bank requested that its motion for summary judgment be heard before the plaintiff's motion for certification. Because the motion for certification had not yet been scheduled and summary adjudication could potentially dispose of the proceeding in whole or in part, I agreed to hear the Bank's pre-certification motion for summary judgment.[4]

[15] Both sides agree, as do I, that summary judgment is appropriate. The issues in this case are in essence questions of law. The facts are not really in dispute. As with other banking fee disclosure actions that were found appropriate for summary judgment, here as well "the relevant facts are largely uncontested and there are no credibility concerns."[5]

Analysis

[16] I begin with this observation. If this motion turned only on the NSF fee provision, I would have had little difficulty agreeing with the plaintiff that the imposition of the second NSF fee for processing PayPay's re-presentment was not fully and fairly disclosed given the language in the NSF Provision. Recall again how the Bank phrased its right to charge an NSF service fee:

> If you do not have overdraft protection service and you issue a cheque or make a payment without sufficient funds in your account [TD may charge] $48.00 if TD does not approve the cheque or payment.

[17] This NSF Provision uses the 'second person imperative' — *if <u>you</u> make a payment* without sufficient funds in your account — and focuses only on the payment that *you* made. The Bank says it may charge a $48 NSF fee if the Bank does not approve *the payment.* The meaning appears to be plain on its face. The Bank may charge an NSF fee where the customer himself makes "a payment" and "the payment" is not approved by the Bank because of insufficient funds. There is nothing in this disclosure provision about the Bank's right to impose a second NSF fee when a third-party-payee, such as PayPal, re-represents the rejected payment.

[18] Modern contractual interpretation, however, does not proceed in isolation. It is not limited to the specific wording of one particular provision. Context is important.[6] The law is clear that judges should read the contract in question as a whole, giving the words used their ordinary and grammatical meaning, consistent with any surrounding circumstances that were known to the parties at the time of formation of the contract.[7]

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[3] *Class Proceedings Act, 1992,* S.O. 1992, c. 6, as amended.

[4] *Dufault v. Toronto Dominion Bank,* 2021 ONSC 6223.

[5] *MacDonald et al v. BMO Trust Company et al*, 2020 ONSC 93, at para 4.

[6] *Weyerhaeuser Company Limited v. Ontario (Attorney General),* 2017 ONCA 1007 at para. 237.

[7] *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, at para. 47.

[19] The surrounding circumstances or factual matrix may sometimes help the court interpret the meaning of the words that the parties chose to express their agreement.[8] However, when dealing with standard-form "take it or leave it" contracts, such as here, "surrounding circumstances" generally play "less of a role"[9] and have "little impact" in the interpretation process."[10] This is because of the "take it or leave" nature of a consumer adhesion contract and the likelihood that the surrounding circumstances, if they involve background rules and regulations or industry-specific minutiae, will not be known to the consumer at the time of contracting.

[20] Still, says the Bank, in the interpretation of this particular Agreement there are surrounding circumstances that must be considered by the court — namely, the *Automated Clearing and Settlement System Rules and Standards* prescribed by Payments Canada and often referred to in the banking industry as the Network Rules.

[21] The Bank's primary argument is that its imposition of a second NSF fee when a third party's re-presentment is rejected is actually mandated by the Network Rules which require that the Bank treat both the original request and the re-presentment not only as two separate and distinct transactions but as two separate and distinct "payments". And this federal banking obligation, in turn, says the Bank, should inform the court's interpretation of the word "payment" in the NSF Provision.

[22] The Bank argues that the Network Rules should have been known to the plaintiff because section 2.6 of the Agreement provides that payment instruments such as cheques or PADs will be paid "in accordance with applicable laws, self-regulatory codes, *network rules*, and other industry rules" (emphasis added). If the plaintiff had read the "network rules", says the Bank, he would have realized that PayPal's re-presentment was a second "payment" and he would have understood that this characterization informed the interpretation of "payment" as used in the NSF Provision. That is, the plaintiff would have understood that the second NSF fee was amply covered by the word "payment" and the second NSF fee was therefore fully disclosed on a plain reading of the NSF Provision.

[23] Counsel on both sides devoted much time and effort advancing and responding to this Network Rules submission. The inordinate level of attention paid to Payments Canada and its rules and standards for the clearing and settlement of payments no doubt explains why the agreed-to costs award on this motion, as fixed by the court below, is so large.

[24] The problem with the Bank's reliance on the Network Rules is not just in their complexity but in their content as well. Counsel for the plaintiff makes a compelling argument

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[8] Hall, *Canadian Contractual Interpretation Law*, 3rd ed. (2016) at 33-34.

[9] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, at para. 32.

[10] *Sankar v. Bell Mobility Inc.*, 2017 ONCA 295, at para. 11.

that there is actually nothing in these Rules that mandates the Bank's "two payments" characterization.

[25] The plaintiff points out that ACSS/Network Rule H-1 talks about "a PAD" and "the PAD" and not about two separate payments. That is, "a PAD that has been dishonoured may only be re-presented in accordance with the applicable provisions…" and that "the Payee [that is, PayPal] may re-present the PAD electronically on a one-time only basis." Also, the Payments Canada website, when discussing "Paying by Pre-Authorized Debit", refers to the re-presentment of the "same debit", not a different or separate debit or payment:

> If you don't have enough funds in your account to cover a withdrawal, the biller can try the same debit one more time. The biller needs to do so within 30 days from the date of the withdrawal and it must be for the exact same amount (emphasis added).

[26] Counsel for the plaintiff may well be right in their analysis. However, as I explain further below, this case does not turn on the Network Rules. I am, for the sake of argument, prepared to accept the Bank's submission that the coding instructions and related directions set out in the 200-plus pages of the ACSS/Network Rules may well require that the original PAD on December 2 and its re-presentment on December 7 must not only be treated by the Bank as two separate transactions but should also be characterized as two separate debits or payments.

[27] What I do not accept is that any such characterization in the Network Rules of the two transactions as "two payments" for clearing and settlement purposes must necessarily inform the interpretation of the word "payment" in the NSF Provision and this in turn, is enough to establish that the second NSF fee in question was fully disclosed.

[28] This submission does not succeed. I say this for two reasons.

[29] *One*, to be available and helpful in contractual interpretation, and particularly in the context of a standard-form agreement, the surrounding circumstances (i.e. the Network Rules) must have been "known to the parties at the time of formation of the contract."[11] In my view, it cannot be seriously argued that the Network Rules were known or should have been known to the plaintiff, or indeed any banking consumer, of whatever age, when they opened their bank account. And, in particular, that the banking consumer should somehow have known that under the Network Rules the word "payment" as used in the NSF Provision could arguably include a third-party-payee's re-presentment of the initially rejected PAD payment.

[30] I agree with counsel for the plaintiff that it would be unreasonable in the extreme to assume that ordinary banking consumers (whether in 2009 or 2020) had or should have had a detailed (or any) understanding of the surrounding banking rules and coding requirements set out in the 200-plus pages of the so-called Network Rules. In my view, the Bank's "inside baseball"

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[11] *Supra*, note 7.

reliance on the content and reach of the Network Rules may be relevant to sophisticated squabbles with regulators or in an arcane inter-bank or business dispute but not in the interpretation of standard-form consumer banking agreements. Indeed, in my view, there is zero chance that any court would conclude otherwise.

[31] *Two,* and in any event, whatever else is said in the Network Rules about transaction-coding or related matters, there is nothing in the Network Rules that speaks to or even mentions NSF fees (how or when they should be imposed) and certainly nothing about the imposition of a second NSF fee on a rejected re-presentment. These NSF service fee decisions fall solely within the exclusive discretion and determination of the Bank, as they should.

[32] I pause here to note again that the plaintiff does not question the Bank's right to charge additional service fees for additional services — provided that the additional fees are fully and fairly disclosed. It is clear on the record that the Bank incurs additional expenses processing the third-party-payee's re-presentment and that these additional expenses could well justify the imposition of the second NSF fee. The plaintiff's complaint and the issue before this court is that the possible imposition of this second NSF fee in these circumstances was not disclosed in the Fee Schedule of the Agreement.

[33] In sum, the Bank's reliance on the Network Rules as surrounding circumstances that could assist in the interpretation of the NSF Provision is misplaced. For the reasons just stated, there is nothing in the Network Rules that is of any assistance in resolving the interpretation issue.

[34] I return then to the "ordinary and grammatical meaning" of the NSF Provision itself.

[35] As I said at the outset, if my focus were limited only to the NSF Provision, I would have had little difficulty agreeing with the plaintiff — that the imposition of the second NSF fee for processing PayPay's re-presentment was not authorized on the plain and ordinary meaning of the wording in the NSF Provision.

[36] To the Bank's credit, the NSF Provision is written in plain English and uses the 'second person imperative' construct. But it only focuses on the first payment —*if <u>you</u> make a payment* without sufficient funds in your account, the Bank will charge a $48 NSF fee if the Bank does not approve *the payment.* The ordinary and grammatical meaning is, in my view, plain on its face. The Bank may charge an NSF fee if you, the customer, "make a payment" and "the payment" is not approved because of insufficient funds. I note that "you" is defined in the Agreement as "the customer…listed on the account". There is nothing in this fee disclosure provision about the Bank's right to impose a second NSF fee when someone else — a third-party-payee such as PayPal — re-represents the rejected payment.

[37] PayPal was launched in Canada in 2006. The plaintiff opened his bank accounts in 2009 and began using PayPal in 2014. Even if the Bank was not familiar initially with Pay Pal *per se*, the evidence shows that the Bank knew about on-line payment systems over the course of this time period. It also knew that third-party-payees, such as PayPal, had a practice of re-presenting PADs that were returned NSF and that they typically did so within five days of the declined payment.

[38] The Bank knew all this when it drafted or had the opportunity to redraft (at every renewal) the language in the Agreement, including the NSF Provision in question. The Bank always had complete control over the words it used and presumably understood their ordinary meaning. Therefore, the Bank should not be surprised by a judicial decision that takes the ordinary meaning of these words seriously and concludes that word choices, particularly in banking fee disclosure provisions, will have consequences.

[39] Again, this case does not turn on the fact that the Bank's internal processing system did not distinguish between original and re-presentment transactions. Nor does it oblige the Bank to reconfigure its processing technology to identify and root out re-presentments or conduct other investigations, even if this were technically possible. The case turns on what constitutes full and fair disclosure of service charges in a standard-form consumer banking agreement.

[40] I note that the Agreement has a 13-page Fee Schedule that discloses and explains ta long list of service fees that are imposed across a myriad of situations. The same should have been done here. The Bank could easily have satisfied its service-fee-disclosure obligation, while at the same time charging a second $48 fee for processing a third-party's re-presentment, by saying something like this:

> If a cheque, payment or re-presentment of a payment is not approved because of insufficient funds, the Bank may charge a $48 NSF fee every time the cheque, payment or re-presentment is rejected.

[41] There are, of course, other ways to draft the NSF Provision to achieve the required disclosure objective. For some reason, the Bank did not bother to do so.

[42] I conclude that the Bank's deliberate use in the NSF Provision of the second-person imperative and the phrase *if you make a payment*, is plainly and unambiguously concerned with situations where the customer with insufficient funds in their savings account makes a payment or attempts to make a second payment after the first is rejected for insufficient funds. It does not address the situation where a third-party-payee re-presents the rejected payment a second time.

[43] Indeed, on the Bank's own evidence, as provided by Ms. Pereira, there is an acknowledged difference between the two scenarios:

> Q. Yes. In one of the scenarios, the customer is actively attempting a second payment?
>
> A. The customer Mr. Dufault?
>
> Q. Yes.
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> A. Yes, they can actively do that. Yes.
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> Q. So that's one scenario. And the other scenario is where the customer has only tried to make the payment once and it's the payee who is attempting to process the payment a second time?
>
> A. That's correct.

[44] According to the Bank's own evidence, where there is a re-presentment by a third-party-payee, the "customer has only tried to make the payment *once*" (emphasis added).

[45] In my view, this accords with the reasonable interpretation of the NSF Provision which on its face remains plain and unambiguous and is limited to NSF situations where "you" (the customer) made "a" payment without sufficient funds in your savings account.

[46] However, if I am wrong in this regard and there is ambiguity in the wording and meaning of the NSF Provision, the plaintiff is prepared to make further submissions based on the principle of *contra proferentem* and s. 11 of the *Consumer Protection Act* that requires any ambiguity in a consumer agreement to be resolved in favour of the consumer.[12]

[47] Given my analysis, as set out above, there is no need for these additional submissions.

[48] In sum, I am satisfied, for all the above reasons, that the Bank's motion for summary judgment must be dismissed. The Bank has not established that the plaintiff has no cause of action in breach of contract, provincial consumer protection law or unjust enrichment. These are genuine issues that should proceed to certification and, if the proposed class action is certified as a class proceeding, to an adjudication on the merits.

[49] I further find, because both sides understandably argued the merits of the core interpretation issue, that the imposition of the second NSF fee (for a third-party-payee's re-presentment) was not authorized (not disclosed) by the NSF Provision.

[50] Given this broader finding, I considered whether this was an appropriate case for a "reverse summary judgment" — whether the court on its own initiative should grant the plaintiff the "breach of contract" and related declarations about the second NSF fee that were pleaded but not advanced by way of a cross-motion for summary judgment. As I began to work on these reasons, I advised counsel that I was considering this possibility and invited and received their written submissions. Counsel for the plaintiff pressed for a reverse summary judgment. The Bank was opposed.

[51] But for the fact that the action before me is a proposed class action, I would probably have agreed with counsel for the plaintiff. On balance, however, I am not persuaded that in the context of a proposed class action where the broader findings made herein will in any event be before me when I hear the certification motion, that any practical purpose is served in granting a reverse summary judgment.

[52] One final comment. Counsel for the plaintiff has advised that a parallel proposed class action has been proceeding in the Southern District of New York against the same defendant

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[12] Also see *Tecton Construction Inc. v. Yeung*, 2016 ONSC 3039 at para. 87.

bank on essentially the same facts and issues.[13] The court has also been advised that the parallel American proceeding has settled for $41.5 million in US funds.[14] I mention this only to remind all counsel that the proposed class action herein as it goes forward need not re-till plowed ground. It may be useful for both sides to review the counter-part proceeding in the U.S. and determine whether or to what extent it can assist in helping to narrow the issues here.

Disposition

[53] The Bank's motion for summary judgment is dismissed. The motion for certification shall be scheduled and heard as soon as practicable.

[54] As already noted, counsels' deep-dive into Payments Canada's network rules and standards increased the costs of this motion for both sides. The parties, however, have agreed that a fair and reasonable costs award is $120,000 all-inclusive. So fixed. The defendant Bank shall pay $120,000 in costs to the plaintiff within 30 days.

[55] Order to go accordingly.

Signed: *Justice Edward Belobaba*

Date: May 6, 2022

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[13] *Perks v. TD Bank, N.A.*, 444 F. Supp. 3d 635 (2020).

[14] Nichola Saminather, "Toronto-Dominion Bank reaches $41.5 mln settlement in U.S. excessive fees lawsuit" Reuters (May 18, 2021). The U.S. District Court's preliminary approval of the settlement in *Perks v. TD Bank, N.A.* (1:18-CV-11176-VEC) was filed on July 9, 2021.