Cassels

The Downside to Preliminary Motions: Ontario Court Declines to Grant Summary Judgment to Defendant in Banking Fees Case

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A recent decision of the Ontario Superior Court of Justice highlights that although the new class proceeding regime in Ontario may be more permissive in respect of pre-certification motions, defendants still need to be careful with respect to the merits of their motions before bringing them. In *Dufault v. Toronto Dominion Bank*,[1] a preliminary summary judgment motion in a banking fee class action was wholly unsuccessful and gave rise to some unhelpful findings and commentary by the motions judge against the defendant.

The issue in *Dufault* is what constitutes full and fair disclosure of service charges in a standard-form consumer banking agreement and arises out of the plaintiff being double charged for NSF fees by the defendant TD Bank, allegedly in contravention of the parties' banking agreement.

In an earlier sequencing motion under s.4.1 of the amended *Class Proceedings Act,* TD 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, Justice Belobaba agreed to hear TD Bank's pre-certification motion for summary judgment.

TD Bank was ultimately unsuccessfully on its motion, and the decision offers a procedural warning on pre-certification motions and substantive lessons on contractual disclosure obligations and contractual interpretation. In respect of the latter, it shows the Court will take the ordinary meaning of words seriously, particularly in banking fee disclosure provisions applied to the ordinary banking consumer.

Summary Judgment and TD Bank's NSF Fees

In the summary judgment motion, the Court engaged in a full analysis of the matters at issue in the litigation, commenting:

"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.'"

In this case, when the plaintiff opened bank accounts with TD Bank in 2009, he understood that if his cheque bounced or a payment that he made was rejected because of insufficient funds, TD Bank could charge an NSF ('non-sufficient funds') service fee. The NSF Provision in TD Bank's standard-form consumer banking agreement stated:

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.

On December 2, 2020, the plaintiff made a $19.40 purchase using PayPal – a third-party online payments service via a Pre-Authorized Debit (PAD) process. He only had $19.04 in his account and he did not have overdraft protection. When PayPal's initial request for payment was rejected by TD Bank, the plaintiff was charged the $48 NSF fee, as expected. However, four days later, on December 7, 2020, PayPal re-presented the same transaction for payment. Given that the plaintiff's account balance remained short 36 cents, TD Bank rejected PayPal's re-presentment, and to the plaintiff's surprise, charged him a second $48 NSF fee.

The plaintiff argued he was charged $96 in NSF fees for a "single" rejected payment, contrary to the plain language in the banking agreement and in contravention of provincial consumer protection law.

TD Bank asked the Court to summarily dismiss the proposed class action. In its primary argument, TD Bank asserted that its imposition of a second NSF fee when a third-party's re-presentment is rejected due to insufficient funds was mandated by banking industry rules and standards prescribed by Payments Canada, often referred to as the "Network Rules." Accordingly, the Network Rules allegedly required TD Bank to treat both the original request and the re-presentment as two separate and distinct "payments."

After considering the parties' arguments, the Court not only refused to grant TD Bank's summary judgment motion, but also indicated that it might have considered granting reverse summary judgment had this not been a class action.

Modern Contractual Interpretation and Standard Form Contracts

The Court applied modern contractual interpretation to look at the words of the banking agreement used in their ordinary and grammatical meaning consistent with any surrounding circumstances that were known to the parties at the time of the formation of the contract.

The Court determined that in standard-form "take-it-or-leave-it" consumer adhesion contracts, like banking agreements, the surrounding circumstances generally play less of a role in the interpretation process. This is because it would be unreasonable to expect that surrounding circumstances involving industry-specific background rules and regulations, like the Network Rules, are known to the consumer at the time of

contracting.

Looking at the ordinary and grammatical meaning of the NSF Provision itself, the Court concluded that TD Bank used the second-person imperative to provide that TD Bank may charge an NSF fee if "you," the customer, "make a payment" and "the payment" is not approved because of insufficient funds. While the NSF Provision clearly explained that an NSF fee applies to a payment made by the customer listed on the account, it mentioned nothing of TD Bank's right to impose a second NSF fee when someone else, a third-party payee such as PayPal, re-presents the rejected payment.

So, what does satisfy full and fair disclosure of service fees in a standard-form consumer banking agreement? The Court suggested TD Bank plainly and unambiguously say 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.

The Takeaway in the Class Action Context

The decision in *Dufault* brings to mind the old adage, "be careful what you wish for." The Court not only rejected the defendant's motion for summary judgment, but gave rise to the spectre of summary judgment being granted *against* TD Bank. Justice Belobaba commented:

"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."

Ultimately, Justice Belobaba declined to grant summary judgment against TD, stating:

"But for the fact that the action before me is a proposed class action, I would probably have agreed with counsel for the plaintiff [in granting reverse summary judgment]. 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."

The Court then indicated that the case would proceed to the scheduling of certification.

Dufault provides general helpful commentary on the interpretation and enforceability of standard form

contractual provisions in a consumer context. More importantly in a class proceeding context, *Dufault* provides a warning that although the new Ontario *Class Proceedings Act* amendments may permit an easier path to preliminary motions such as motions for summary judgment, defendants ought to be careful when bringing them, as adverse results could potentially lead to a significant loss of leverage at an earlier stage in the litigation.

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[1] *Dufault v. Toronto Dominion Bank*, 2022 ONSC 2397 (*Dufault*).

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