COURT FILE NO.: 4290/07
DATE: 2009-07-15

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
CANADIAN IMPERIAL BANK OF COMMERCE	)	*Ralph Swaine*, for the Plaintiff
	)	
	)	
	)	
Plaintiff	)	
	)	
	)	
- and -	)	
	)	
	)	
MICHAEL GERALD DONNELLY	)	*No one appearing*, for the Defendant
	)	
	)	
	)	
Defendant	)	
	)	
	)	
	)	**HEARD:** March 10, 2009,
	)	at Brampton, Ontario

Price J

Reasons For Order

[1] These are further reasons following my decision and reasons dated March 11, 2009. In those reasons, I invited the plaintiff's counsel to provide submissions in writing, if he wished as to whether section 81 of the

C*onsumer Protection Act, 2002*[1] ("the CPA") applied to the present case and, if so, what its impact was on the defendant's liability.

[2] As I indicated in my reasons of March 11, 2009, The Bank issued its claim in this action on July 18, 2007, claiming $ 33,426.47 said to be the balance due under VISA account number 4500 600 027 139 231 as of June 18, 2007, and pre-judgment and post-judgment interest at the rate of 19.5 % per annum from November 29, 2006 in accordance with the terms of the VISA cardholder agreement or, in the alternative, at the rate provided for under the Courts of Justice Act.

[3] $ 33,426.47 corresponded to the balance shown in the statement that the bank issued to the defendant for the period March 23 to April 22, 2007. This was the last of a series of statements that the bank tendered at trial and upon which it relied in support of its claim. The earliest statement that the Bank submitted was dated January 22, 2001 and showed an annual interest rate of 19.5 %.

[4] The Bank raised its interest rate to 24 % in its statement for the period August 23 to September 22, 2005. The rate remained at that level until April 22, 2007. The defendant asserts in his Amended Statement of Defence that this increase was without warning or discussion.

[5] The Bank obtained a summary judgment from Gray J. on January 8, 2008 in the sum of $ 20,000.00. At the trial before me, Counsel for the Bank stated that this was an arbitrary amount that Justice Gray had concluded was "the least that the defendant must owe the bank." Counsel

[1] *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A

for the Bank further advised me that the amount of the judgment was paid, including interest, on September 2, 2008.

[6] Counsel for the Bank submitted to me a document entitled "Calculation of Pre-Judgment Interest." It calculated the Bank's claim as of the date when summary judgment was paid, less the amount paid, plus interest at 19.5 % per year on the difference from April 22, 2007, being the date of the last monthly statement that it relies on, to the date of payment.

[7] The Bank's witness at the trial, Sonja Walton, a Relationship Officer in the Bank's credit card division, testified that the terms and conditions contained in the cardholder agreement permitted the Bank to make unilateral changes to the interest rate it charged the customer. I asked Ms. Walton whether the cardholder signs an agreement to the terms and conditions. She replied that a cardholder agrees in his application for credit card to be bound by the terms and conditions but they are not set out in the application and the cardholder is not asked to sign them or an acknowledgment that he has read them. She did not have the application for credit card that the defendant had signed or a copy of it.

[8] As for changes in the interest rate, Ms. Walton testified as follows:

> Q. All right. And how is the cardholder notified of what his interest rate is?
>
> A. The cardholder would be notified by letter.
>
> Q. Okay.
>
> A. That would go out to the customer along with their statement.

[9] The problem that I raised in my reasons of March 11th was that the amount that the Bank claims appears to include interest at 24% on the unpaid balance from August 23, 2005 to April 22, 2007. Apart from the fact that this is a higher rate of interest than that claimed by the Bank in its pleading, I raised the concern that it also might be in contravention of the Consumer Protection Act, 2002 which requires a lender in a cardholder situation to notify the cardholder at least thirty days in advance of any change in the interest rate being charged. I asked Counsel for the Bank whether he had any calculation of the amount that would be owing to the Bank on the basis of an interest rate of 19.5 % throughout and he replied that this calculation would be very complicated and had not been done.

[10] In the submissions that the Bank has provided to me in response to the invitation in my March 11th reasons, Counsel focused exclusively on whether the CPA applied and did not address the second question as to whether, if it did apply, what its impact was on the defendant's liability. I will nevertheless attempt to deal with both questions in the reasons that follow.

[11] Counsel for the Bank takes the position that, for constitutional reasons, the CPA does not apply to the credit card business of Canadian banks. It also submits that, in any case, s. 452 of the *Bank Act*[2] and section 12 of the *Cost of Borrowing (Banks) Regulations*[3] are essentially identical to s. 81 of the CPA and should be applied in preference to it. The Superior Court of Quebec in recent three class actions has rejected the

[2] *Bank Act*, S.C. 1991, c. 46
[3] *Cost of Borrowing (Banks) Regulations*, S.O.R./2001-101

argument that certain provisions of the CPA were constitutionally inapplicable to or inoperative as against banks.[4] In these cases, the issue was the legality of commissions charged on credit cards for foreign currency conversions.

[12] I do not propose to try to resolve the constitutional issue in the present case, where the defendant has not appeared and there is no one to present the argument favoring the applicability of the CPA. I agree with the position of Counsel for the Bank that it is not necessary to apply the CPA where there are virtually identical provisions in the *Bank Act* and its regulations.

The Law

a) The Regulatory Framework

[13] Section 452 (2) of the *Bank Act* prescribes the information, including changes in interest rate, that banks must disclose to their cardholders:

> 452 (2) Where a bank issues or has issued a credit … card to a natural person, the bank shall, in addition to disclosing the cost of borrowing in respect of any loan obtained through the use of the card, disclose to the person, in accordance with the regulations,
>
> (d) at such time and in such manner as may be prescribed, such changes respecting the cost of borrowing … as may be prescribed….

[14] The banks' disclosure obligations are set out in detail in the Regulations. Specifically, s. 12 (3) provides that banks must give 30 days

[4] *Adams v. Amex Bank of Canada*, [2009] Q.J. No. 5769 (S.C.);*Marcotte v. Fédération des Caisses Desjardins du Québec*, [2009] J.Q. no. 5770 (C.S.) and *Marcotte c. Banque de Montréal*, [2009] J.Q. no. 5771 (C.S.)

notice in writing before changing, among other things, the annual interest rate charged:

> 12 (3) Despite section 13, ***if a credit agreement for a credit card is amended, the bank must, in writing and 30 days or more before the amendment takes effect, disclose to the borrower the changes to the information required to be disclosed in the initial statement*** other than any of those changes that involve
>
> (a) a change in the credit limit;
>
> (b) an extension to the grace period;
>
> (c) a decrease in non-interest charges or default charges referred to in paragraphs 10 (1) (c) and (g);
>
> (d) a change concerning information about any optional service in relation to the credit agreement that is referred to in paragraph 10 (1) (i); and
>
> (e) a change in a variable interest rate referred to in subparagraph 11 (1) (a) (ii) as a result of a change in the public index referred to in that subparagraph. [Emphasis added.]

[15] The annual interest rate is required to be disclosed in the initial statement pursuant to section 11 (1) (a) (i) and 12 (1) (a):

> 11. (1) A bank that issues credit cards and that distributes an application form for credit cards must specify the following information in the form or in a document accompanying it, including the date on which each of the matters mentioned takes effect;
>
> (a) in the case of a credit card with a
>
> (i) fixed rate of interest, the annual interest rate, or
>
> …
>
> 12. (1) ***A bank that enters into a credit agreement for a credit card must provide the borrower with an initial disclosure***

> ***statement that includes the following information*** in addition to that required by paragraphs 10 (1) (a) and (c) to (k):
>
> (a) the manner in which interest is calculated and ***the information required by paragraph 11 (1) (a)***. [Emphasis added.]

[16] According to sections 19 and 22 (1) of the *Financial Consumer Agency of Canada Act*[5] and section 2 (a) of the *Financial Consumer Agency of Canada Designated Violations Regulations*[6], every contravention of a consumer provision constitutes a violation punishable by a maximum penalty of $ 50,000.00 for a person and $ 200,000.00 for a financial institution.

b) The Commissioner's Decisions

[17] The Commissioner of the financial Consumer Agency of Canada ("FCAC") issued a Notice of Violation[7] with a proposed penalty of $ 25,000 to a bank for failing to issue a written statement outlining the changes it had made to a credit card agreement at least 30 days before the changes came into effect. The FCAC cited s. 452 (2) of the *Bank Act* and ss. 6 (6) (c) and 12 (3) of the *Regulations*.

[18] The facts are somewhat similar to the present case. A consumer had difficulty meeting the minimum payment requirements for her credit card, which resulted in the bank increasing her interest rate. The bank notified the consumer of the increasing interest rate by a message on her credit card statement. It indicated that the higher interest rate would apply to her

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[5] *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9
[6] *Financial consumer Agency of Canada Designated Violations Regulations*, S.O.R./2002-101
[7] File: 22113-136Q307, found on the FCAC's web site at http://www.fcac-acfc.gc.ca/eng/industry/CommDecisions/HTML/22113-136Q307-eng.asp

account starting the day after the bank issued the next month's statement. The FCAC found that this was a systemic issue involving a number of other consumers.

[19] The FCAC issued a Notice of Violation and held that "[a]lthough the bank did provide clients with advance notice of its interest rate amendment, it did not do so in the manner specified by the Regulations." Under s. 12 (3), if a credit card agreement is amended, the bank must inform the borrower of this in writing at least 30 days before the amendment takes effect.

[20] Section 6 (6) (c) provides:

> 6 (6) A disclosure statement is deemed to be provided to the borrower
>
> …
>
> c) five days after the postmark date, if provided by mail;

[21] In this case, the bank failed to "factor into its process five days for delivering notices by mail, as well as other time required to cover delays in preparing and printing customer statements." The FCAC explained:

> The *Cost of Borrowing Regulations* are intended to ensure that cardholders are informed of changes to their credit card agreement before these changes take effect. Consumers who receive proper notice of amendments to their credit card agreement are better able to weigh their options and choose the financial institution, as well as the financial products or services that suit their needs and their banking habits. [Emphasis in original.]

In the result, the bank paid the penalty and implemented changes to ensure that the process for advising clients of changes to the interest rate charged would comply with the 30 day notification period set out in the legislation.

c) Case Law

[22] In Michael G. Tweedie, *Debt Litigation*[8], the author notes that a loan is not vitiated by a bank's breach of its governing statute or regulations:

> There is a general principle that a lender such as a bank is not affected in its individual loans by a lack of compliance with its governing statute. Where a lender breaches a statutory provision regulating it, this does not vitiate the loan between the parties. See the Bank Act, Part XVII, "Sanctions", which deals with the effect of an offence on contracts.
>
> 988. Unless otherwise expressly provided in this Act, a contravention of any provision of this Act or the regulations does not invalidate any contract entered into in contravention of the provision.
>
> There is also a saving provision in the Bank Act,
>
> 16. No act of a bank…is invalid by reason only that the act … is contrary to
>
> (a) in the case of a bank, … this Act;
>
> …
> So even if there is evidence that the bank is relying on a prohibited transaction, this is in and of itself would not relieve the borrower of his or her obligations to pay under a debt instrument.

[23] On the issue of notice, Tweedie notes:

> [a] ***party cannot complain that interest charges are not agreed to where it*** has received notice of such charges and ***has acquiesced to the same for a protracted period of time***"[9] [Emphasis added]

[8] Michael G. Tweedie, *Debt Litigation*, vol. II, looseleaf (Aurora: Canada Law Book, 2009), at para. 6:140.30
[9] Tweedie, above, at para. 6:140.40.30

[24] In Royal *Bank of Canada v. Pace Machinery Ltd.*[10], the Alberta Court of Queen's Bench (affirmed by C.A.) allowed a bank's action to collect on a debt owed by the defendants, a machine shop and its principals (also the guarantors). One of the issues was whether the bank had proven the amount of principal and interest owing. They argued that no agreement to pay interest or to pay on demand had been shown with respect to a portion of the amount claimed by the bank. The Court rejected this argument. MacLeod J. relied on the following passage from *Royal Bank of Canada v. Estabrooks Pontiac Buick Ltd.*[11] at para. 54:

> It is my view that ***by acquiescing for more than one year to this now well established commercial practice the company cannot be heard to complain of the interest charges being made***. Whether there is acquiescence, of course, is a matter of evidence but here it was established that the interest charges were brought to the company's attention on a monthly basis for over one year without objection. A perusal of the bank statements in evidence clearly indicates interest charges were made. [Emphasis added]

[25] In *Estabrooks*, one of the issues on appeal was whether the trial judge properly determined the interest payable on several notes. Instead of calculating interest at the fluctuating rates actually charged monthly by the bank, the trial judge used fixed rates. The court held that the bank was entitled to the actual interest charged. The interest charges were clearly shown on the monthly bank statements regularly received by the defendant company. The bank's representatives, one of whom acknowledged receiving and reconciling the monthly statements, were not aware that the company ever disputed the interest charges on the statements. In these

[10] *Royal Bank of Canada v. Pace Machinery Ltd.* (1991), 83 Alta L.R. (2d) 61 (Q.B.), afff'd (1995), 26 Alta. L.R. (3d) 14 (C.A.)
[11] *Royal Bank of Canada v. Estabrooks Pontiac Buick Ltd.* (1985), 60 N.B.R. (2d) 160 (C.A.), at para. 54

circumstances, the evidence was held to have established that the company had acquiesced to the interest charges for more than one year and, as such the bank was entitled to the interest charged.

[26] In *Toronto-Dominion Bank v. Aldor*, the motions judge granted summary judgment to the bank on the defendant's guarantee of the company's debts.[12] The court allowed the appeal. The defendant's assertion that the interest rate increase was done without his knowledge and consent was held to raise a genuine issue for trial. As the Court wrote at para. 7, the question in these circumstances was "can it be said that the appellant knew and consented to or acquiesced in, the interest rate change?" This was a question of fact to be determined at trial.

Findings of Fact and Analysis

[27] On the evidence before me, which consisted of the Document Brief, the Calculation of Pre-Judgment Interest and the testimony of Sonja Walton, I find that the Bank did not give the defendant any advance notice of the change in interest rate. Ms. Walton testified generally that notice is given in the form of a letter that accompanies a customer's monthly statement. She offered no evidence regarding such notice having been given to the defendant in particular and no such letter was included in the Bank's Brief of Documents.

[28] My examination of the documents contained in the Brief of Documents discloses that on the statement for the period ending August 22, 2005, the annual interest rate was 10.5 %. On the next statement, for

[12] *Toronto-Dominion Bank v. Aldor*, [1998] O.J. No. 2174 (C.A.), rev'g [1997] O.J. No. 5206 (Gen. Div.)

the period ending September 22, 2005, the annual interest rate was 24 %. There is no message on either statement indicating that the interest rate would be changing or that it had changed.

[29] On all the evidence, I am not satisfied on a balance of probabilities that any advance notice was given to the defendant of the increase in the interest rate to be charged. Based on the regulatory framework and the Commissioner's decisions, I find that there was a violation of s. 12 (3) of the *Regulations*. The Bank did not, in writing, and 30 days or more before the change took effect, disclose to the defendant the change to the annual interest rate.

[30] What impact does this have on the defendant's liability? As Tweedie wrote, "a bank is not affected in its individual loans by a lack of compliance with its governing statute." It is the mandate of the FCAC, not of this Court, to "supervise financial institutions to determine whether they are in compliance with the consumer provisions applicable to them."[13]

[31] Nevertheless, the VISA Cardholder Agreement itself provides for notice by mailing (or any other way) of a change in the interest rate. Paragraph 5 (c) states:

> Interest is charged at the rate specified in the Disclosure Statement which accompanies this Agreement. ***The interest rate is subject to change in accordance with Paragraph 14 of this Agreement***, and the current rate, on an annual and daily basis, appears on the monthly statement. [Emphasis added.]

[32] Paragraph 14 provides:

[13] *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9, s. 3 (2)(a).

> ***You [CIBC] may change this Agreement and/or any Disclosure Statement from time to time, by mailing a notice (or sending it in any other way) to me [the defendant] at the most recent address*** appearing in the records of your VISA Centre. The notice will bind the Authorized User if it is also mailed or sent to the Authorized User at my address. The Authorized User directs you to use that address for such purposes. ***A change may apply both to existing Indebtedness and to Indebtedness arising after the change is made.*** I will give your VISA Centre prompt notice of any change in my address. [Emphasis added.]

[33] Further, paragraph 13 gives the defendant 30 days to report an error or omission on a monthly statement before it is deemed to be complete and correct:

> ***If I or an Authorized User do not notify you within 30 days after the date of a monthly statement of any error or omission, the statement will be conclusively settled to be complete and correct*** except for any amount improperly credited to the VISA Account. A microfilm or other copy7 of a sales draft, cash advance draft, CIBC Convenience Cheque or other document relating to a Transaction will be sufficient to establish liability. [Emphasis added].

[34] Applying the principle of contra proferentem, any ambiguities in the agreement should be construed against the Bank, as it drafted the contract. I interpret the agreement to mean that any notification of change in interest rate takes place only thirty days after the statement can be presumed to have been received by the customer, which would be five days after the Bank sends it to him.

[35] Following cases such as *Pace*, *Estabrooks* and *Aldor*, the question remains whether the defendant "knew and consented to or acquiesced in, the interest rate change", despite the lack of any true notification in advance by the Bank. Ms. Walton gave no evidence that the defendant ever disputed the change in interest rate. As for the documentary

evidence, the higher interest rate first appeared on the statement for the period ending September 22, 2005. It appeared on every monthly statement that followed and the defendant continued to use the credit card to make purchases and draw cash advances on a fairly regular basis until the period ending November 22, 2006. He made payments also, although not regularly. The last time he paid an account in full was on September 28, 2005.

[36] The evidence that the higher interest rate appeared on the monthly statements and that the defendant continued to use the credit card at the higher rate for over a year establishes that he acquiesced in the change in the rate. The Bank became entitled at some point, to the interest charged.

[37] It would be unreasonable to infer that the defendant knew, let alone acquiesced in, the interest rate change when it first came into effect during the period ending September 22, 2005. I infer that he first learned of the higher interest rate five to seven days after September 22, 2005, by which time he would have received the statement. The earliest he can be taken to have acquiesced in the interest rate change is October 29, 2005, approximately 30 days after receiving the statement in the mail. This would be consistent with the terms reviewed above.

Order

[38] Based on the foregoing, I invite the Bank to recalculate the amount of its claim such that the 24 % interest rate is not applied until October 29, 2005. On the question of whether the 24 % interest rate should apply to the existing balances as of October 29, 2005, I note that paragraph 14 of

the agreement states that "[a] change may apply both to existing indebtedness and to indebtedness arising after the change is made." In the absence of any notice clarifying which of these applies, I construe this term against the Bank and find that the change applies only to the indebtedness that arose after the change was made.

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Price J

Released: July 15, 2009

COURT FILE NO.: 4290/07
DATE: 2009-07-15

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

Plaintiff

- and –

MICHAEL GERALD DONNELLY

Defendant

REASONS FOR ORDER

Price, J.

Released: July 15, 2009