Date: 20020808
Docket: S. H. No. 173564

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: *Bank of Nova Scotia v. Fraser,* 2002 NSSC 197]

BETWEEN:

THE BANK OF NOVA SCOTIA

PLAINTIFF

- and -

ROBERT W. FRASER and TANA FRASER

DEFENDANTS

D E C I S I O N

HEARD BEFORE:	The Honourable Justice Glen G. McDougall, Supreme Court of Nova Scotia, on July 31, 2002, at Halifax, Nova Scotia, in Chambers
DECISION:	August 8, 2002
COUNSEL:	Mr. Stephen Kingston, for the Plaintiff Mr. Hector J. MacIsaac, for the Defendants

McDougall, J.:

[1] The Bank of Nova Scotia (the “bank”) has a branch office known as the West Side Branch, at New Glasgow, Pictou County, Nova Scotia.

[2] The defendants, Robert W. Fraser and Tana Fraser (the “Frasers”) maintained a joint chequing account and a joint Visa account at this branch.

[3] The Frasers have acknowledged their agreement with the bank that, in the event their chequing account became overdrawn, a cash advance would be charged to their Visa account and applied to offset the overdraft.

[4] According to the bank’s transaction summary, a total of 321 such advances were made to the Frasers’ chequing account between 1994 and 1999, totalling $38,450.00. Instead of charging these advances to the Frasers’ Visa account, the bank mistakenly charged them to another customer’s account. When the bank discovered their mistake they reimbursed the customer who was incorrectly charged and then sought repayment (without interest) from the Frasers.

[5] The Frasers take the position that the bank advanced funds from time to time to cover their overdraft on the joint chequing account gratuitously. Consequently they should not be liable for the repayment of the amount claimed. They do not take issue with the amount claimed. They simply wish to treat it as a gift from the bank.

[6] The bank now applies to set aside the defence and obtain judgment against the Frasers under *Civil Procedure Rule* 13.01 which provides:

> Where a defendant has filed a defence or appeared on a hearing under an originating notice, the plaintiff may, on the ground that the defendant has no defence to a claim in the originating notice or a part thereof except to the amount of any damages claimed, apply to the court for judgment against the defendant.

Analysis:

[7] *Civil Procedure Rule* 13.02 outlines what the court may do upon hearing a *Rule* 13.01 application. The court's discretion includes:

> . . .
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> (b) grant judgment for the plaintiff on the claim or any part thereof;
>
> . . .
>
> (d) allow the defendant to defend the claim or part thereof, either unconditionally or on terms relating to giving security, time, the mode of trial, or otherwise;
>
> . . .

(j) award costs;

(k) grant any other order or judgment as it thinks just.

[8] The only real issue to decide is whether or not the Frasers have a valid defence to the bank's action. There is really no dispute as to the existence of the joint chequing account and the agreement between the bank and the Frasers that any overdraft on this account would be covered by advances charged to their Visa account.

[9] The Frasers also do not dispute the amount the bank claims was advanced to cover their overdrafts from time to time.

[10] What the Frasers state in their defence is that the advances were not made based on their agreement. Their agreement was that any such advances were to be charged to their Visa account, not someone else's. As such they received gratuitous advances from the bank which they had not requested and for which they should not be required to repay. They further deny that they received any unjust enrichment at the expense of the bank.

[11] In an application for summary judgment, the legal principles governing the exercise of the court's discretion are well established. In *Montreal Trust Company of Canada v. Quad-Ram Development Group Ltd.* (1994), 136

N.S.R. (2d) 333, Justice J. Doane Hallett, speaking for the Nova Scotia Court of Appeal, stated at pp. 341-42:

On an application for a summary judgment pursuant to Civil Procedure Rule 13 the law is clearly stated in **Carl B. Potter Ltd. v. Antil Canada Ltd. and Mercantile Bank of Canada** (1976), 15 N.S.R. (2d) 408; 14 A.P.R. 408 (C.A.). In that case Mr. Justice MacIntosh, sitting in chambers, had dismissed an application by the plaintiff for summary judgment. In dismissing an appeal from that decision Mr. Justice Cooper stated:

> We were referred to authorities which set out what an applicant under our rule 13 and corresponding rules in other jurisdictions must establish to obtain summary judgment. It is stated in **The Supreme Court Practice**, 1973, vol. 1 at p. 132 that:
>
> > The purpose of O. 14 is to enable a plaintiff to obtain summary judgment without trial, if he can prove his claim clearly, and if the defendant is unable to set up a bona fide defence, or raise an issue against the claim which ought to be tried (**Roberts v. Plant,** [1895] 1 Q.B. 597 (C.A.); **Robinson & Co. v. Lynes,** [1894] 2 Q.B. 577; **Dane v. Mortgage Ins. Corp.,** [1894] 1 Q.B. 54 (C.A.); **Nassau Steam Press v. Tyler**, 70 L.T. 376; **Edwards v. Davis**, 4 T.L.R. 385 (C.A.)).
>
> > > When the Judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff (per Jessel, M.R., **Anglo-Italian Bank v. Wells**, 38 L.T. 201 (C.A.)).
>
> In **Royal Bank of Canada v. Malouf**, [1932] 2 W.W.R. 526 (Sask. C.A.), Martin, J.A., said at p. 529:

> It is well settled that the provisions of rule 127 are not to be used to strike out a defence, unless it is very clear that the defendant had no substantial defence to submit to the court; but when a judge is satisfied, not only that there is no defence, but no fairly arguable point to be presented on behalf of the defendant, it is his duty to give effect to the rule and to allow the plaintiff to enter judgment for his claim: **Anglo-Italian Bank v. Wells** (1878), 38 L.T. 197, at p. 200; **Ontario Bank v. Bourke** (1885), 10 P.R. 561; **Velie v. Hemstreet** (1909), 2 Sask. L.R. 296; 11 W.L.R. 297. Moreover, in order to resist an application under the rule, it is not sufficient for the defendant to say he has a good defence on the merits; the defence must be disclosed, and sufficient facts must appear to show that there is a bona-fide defence, or at least, as stated by Jessel, M.R., in **Anglo-Italian Bank v. Wells**, supra, "a fairly arguable point to be argued on behalf of the defendant:" ...

> The matter was also dealt with by the Ontario Court of Appeal in **Featherstonhaugh v. Featherstonhaugh**, [1939] 2 D.L.R. 262, where at p. 268 Robertson, C.J.O., said:

> > The defendant is to show the nature of his defence, and to disclose such facts as may be deemed sufficient to entitle him to defend, and it is upon his success or failure in doing so that the fate of the motion must turn. In a sense the usual rule is reversed for this special purpose, and the burden of proof, such as it is, lies upon the defendant and not upon the plaintiff.

> These tests have been consistently applied by the Supreme Court for many years.

[12] Clearly in this case the bank has established its claim clearly. The onus then shifts to the Frasers who need only set up a bona fide defence or raise an issue which should be tried in order to have the application for summary judgment denied.

[13] The matter really boils down to whether the advances made by the bank to the Frasers were truly gratuitous thereby rendering repayment unenforceable for lack of consideration, as their solicitor contends.

[14] With all due respect, I do not accept the position advanced on behalf of the Frasers. They cannot capitalize on an innocent mistake made by bank personnel. They would have received monthly bank statements showing the advances credited to their chequing account without a corresponding debit to their Visa account. To allow them now to avoid repayment would be fundamentally wrong.

[15] I accept the argument advanced by the bank's solicitor that their failure to repay the monies credited to their chequing account constitutes a breach of their agreement with the bank. I further accept the bank's argument that the Frasers have been unjustly enriched at the bank's expense. [Refer to *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257 (S.C.C.)]

[16] There is no arguable issue to be tried.

[17] I therefore grant the application to set aside the defence and order judgment against the defendants for the full amount claimed ($38,450.00), along with costs to the plaintiff of this application in the amount of $750.00 and costs in

this action to be taxed according to Scale 3 of Tariff “A”, together with its taxable disbursements.

J.