

Case comment

Bunan v Toronto-Dominion Bank, 2015 ONCA 226

The Ontario Court of Appeal's recent decision in *Bunan v Toronto-Dominion Bank*, 2015 ONCA 226 ("Bunan") provides assurance to financial institutions that they can effectively limit liability for claims regarding unauthorized transactions through properly worded account verification clauses.

Background facts

The Appellant was defrauded by his cousins. He agreed to lend more than \$1 million to a partnership owned and controlled by his cousins. The Appellant's cousins perpetrated the fraud by making withdrawals from a bank account that the Appellant established with the Respondent, The Toronto-Dominion Bank ("TD").

The Appellant sued his cousins under certain personal guarantees and promissory notes respecting the debts of the partnership. The Appellant also sued TD for, among other things, breach of contract and negligence stemming from the withdrawals from the bank account.

TD denied liability for losses attributable to the bank account because the Appellant had signed a Financial Services Agreement ("FSA"). While TD was not able to locate a copy of the FSA actually signed by the Appellant, TD's standard-form FSA required the Appellant to report any account errors within 30 days. If the Appellant failed to report an error within the 30 day period, TD was released from liability. A portion of the language used in the FSA is as follows:

You will notify us in writing of any errors in the account, transaction, information or the Instruments. If we don't receive notice from you within 30 days of the statement date, passbook update date or, for electronic method, the transaction date, you accept the statement, update, transaction information and Instruments as valid and correct...

Decision at trial

At trial, the judge granted the Appellant's claim against his cousins and dismissed the claim against TD. The trial judge found the Appellant signed the FSA and, therefore, its verification provisions applied in the circumstances to discharge TD from any liability.

Grounds of appeal

The Appellant appealed the dismissal of the claim against TD on two grounds:

1. The trial judge gave insufficient reasons for the finding that the FSA was signed by the Appellant, and
2. The FSA did not relieve TD of liability.

Appellate court decision

The Ontario Court of Appeal dismissed the appeal.

To begin, the Court found there was ample evidence in the record to support the trial judge's finding that the Appellant had, in fact, signed an FSA. The Court noted, in particular, the evidence of TD's practices and standard procedure which required confirmation of execution of the FSA at various stages. The Court also relied upon another FSA signed by the Appellant for another account with TD and a signature card for the bank account, which confirmed receipt of the FSA. This aspect of the decision highlights the importance of standard practices and procedures in the opening and operation of client accounts.

Second, the Appellant argued the FSA did not protect TD from liability for two reasons. He argued that a separate clause of the Agreement imparted a reasonableness requirement into the 30 day notice period -rendering the notice period applicable only if the client failed to take reasonable care with respect to his account.

The Appellant maintained he met this reasonableness requirement. He claimed he was denied the means to monitor his account because TD did not send him statements and he did not have online access. Further, the account was a savings account, and therefore, he did not expect any withdrawals. The Court found that the notice period in the FSA was not subject to a reasonableness requirement. While another clause of the FSA required the Appellant to take reasonable care with respect to his cheques and other instruments, the account verification provision was entirely separate. The Agreement, read as a whole, required the Appellant to review his account transactions periodically and to report errors within 30 days. Savings accounts were not exempted from this requirement.

Furthermore, the Court ruled that even if there was a reasonableness requirement vis-à-vis the notice provision the Appellant did not meet it. TD gave the Appellant three options for reviewing his account when he opened it: a passbook, statements by mail or electronic access. The Appellant opted for electronic access but subsequently forgot his password. He made no inquiries of TD to recover the password, and only reviewed a printout of the transactions after his brother-in-law coordinated recovery of the password. Even then, the Appellant waited nearly a year to report errors with respect to transactions completed between 3 and 7 years prior.

This decision of the Ontario Court of Appeal provides strong authority that a clearly worded verification requirement in an account operating agreement can be a complete defence to a claim for unauthorized transactions. Careful drafting is required, but a financial institution can limit its risk by clearly stating a client's responsibility to inspect transaction records and report errors.