

February 2010

## STRETCH

At the start of this New Year, we bring you the most interesting defence of the past year. It was raised in Toronto-Dominion Bank v. Solferino Café Inc., a 2009 decision of the Ontario Superior Court of Justice.

### Humdrum

The facts were not unusual. Two partners opened a business, a "can't fail" gelato shop.

Two bank loans financed the business: the first was a \$194,000 loan under the Canada Small Business Financing Act and the second was a \$50,000 demand loan. Each partner was fully liable for the second loan and liable for \$48,500 of the first loan.

The partners had a falling out; one left and opened a competing café. Of course, the original business failed; the landlord distrained and sold the equipment and furniture; and the bank demanded payment and ultimately brought its action against the partners.

### Self Rep

The partner who continued the business defended the action without a lawyer - sort of. He actually was a lawyer, although not a litigation lawyer, and presumably thought he could perform an adequate job defending himself. He was wrong.

The partner had a number of complaints about the bank:

1. The bank allowed the amortisation period on the small business loan to be 5 years rather than 10 years. Accordingly, the monthly payments were too high and put crippling pressure on the business. The bank should have known better, even if the partner, an inexperienced businessman, did not. Translation: I am a lawyer, but do not understand the concept of a high payment rather than a low one.

2. When the bank did extend the amortisation period to 10 years, it should have done so retroactively. The relief was only partial and insufficient. Translation: Thanks for the help, but I want more.

3. The bank ought to have known that cash flow from a gelato business would vary throughout the year, but instead kept the same payment schedule even during the winter. Translation: The bank should have known that ice cream sells better in the summer than in the winter, but I did not.

4. The bank knew that the partners were not experienced business people and therefore ought to have provided business advice. Translation: the bank should conduct a business acumen test before lending money.

5. The bank moved too slowly to seize and sell the business' furniture and equipment and therefore the landlord got it instead. Translation: save me from myself, regardless whether your security documents state that you do not have to do so.

## Cause of Action

The partner had a hard time claiming that he did not understand his possible liability. He also had an uphill (straight up) battle to show that the bank was anything other than his banker. He had to demonstrate that the bank was his investment advisor before that defence would be successful and the facts did not warrant that finding. Indeed, he specifically complained that the bank did not advise him. Accordingly, he had to, and did, devise another defence; one that was ingenious.

He asserted that there should be *"the imposition of a new form of professional negligence, being that of a 'reasonable and professional banker'.*" Aside from the silliness of the assertion, the lawyer (acting for himself) did not plead this new tort in his statement of defence. He made it up as he went along.

The judge therefore held that the statement of defence contained no defence at all; the facts the partner asserted in the motion provided detail, but did not remedy the deficiency in the pleading. The judge granted summary judgment for the amount due plus costs. The exercise was another valiant, but useless, time-consuming and costly, effort to forestall the inevitable.

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## MAINTENANCE #2

Sometimes two equally deserving litigants square off, both have worthy claims, but only one can win. This was the case in De Coito v. De Coito, a 2009 decision of the Ontario Su-

perior Court of Justice.

## Wife

Husband and wife were divorced and, it seems, husband simply abandoned all of his assets to his wife. He ignored wife's divorce action and allowed wife to obtain judgment against him for a 50% share in the matrimonial home and child support arrears of \$55,000, which were to be paid from husband's share in the matrimonial home.

Ultimately, the parties sold the home and, after accounting for encumbrances and sale costs, the surplus was \$95,000.

## Creditor

One month after the divorce judgment, husband sweet-talked a woman - we do not know if there was a romantic aspect to the relationship - into lending him \$25,000 to put the mortgage on the home into good standing. Husband gave her a promissory note for her largesse. Subsequently, she took out credit cards in her name with husband as a supplementary cardholder. He rang up \$31,000 in debt and, instead of paying the debt, gave her a new promissory note for \$56,000. The woman finally saw the writing on the wall, sued husband, and obtained a \$59,000 judgment.

## Motion

Wife brought a motion to obtain the surplus funds from the sale of the home. Husband, true to form, did not appear, but creditor did. She wanted her money.

There was insufficient money to pay both wife and creditor. Wife received \$47,500 for her half of the home and the other \$47,500 was to be applied either to the maintenance arrears

or to creditor's judgment.

## Family Law

We dealt with this issue in our newsletter of August 2007. Section 4 of the Creditors' Relief Act gives priority to a support or maintenance order to the extent of the arrears in periodic payments or a lump sum order for arrears. Accordingly, wife had priority over creditor.

Creditor, however, also argued that wife was unjustly enriched and therefore creditor should still be paid. To demonstrate unjust enrichment, creditor had to establish that wife was enriched, creditor had a corresponding deprivation, and there was no juridical reason for the enrichment.

The judge looked in turn at each of the payments creditor made to husband. For the money loaned to pay arrears of the mortgage on the

home, there was indeed enrichment and deprivation. After all, had creditor not advanced money to pay the arrears, the net proceeds would have been \$25,000 less than they were. However, the judge held that there was a juridical reason for the enrichment. Husband and debtor had agreed that creditor would lend the funds and creditor knew the purpose of the loan.

For the money loaned under the credit cards, there was no enrichment of wife. She did not receive the money; husband did. Accordingly, that argument also failed.

The Court of Appeal dismissed creditor's appeal in a terse endorsement.

The upshot was that wife got everything and creditor received nothing. We can see how creditor might have been a little upset. If she had a romantic relationship with husband, we doubt that it lasted.

You will find this and prior newsletters posted on our website.

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