

Court File No. 03-CV-254970 CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

STEPHEN MARKSON

Plaintiff

- and -

MBNA CANADA BANK

Defendant

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF DEFENCE

1. The defendant admits none of the allegations in the Amended Statement of Claim unless hereinafter specifically admitted.
2. The defendant denies all of the allegations contained in the Amended Statement of Claim unless hereinafter specifically admitted, and denies that the plaintiff is entitled to the relief requested in paragraph 1 or any relief at all.
3. With respect to paragraph 3 of the Amended Statement of Claim, the defendant states that it is a Schedule II bank under the *Bank Act*, R.S.C. 1991, c.46 and that it carries on business throughout Canada and that its head office is in Ottawa, Ontario. MBNA does not issue a wide variety of credit cards; it issues a number of credit card products within the MBNA MasterCard brand.

The Plaintiff's Agreement

4. With respect to paragraph 4 of the Amended Statement of Claim, the defendant states that the plaintiff obtained an MBNA Platinum Plus MasterCard on or about February 26,

2002. The defendant also states that all of the activity on the plaintiff's card is recorded in monthly statements which were sent to the plaintiff.

5. With respect to paragraph 6 of the Amended Statement of Claim, the defendant states that it entered into a cardholder agreement with the plaintiff which sets out, *inter alia*, the terms upon which credit is advanced and the terms upon which credit is to be repaid ("the Plaintiff's Agreement"). The Plaintiff's Agreement consists of a document entitled "Credit Card Agreement" as well as the "Disclosure Statement" and related amendments.

6. The defendant admits that the Plaintiff's Agreement provides for the ability to obtain a cash advance in the manner described in paragraph 7 of the Amended Statement of Claim.

7. Subject to each individual's credit limit and subject to the defendant's strategies for monitoring and addressing any unusual and potentially risky pattern of activity, the defendant does not impose any restrictions on the number, variety or amount of cash advance transactions that an individual may make. No such restrictions applied to the plaintiff's cash advance activity.

8. Other than requiring minimum payments, as set out in the Plaintiff's Agreement, and having the discretion to require immediate payment in limited circumstances, also as set out in the Plaintiff's Agreement, the defendant does not require any fixed payment schedule for the repayment of cash advances.

9. The defendant states that none of the plaintiff's actions in obtaining or repaying the two cash advances described in paragraphs 12 to 16 below were compelled by the defendant or by the terms of the Plaintiff's Agreement. No immediate payment demands were made by the defendant and the plaintiff repaid the two cash advances well in advance of any minimum payment requirements under the Plaintiff's Agreement.

The Plaintiff's Cash Advances

10. Prior to obtaining his first cash advance on April 19, 2003 ("the April 19th Cash Advance") the plaintiff completed a number of calculations designed to determine the amount

)
of advance and the timing of repayment that would result in a payment of an effective annual interest rate in excess of sixty per cent.

11. As a result, the plaintiff decided to and did obtain a cash advance of \$201.50 on April 21, 2003 and decided to and made a payment of \$201.50 on April 22, 2003.

12. The plaintiff received his May, 2003 statement (the "First Statement") recording the April 19th Cash Advance. This First Statement disclosed an annual percentage rate for that billing cycle of 45.02%. The annual percentage rate is calculated in a different manner than the effective annual interest rate under section 347 of the *Criminal Code*. The plaintiff apparently made a decision to engineer another cash advance that would result in a statement that disclosed on its face an annual percentage rate in excess of sixty per cent.

13. After receiving the First Statement, the plaintiff completed a number of additional calculations to determine the amount of advance and timing of repayment that would result in a payment of an effective annual interest rate in excess of sixty per cent and an annual percentage rate in excess of sixty per cent.

14. As a result, the plaintiff decided to and did obtain a cash advance of \$101.50 on May 27, 2003 ("the May 27th Cash Advance") and decided to and made a payment of \$116.56 on June 2, 2003.

15. The plaintiff received his July, 2003 statement (the "Second Statement") recording the May 27th Cash Advance. The Second Statement disclosed an annual percentage rate of 94.11% for that billing cycle.

16. The only activity there has ever been to date on the plaintiff's account were the April 19th Cash Advance and the May 27th Cash Advance (together, "the Cash Advances").

The Criminal Code

17. The defendant admits that, as a result of the deliberate actions of the plaintiff, it received interest on the Cash Advances at an annual effective rate in excess of sixty per cent.

However, the defendant denies that this receipt amounts to a violation of section 347 of the *Criminal Code*.

18. The defendant denies that the plaintiff paid interest in violation of section 347(1)(a) of the *Criminal Code*.

19. Section 347(1)(a) of the *Criminal Code* has no application to the plaintiff's claim because the Plaintiff's Agreement did not require the payment of an effective annual rate of interest that exceeds sixty per cent on the credit advanced to the plaintiff on May 27, 2003 or June 2, 2003.

20. The defendant also denies that it received interest in violation of section 347(1)(b) of the *Criminal Code* from the plaintiff.

21. There is no violation of section 347(1)(b) of the *Criminal Code* where a payment of interest at an effective annual rate of interest exceeding sixty per cent arises from a voluntary act of the debtor. A voluntary act is one wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement.

22. Not only did the plaintiff control the amount of the Cash Advances obtained, as well as the amount and timing of the repayment of the Cash Advances, the plaintiff deliberately set out to create a transaction that resulted in him paying an effective annual rate of interest in excess of sixty per cent.

Unjust Enrichment

23. The defendant denies that it has been unjustly enriched as a result of the plaintiff's cash advance activity. The defendant denies that it has received an enrichment and that there has been a corresponding deprivation of the plaintiff. In the alternative, the defendant states that if there has been an enrichment (which is expressly denied), there is no absence of a juristic reason for such enrichment.

24. With respect to the transactions carried out by the plaintiff, the defendant received less interest than it would have received if the plaintiff had repaid the advances in accordance with

the minimum payment requirements applicable to his transactions. In addition, the effective annual rate of interest would not have exceeded sixty per cent if he had done so.

25. Accordingly, the defendant denies that the plaintiff is entitled to damages for unjust enrichment in the circumstances of this claim.

Breach of Contract

26. In response to the plaintiff's alternative pleading that there has been a breach of contract, the defendant denies that it is obligated by contract to credit the plaintiff with any amount of interest that the plaintiff has paid in excess of an effective annual rate of sixty per cent. For the reasons set out above, the effective rate of interest charged or received on the plaintiff's cash advances did not exceed the maximum amount permitted by law.

Proposed Class Proceeding

27. The defendant states that this action is not appropriate for class treatment as the plaintiff cannot establish the criteria required by section 5(1) of the *Class Proceedings Act, 1992* (the "Act").

28. In particular, the defendant states:

- (a) the statement of claim does not disclose a cause of action as the proposed representative plaintiff has failed to plead the material facts relied upon to establish that there is a violation of section 347 of the *Criminal Code* or a breach of contract;
- (b) the plaintiff's proposed class definition does not satisfy the requirements of the Act as it is overly inclusive and has no rational connection to the proposed common issues;
- (c) the claim does not raise any common issues within the meaning of the Act;

- (d) a class proceeding is not the preferable procedure as it is clear that any issues that can be phrased commonly play a minimal role in the context of the entire claim which manifestly requires a review of individual circumstances;
- (e) the proposed representative plaintiff has interests in conflict with other members of the proposed class given that the plaintiff deliberately set out to create a transaction that resulted in him paying an effective annual rate of interest in excess of sixty per cent. Furthermore, the proposed representative plaintiff has not provided a workable litigation plan.

29. The defendant, therefore, requests that this action be dismissed with costs on a substantial indemnity basis.

June 22, 2004

BLAKE, CASSELS & GRAYDON LLP
Barristers & Solicitors
199 Bay Street, Suite 2800
Toronto, Ontario
M5L 1A9

William G. Horton LSUC:# 15990K
Tel: (416) 863-2290

Jill Lawrie LSUC#: 34343W
Tel: (416) 863-3082
Fax: (416) 863-2653

Solicitors for the Defendant

TO: PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
250 University Avenue
Suite 501
Toronto, Ontario
M5H 3E5

Martin Doane/Margaret Waddell
Tel: (416) 646-4329
Fax: (416) 646-4303

Solicitors for the Plaintiff

AND TO: KOSKIE MINSKY
Barristers and Solicitors
20 Queen Street West
Suite 900
Toronto, Ontario
M5H 3R3

Kirk M. Baert
Tel: (416) 595-2117
Fax: (416) 204-2889

Solicitors for the Plaintiff

STEPHEN MARKSON Plaintiff
v.
MBNA CANADA BANK Defendant

Court File No. 03-CV-254970 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at TORONTO

STATEMENT OF DEFENCE

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street, Suite 2800
Toronto, Ontario M5L 1A9

William G. Horton LSUC:# 15990K
Tel: (416) 863-2290

Jill Lawrie LSUC#: 34343W
Tel: (416) 863-3082
Fax: (416) 863-2653

Solicitors for the Defendant