

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2006/0982

BETWEEN:

ROYAL BANK OF CANADA

Claimant

and

PATRICIA MURRAY

Defendant

Appearances:

Mrs. Sardia Cenac-Prosper for the Claimant
Mrs. Carol Gedeon-Clovis for the Defendant

2017: February 7;
2017: March 14.

JUDGMENT

- [1] **SMITH J:** Dr. Patricia Murray's claim is that the Royal Bank of Canada ("the Bank"), without her knowledge and consent, unlawfully applied \$104,722.98 that she had in a term deposit to a separate current account which was in overdraft. That current account was in the name of National Enterprises Limited ("the Company") in which Dr. Murray and her husband (now deceased) were the sole directors, shareholders and signatories.

The Factual Background

- [2] The facts not in dispute are that in October 1993 the Company took a loan with the Bank. The Murrays, by Guarantee and Postponement of Claim, guaranteed the debts and liabilities of the Company. The Murrays had a term deposit (Renewal Contract No. 1112925-002) in their joint names with the Bank into which they deposited \$104,722.98 on 6th December 1994. The Company fell into arrears in servicing its loan and on 30th March 1995 the Bank applied the term deposit to the Company's current account (No. 100-331-8). In December 2006, the Bank sued the Company and the Murrays for the sums due and owing under the loan and guarantee. Dr. Murray counterclaimed for an accounting of the term deposit, alleging that it was applied to the Company's current account without her knowledge and consent. She eventually settled the claim by payment of an agreed sum, the Bank discontinued its claim, but Dr. Murray maintained her counterclaim. This is the trial of that counterclaim.
- [3] What is at the core of the dispute in the surviving counterclaim is whether the term deposit was collateral security for the Company's debts as contended for by the Bank, and whether the application of that deposit to the current account was done with the Murrays' knowledge, consent or acquiescence.
- [4] In the normal course, these issues would have been easily resolved by the production of the standard bank forms proving that Dr. Murray consented to the term deposit being applied to the current account, or, that she knew or consented to the term deposit being held as collateral security for the Company's loan. The case, however, is complicated by the fact that the Bank could not produce signed copies of these critical documents.
- [5] The Bank stated that, in accordance with standard international banking practice, it has a seven-year document retention policy. Records are retained for seven years after which they are destroyed. The Bank said that it retains documents that are relevant to assets of the Bank such as loans, but would not necessarily retain records or documents beyond 7 years in respect of current accounts or term deposits. In this case, the funds in the term deposit (contract dated 1994), was applied to the current account in March 1995, even

before the maturity date of December 1995. The counterclaim was filed twelve years later in 2007.

- [6] The central issues for the court's determination are whether the term deposit was indeed held as collateral security and whether it was applied to the current account with the Murrays' knowledge, consent or acquiescence. The court will also have to determine whether the Bank accounted for the term deposit; whether the counterclaim is prescribed; and whether, if the counterclaim were successful, it would constitute unjust enrichment.
- [7] The trial of this counterclaim commenced in November 2014 before Wilkinson J. Dr. Murray was the sole witness in the counterclaim, her witness statement stood as her examination in chief and she was cross-examined on it. Ms. Brenda St. Ville was the sole witness for the Bank and her witness statement was amplified without objection from counsel for Dr. Murray, Mrs. Gedeon-Clovis. The matter was then adjourned to 17th June 2015. It was not however continued on that date and, in the interregnum, Wilkinson J. was assigned judicial duties in another jurisdiction. In January 2017 the matter was assigned to this court. I directed that that a transcript of the proceedings be made available to the parties and scheduled the continuation of the trial for 3rd February 2017. At the continuation of the trial, Ms. St. Ville was cross-examined, the Bank closed its case and I directed that written closing submissions be filed by 10th February 2017.

Was the Term Deposit Collateral Security?

- [8] An examination of the term deposit contract in evidence dated 6th December 1994 shows that it is in the names of "*Antoine Murray or Patricia Murray*". The value date is December 6th 1994 and the maturity date is December 6th 1995. The amount deposited is \$104,722.98 bearing interest at the rate of 6.5% for a term of 212 days with a maturity value of \$108,676.63. Interest at maturity is stated to be \$3,953.65.
- [9] At the bottom of the page the words "Other Instructions" can be made out. I take that to mean that notations of any other instructions or information regarding the term deposit could be noted there. The words "HELD AS COLL SECURITY" can, with some scrutiny,

be made out. Those words do not appear neatly below the words “Other Instructions”, rather they appear to have been printed, typed or superimposed over the words “Other Instructions”. Controversy, naturally, arose over this.

- [10] In her cross-examination, Mrs. Gedeon-Clovis suggested to Ms. St. Ville that the words “HELD AS COLL SECURITY” were in fact crossed out. Ms. St. Ville staunchly rejected that suggestion. After close inspection, I am in no doubt that the words “Held as Coll Security” are indeed a notation under “Other Instructions” on the face of the term deposit contract No. 1112925-002. But that is not the end of the matter.
- [11] The Bank fully applied the funds in the term deposit to the current account on 30th March 1995. That therefore should have been the end of those funds. But term deposit renewal contract No. 1113250-002 dated July 5th 1996 in the name of “*Antoine Murray or Patricia Murray*” is in evidence before the court. It is a term deposit of \$96,675.32 with interest rate of 6.5%, a value date of July 5th 1996 and a maturity date of February 5th 1997. This creates an anomaly. If term deposit 1112925-002 was indeed fully applied to the Company’s current account in March 1995, why was there term deposit renewal contract 1113250-002 in the Murrays’ name dated July 5th 1996?
- [12] Mrs. Cenac-Prospere’s argument for disambiguation was to say that the two term deposit contracts are materially different “on their face”, having different contract numbers and being in respect of altogether different amounts. She pointed to the evidence of Ms. St. Ville who, under cross-examination, had testified that, in relation to term deposit 1112925 – 002, it “*was not a new contract based on the fact that there’s a 002 following contract number and by basis of “renewal” being noted, it was an automatic renewal*”. Mrs. Cenac-Prospere argued that if term deposit 1112925-002 had indeed “rolled over” or been renewed in 1996, the renewal contract, on its face, would have borne the self-same contract number with the addition of “003” to signify that it was a renewal. It would have appeared as Renewal Contract No. 1112925-003 and not 1113250-002. There is logical force in this submission.

[13] The difficulty I have, however, is that, on the Bank's narrative (as well as the Murrays), the Murrays only ever opened one term deposit, namely, Renewal Contract No. 111295-002. If term deposit contract No. 1113250-002 in the Murrays' name was not the renewal of term deposit 111295-002, it begs the question how did contract 1113250-002 arise in the name of the Murrays and what happened to those funds? This ambiguity has not been cleared up and causes the court some anxiety.

[14] Furthermore, the Bank, while stating that it has a 7-year document retention policy, was nevertheless able to retrieve copies of these two term deposit contracts from its archives. Each one bore the signature of an official of the Bank but they were not signed by either of the Murrays. Ms. St. Ville in amplifying her witness statement said: "...the retention period is 7 years...However because it's being done by human, I mean told her that we would just double check, and so said, we were able to retrieve some information." No form signed by the Murrays authorizing the Bank to apply the term deposit to the current account was among the documents the Bank was able to retrieve. This tends to exacerbate the court's anxiety.

[15] Then there are the terms and conditions of the term deposit contract which provides that:

"L. No substitute certificate(s) will be issued if at any time of any renewal of this deposit it is held by the Bank as security for any obligation."

[16] When Mrs. Gedeon-Clover confronted Ms. St. Ville with the incongruity of the Bank issuing a substitute (renewal) certificate while maintaining that the deposit was held as collateral, this was how the exchange went:

"CGC: I refer the Court to Core Bundle 3 to page headed, Terms and Conditions. In relation to that fixed deposit again I want you to direct your attention to paragraph L. I will read into record, 'No substitute certificate(s) will be issued if at any time of any renewal of this deposit it is held by the Bank as security for any obligation.' You issue renewal certificates didn't you?

BSV: My Lord based on what I have before me it was deposited.

CGC: It was a renewal certificate.

BSV: If it was deposited it could not be a renewal.

CGC: But you said it is a renewal. If it was held as collateral you would not have issued renewal certificates because you are prevented by terms from doing that?

BSV: Repeat the question.

CGC: We were talking about the use of the fixed deposit as collateral security and you indicated to the Court that they roll over and the – something shows that.

BSV: Yes.

CGC: I am now referring you to paragraph L, 'No substitute certificate(s) will be issue if at any time of any renewal of this deposit it is held by the Bank as security for any obligation.' I am putting it to you that the deposit was held as security the Bank could not have been issuing renewal certificates because it is held as security. Therefore, you wouldn't need to issue renewal certificates but you did.

BSV: My Lord once a client has a term deposit, there would be issuance of certificates every 214 days.

His Lordship: Even if it's being held as collateral security?

BSV: No, My Lord. This was 214 days instrument.

His Lordship: Is this the case even where the term deposit is held as collateral security.

BSV: Yes, even if term deposit is held as collateral security it will roll over.

BS- Yes, My Lord a renewal certificate would be issued every 214 days."

[17] My general observation of Ms. St. Ville under cross-examination is that she, a senior officer of the Bank with over thirty years experience, was for the most part clear and direct. However on this point she equivocated. She appeared to have been avoiding answering the questions directly. Then she contradicted herself by stating that since the term deposit had been deposited it could not be renewed; and thereafter, by stating that the term deposit could be renewed notwithstanding the fact that it was held as collateral security. This tended to undermine the credibility of the Bank's position.

[18] Mrs. Cenac-Prosperre submitted that since the renewal certificates were not signed by the client (Dr. Murray) and were only copies obtained from the Bank's files, no renewal certificate was in fact actually issued to Dr. Murray. It is difficult to see how this argument can avail the Bank. Firstly, the Bank relies on the renewal certificate as evidence that it has accounted for the term deposit (via the "Held as Coll Security" notation). Secondly, it relies on it as its authorization for applying the term deposit to the current account. Thirdly, it was the Bank that went into its archives and produced these renewal certificates to Dr. Murray. It couldn't be that the Bank is allowed to rely on them and Dr. Murray cannot.

[19] The cumulative effect of these ambiguities is that I am unable to conclude, on a balance of probabilities, that the term deposit was held as collateral security.

Was There Consent or Authorization?

[20] Under cross-examination, Ms. St. Ville agreed that before the Bank could apply the term deposit to the current account “*the client would have had to provide the bank with a signed copy of form 812, which is not available, authorizing the bank to hold term deposit as collateral and the conditions for first demand.*” She agreed that the Bank could “*not at this time*” show that it had that authorization, nor could it show that there was a demand in relation to the fixed deposit. She insisted, however, that “*a form had to have been there and the client had to have signed the form for the account to be held as security*”. That form was not in evidence before the court.

[21] On the state of the evidence, I am obliged to conclude that the Bank did not have the consent and/or authorization of the Murrays to apply the funds in the term deposit to the current account.

Was There Knowledge or Acquiescence?

[22] The Bank contends that the evidence supports the inference that Dr. Murray knew of and concurred or acquiesced in the application of the term deposit to the current account. It is the law that a person acquiesces where he refrains from seeking redress when there is brought to his notice a violation of his rights which he did not know at the time; and in that sense acquiescence is an element in unconscionable delay (laches).

[23] The evidence relied on is, firstly, that under cross-examination, Dr. Murray could not recall making enquiries or checking on her term deposit. She said: “*I will not say I didn’t – I’m saying I cannot recall.*” The Bank finds it “improbable” that in ten years Dr. Murray did not seek to ascertain the status of her term deposit and therefore can be said to have acquiesced in its application to the current account.

[24] Secondly the Bank relies on Dr. Murray’s acknowledgment under cross-examination that as a director of the Company she would have been aware of cheques drawn and deposits made in relation to the checking account, she would have received bank statements and that she never queried any of those statements between 1995 and 2005. The Bank

therefore contends that this shows that Dr. Murray must have had knowledge of or acquiesced in the application of the term deposit to the current account.

[25] A term deposit held with a reputable bank is considered a very safe investment which automatically rolls over unless interrupted by the depositor/investor. There is usually no need to do anything further or to make enquiries unless the investor wishes to issue fresh instructions to the Bank. I am not persuaded, on a balance of probabilities, that the evidence supports the inference that she must have known or realized, over the course of those ten years, that the term deposit had been applied to the current account.

[26] Secondly, the Transaction History Report SDR 250 dated between 19th March 1995 and 31st March 1995, which showed the application of the term deposit to the current account, was only provided to Dr. Murray after she had filed a counterclaim. While a diligent businessperson might have readily identified something in the bank statements that prompted queries, I do not find it implausible that Mrs. Murray, a homeopath doctor, did not spot anything in the Bank's statements relating to the Company's current account that prompted her to raise a query. Any lack of basic business prudence or carelessness with her banking affairs does not rise to "knowledge" or "concurrence" for meeting the prerequisites of the defence of acquiescence.

[27] The Bank also relies on paragraph J of the terms and conditions of Term Deposit Renewal Contract No. 1112925-002 which provides:

"The disposal of funds by the Bank in accordance with the provisions on the face hereof and above shall discharge the Bank from all obligations in respect of the deposit or interest, as the case may be"

[28] The Bank's argument is that the term deposit was in fact disposed of in accordance with the face which provided that it was "Held as Coll Security", and was so applied. Since I have already concluded above that the term deposit was not held as collateral security, this point fails with that finding.

Whether Unjust Enrichment Arises?

[29] The Bank further contends that if Dr. Murray is permitted recovery on the counterclaim she, as guarantor, shareholder and ultimate beneficiary of the Company, would have received the benefit of the term deposit applied and so be unjustly enriched at the Bank's expense. Firstly, unjust enrichment was not pleaded in the Bank's defence to the counterclaim. Secondly, no evidence was led to satisfy the prerequisites for unjust enrichment. Thirdly, the circumstances of this case do not appear to support a claim for unjust enrichment. The basic principle of unjust enrichment is that a benefit has been conferred on the joint understanding that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit. Such circumstances do not arise on the facts of this case and, consequently, this argument cannot avail the Bank.

Whether the Counterclaim is prescribed?

[30] As the Bank acknowledges in its closing written submissions, this point stands or falls with the argument as to whether Dr. Murray had knowledge of or acquiesced in the application of the term deposit funds to the current account on 30th March 1995. Since I have found that Dr. Murray neither had the knowledge nor acquiesced in the Bank's action, time did not begin to run so as to prescribe the counterclaim at the time of its filing in 2006.

[31] The evidential picture is of a term deposit contract noted "Held as Coll Security", but not signed by Dr. Murray; it was supposedly fully applied to the current account but thereafter a renewal certificate in the Murrays' name inexplicably appears; according to the terms of the contract, no renewal certificate is to be issued where a term deposit is held as collateral security. In any event, the Bank conceded that ultimately Dr. Murray "*would have had to provide the bank with a signed copy of form 812 authorizing the bank to hold term deposit*", which the Bank could not produce. I am not satisfied, on a balance of probabilities, that the Bank was authorized to apply the term deposit to the current account or that Dr. Murray had knowledge of, consented to or acquiesced in that action. The Bank has not properly accounted to Dr. Murray for the funds in the term deposit.

[32] In her counterclaim, Dr. Murray had sought an account of all transactions relating to the loan account (current account). I am satisfied based on the evidence and on her concessions under cross-examination that she had been provided with reports in relation to the current account. Her claim for relief therefore fails on this ground.

[33] In relation to the term deposit, her counterclaim was specifically for an account of the term deposit and interest on the term deposit at the compounded interest rate of 6.5% annually. She did not seek return or restitution of the term deposit funds. Be that as it may, I accept Mrs. Gedeon-Clovis' submission that **section 17** of the **Eastern Caribbean Supreme Court Act Cap 2.01**, along with **Part 8.6 (2)** of the **CPR**, empower the court to grant any remedy to which any party appear to be entitled to so that, as far as possible, all matters in controversy may be completely and finally determined.

[34] I therefore make the following orders:

- (1) That the Royal Bank of Canada pay to Patricia Murray term deposit funds in the sum of \$104,722.98.
- (2) That interest is payable on the sum of \$104,722.98 at the compound rate of 6.5% from the date of maturity for a period of five years.
- (3) Prescribed cost on the value of the claim in accordance with Part 65 of the CPR.

JUSTICE GODFREY SMITH, SC
HIGH COURT JUDGE