

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Royal Bank of Canada v. Smith*,
2024 BCSC 963

Date: 20240603
Docket: S234337
Registry: New Westminster

Between:

Royal Bank of Canada

Plaintiff

And

Carol Smith

Defendant

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for the plaintiff: K. Croft

Counsel for defendant: D.K. Lo

Place and Date of Trial/Hearing: New Westminster, B.C.
October 20, 2023

Place and Date of Judgment: New Westminster, B.C.
June 3, 2024

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Introduction

[1] The plaintiff, the Royal Bank of Canada (the “Bank”), seeks judgment against the defendant, Carol Smith, for a debt owing on a Royal Bank Visa credit card in the amount of \$34,111.34 as at April 24, 2020, together with interest on the principal amount of \$25,313.77, at the contractual rate of 19.99% per annum from thereafter to the date of judgment in the amount of \$17,652.75, for a total of \$51,764.09.

[2] The plaintiff applies for summary judgment pursuant to Rule 9-7 of the Supreme Court Civil Rules. The defendant agrees the matter is suitable for disposition via summary trial. In view of the amount of money at stake and the nature of the issues to be decided, I find that the matter is suitable for disposition under Rule 9-7.

[3] The primary cardholder of the credit card was Mrs. Smith’s husband, Alfred Smith. Mr. Smith passed away on June 10, 2019, leaving Mrs. Smith a widow. She is now 74 years of age. The primary issue for determination is whether Mrs. Smith is liable for the debt accumulated on the credit card.

[4] In her amended response to civil claim Mrs. Smith also pleaded that the Bank negligently failed to assist her in completing a claim under its BalanceProtector Max (“BalanceProtector”) insurance, which the Smiths paid for on a monthly basis between at least 2014 and January 24, 2019. The Bank says that the BalanceProtector insurance was provided by a third party insurer, and that it had no duty to assist Mrs. Smith. Mrs. Smith abandoned this argument before me, and it need not be considered further.

[5] For the reasons that follow, I find that the Bank has failed to establish that Mrs. Smith is liable for the balance and accrued interest owing on the credit card.

Facts

[6] The plaintiff's evidence is provided by Londa Larmond, a Collections Associate with the Bank. Ms. Larmond did not have any direct dealings with the defendant or her husband. Her evidence is based on her knowledge of the Bank's usual practices and her review of the Bank's documents.

[7] Ms. Larmond says that, on or about February 14, 2001, the defendant applied for the credit card. She further says that the defendant was approved as a co-applicant for the credit card on February 14, 2001, and received the card shortly thereafter. Mr. Smith was the primary cardholder. There is a lack of documentary or other evidence to substantiate precisely when the credit card was applied for or who applied for it. In particular, the application for the credit card is not in evidence. Nor is any document relating to the approval of Mr. Smith as primary cardholder or the defendant as co-applicant in evidence.

[8] Ms. Larmond further says that, by accepting and using the credit card, the defendant agreed to be bound by the terms and conditions of the applicable Cardholder's Agreement. She says that the plaintiff's normal practice was that a copy of the Cardholder's Agreement was sent to the cardholders together with the credit cards. There is no evidence as to whether that occurred in this case.

[9] For her part, Mrs. Smith says that she never applied for a Royal Bank credit card and never agreed to any of the terms in the Cardholder's Agreement.

Cardholder's Agreement Terms

[10] A number of terms of the Cardholder's Agreement were referred to by the parties in their submissions. These include the definition of "you", which is as follows:

When this Agreement refers to "you" or "your", it includes each person who signed or submitted the Credit Card Application, whose name is on the

Account or to whom a Credit Card on the Account has been issued (each Credit Card issued on the Account will have its own unique card number) other than an Authorized User. If this includes more than one person, “you” means each one of you. All of you are, individually and together, responsible under and bound by this Agreement. This means that each of you is fully responsible for amounts owing on the Account, irrespective of which one of you incurred or which Credit Card was used to incur any particular charge. The amounts for which you are responsible include any amounts that may have been owing on your Account at the time your Credit Card is issued.

[11] They also include the definition of “Authorized User”:

“You” and “your” do not include Authorized Users unless otherwise indicated. An “Authorized User” is a person to whom we have issued a Credit Card on your Account at your request. The terms under which we will issue a Credit Card to an Authorized User are set in the “Authorized Users” section of this Agreement. While your Authorized Users will have the same ability to charge transactions to your Account as you do, you will be responsible for all amounts owing on your Account, including those incurred by Authorized Users. You are also responsible for ensuring that all of your Authorized Users comply with the applicable terms and conditions of this Agreement.

[12] The Cardholder’s Agreement provides that it is “your promise to pay” amounts owing on a credit card:

This Agreement is your promise to pay amounts owing on your Account. You should read it carefully as it explains your rights and duties. The signing, activation or use of a Credit Card or your Account number by you or an Authorized User means that you have received and read this Agreement and agree to all of its terms.

[13] The Cardholder’s Agreement addresses credit limits, including how they are increased:

Your initial or current credit limit appears in the information Box accompanying your Credit Card. This is the maximum amount which we allow you and your Authorized Users, taken together, to charge to your Account to cover purchases, Cash Advances, interest and fees.

As the charges on your Account increase, the amount of credit available for you to use will decrease. We calculate how much credit you have available by deducting from your credit limit the amount you owe us including the amount of any purchases we have authorized but not yet posted to your Account.

We may from time to time allow the amount you owe us to exceed your credit limit by authorizing transactions in excess of your credit limit. An Overlimit Fee will be charged to your Account when your balance exceeds your credit limit at any time during your monthly statement period. RBC Avion* Visa

Infinite Privilege and RBC Avion Visa Infinite Privilege for Private Banking Accounts are not charged an Overlimit Fee. We may, at anytime, refused to authorize transactions in excess of your credit limit and require you to pay any balances which exceed your credit limit.

Your monthly statement shows your current credit limit as well as your available credit. If you consistently make late payments – or make no payments at all – we may reduce your credit limit. From time to time, we may ask you if you want your credit limit increased. We will not increase your credit limit without your express consent to do so. You may also ask us at any time to review your eligibility for a credit limit increase.

[14] The Cardholder's Agreement imposes an obligation on the cardholder to review monthly statements and to bring any errors to the Bank's attention within 30 days:

It is up to you to review your monthly statement and to check all transactions, interest charges and fees. If you think there is an error on your monthly statement, you must contact us.

If you do not contact us within 30 days of the last day of the relevant statement period, the monthly statement and our records will be considered correct and you may not later make a claim against us in respect of any charges on the Account.

[15] "Authorized Users" are further addressed as follows:

Authorized Users

An Authorized User is a person to whom we have issued a Credit Card on your Account at your request. You can add or remove Authorized Users by contacting us, though we may limit the number of Authorized Users on the Account.

Authorized Users have the same ability to charge transactions to your Account as you do. However, they have no responsibility to us for any amounts owing for purchases, Cash Advances, fees and interest on the Account. If an Authorized User is responsible to you for any of these amounts, you will need to make your own arrangements with that Authorized User for repayment.

It is your responsibility to ensure that each Authorized User receives a copy of this Agreement and any replacements or amendments to this Agreement, as well as any notices that affect the use of a Credit Card or your Account.

Monthly Statements

[16] Mrs. Smith says that she rarely ever used her RBC Visa Credit Card, but when she did it was on the belief that she was an authorized user on her husband's

credit card and he was solely responsible for all balances. According to Mrs. Smith, she was never contacted about nor authorized or agreed to any increase to the credit limit for the credit card. Ms. Larmond says that the credit limit would not be increased without someone agreeing to the increase, so Mr. Smith must have done so. Ms. Larmond says that, after the various increases to the credit limit, Mrs. Smith used her card.

[17] A number of monthly statements for the credit card for the period 2014-2019 were entered into evidence. The first is for the period April 25 to May 26, 2014. It is addressed to both Mr. Smith and Mrs. Smith. Mr. and Mrs. Smith are both shown as having their own card numbers. It shows Mr. Smith as “primary”, and Mrs. Smith as “co-applicant”. Credits and debits attributed to the two cards are listed separately; Mrs. Smith is listed as having made a payment of \$100.00. It provides the balance, credit limit and annual interest rates.

[18] Subsequent statements were also entered into evidence, each containing the information for the statement period. Initially, Mr. Smith appears to have incurred the vast majority of the charges. The first charge incurred by Mrs. Smith appears to have been made on June 1, 2015.

[19] Over time, the credit limit on the credit card increased. The credit limit was \$16,000 as of the first statement in evidence. As of the statement for August 25 to September 24, 2015, the credit limit was \$20,000. As of the August 25 to September 24, 2016 statement, the credit limit was \$24,000.

[20] For the first few years reflected in the statements in evidence, the Smiths usually paid off the monthly balance in full. That began to change in late 2016, with the balance slowly beginning to rise. On the September 27 to October 24, 2016 statement, the balance owing was \$6,005.56. Just over one year later, on the October 25 to November 24, 2017 statement, the balance owing was \$22,149.31. By the November 25 to December 27, 2017 statement, the balance was over the then \$24,000 credit limit, at \$24,092.83.

[21] By the next statement, December 28, 2017 to January 24, 2018, the credit limit has been increased to \$28,000. This is the highest credit limit ever granted to the credit card.

[22] Mr. Smith's health was declining throughout this period. At a date unspecified in the evidence, Mrs. Smith says he was diagnosed with emphysema and COPD, and he subsequently had a double lung transplant on January 4, 2018. The January 25 to February 26, 2018 statement appears to indicate that Mr. Smith was using the card, including at Vancouver General Hospital in Vancouver. Mrs. Smith also has charges attributed to her in this period.

[23] The last new charges on the card, other than interest, over limit fees, annual fees and the premium for the BalanceProtector insurance on the card, were made in May 2018, when Mrs. Smith appears to have used the card to pay a Telus Mobility bill. It does not appear that she used the card after that. The last automatic payment was made on the card on October 19, 2018. The last BalanceProtector payment was charged on January 24, 2019. The balance steadily increased. On the January 25 to February 25, 2019 statement, the balance owing was \$32,149.94. The credit limit now showed as zero.

[24] On March 15, 2019, a payment of \$200.00 was made, apparently by Mr. Smith. Others were made on April 15, 2019 and May 17, 2019. Mrs. Smith appears to have made a payment of \$195.00 on July 23, 2019. Still the balance continued to climb.

[25] The statements indicate that Mr. Smith made two payments of \$195.00 each on July 31 and August 4, 2019. The statements also appear to indicate that Mr. Smith made a phone payment on September 3, 2019. But Mr. Smith had passed away in June 2019. These payments attributed to Mr. Smith after his death lead me to conclude that I cannot determine, from which card payments or charges are attributed to on the statements, whether it was in fact Mr. Smith or Mrs. Smith who used the card or made a payment on any given date. I accept Mrs. Smith's evidence that used the card, but only rarely.

[26] The last payments, attributed to Mrs. Smith, were made on November 27 and December 2019, for a total of \$400.00. By this time the balance was \$33,529.13.

[27] The last statement in evidence is for the period March 25 to April 24, 2020. The balance was now \$34,111.34.

Additional Bank Evidence

[28] Ms. Larmond says that Mr. Smith expressly consented to multiple credit limit increases. In support of this she attaches to her second affidavit what appears to be a screen shot of a Bank computer screen. It appears to indicate that the credit limit increased from \$1,000 sometime before September 14, 2002, with a number of intervening increases to the final limit of \$28,000 on January 24, 2018. The screen shot provides no information about who if anyone consented to those increases, or how consent was given. The Bank relies on the Cardholder's Agreement, which says that the Bank will not increase a cardholder's credit limit without their express consent.

[29] Ms. Larmond also attaches as an exhibit to her second affidavit a printout of comments made by Bank employees relating to their dealings with the Smiths starting on May 10, 2001. The notes sometimes refer to "client" or "clients" without specifying if the reference is to Mr. Smith or Mrs. Smith.

[30] On April 13, 2018, the Bank's notes refer to Mrs. Smith looking for a consolidation loan to pay out her existing credit card. The note for that date refers to Mr. Smith being in hospital and being unable to make financial decisions at present.

[31] On February 17, 2019, the Bank's notes refer to Mrs. Smith being in the branch for a banking review. The notes say that Mr. Smith usually does all the banking, but he was ill and had been in hospital for quite some time. She presented a power of attorney for her husband. They discussed the BalanceProtector insurance, and a form was provided to Mrs. Smith for her and the doctor to complete.

[32] The next note is from July 2, 2019, when Mrs. Smith presented a copy of Mr. Smith's will. The credit card "that they have jointly" was discussed, and there is a reference to arrangements having been made with Visa to pay it down.

Analysis

[33] The Bank submits that it has an enforceable agreement with Mr. and Mrs. Smith that Mrs. Smith has breached by failing to pay the balance and accrued interest owing on the credit card. It submits that Mr. and Mrs. Smith are jointly and severally liable for the amount owing.

[34] The Bank submits that Mrs. Smith's use of the card as a cardholder makes her jointly and severally liable for the amount owed. In this regard, the Bank relies on the definition of "you" and "your" in the Cardholder's Agreement. That definition does not expressly say that cardholders are jointly and severally liable, but it does say that:

All of you are, individually and together, responsible under and bound by this Agreement. This means that each of you is fully responsible for all amounts owing on the Account, ...

[35] Mrs. Smith submits that she only ever used the card in the belief that she was an authorized user, and that Mr. Smith was solely responsible for all balances. She denies being a co-applicant, and submits that the Bank has failed to prove that she was.

[36] Mrs. Smith submits that if, to the contrary, she was a co-applicant, her liability would be limited to \$1,000, as she never expressly consented to any increases to the credit limit. In support of this alternative submission, Mrs. Smith refers to the portion of the Cardholder's Agreement under the heading "Your Credit Limit". It states that "We will not increase your credit limit without your express consent to do so." She submits that this means that both cardholders would need to give express consent to a credit limit increase.

[37] I am unable to accept Mrs. Smith's alternative position. Given the definition of "you" and "your" in the Cardholder's Agreement, I find that if Mrs. Smith was a co-

applicant, and not merely an authorized user, it would be sufficient for either her or Mr. Smith to have given their express consent to a credit limit increase. The provisions in question are not ambiguous, so contrary to Mrs. Smith's submission, the interpretive principle of *contra proferentem* does not apply.

[38] This case therefore turns on whether Mrs. Smith was a co-applicant. If she was not, then she is not liable. If she was a co-applicant, then the question becomes whether either Mr. or Mrs. Smith gave express consent to the credit limit increases.

[39] Mrs. Smith denies ever applying for any Bank credit card. She further denies ever agreeing to the terms of the Cardholder's Agreement. Ms. Larmond says that Mrs. Smith applied for the credit card on or about February 14, 2001.

[40] It must be remembered that the Bank is the plaintiff in this case, and bears the burden of proving that Mrs. Smith was a co-applicant. The Bank has failed to produce the application for the credit card, despite being requested to do so at Ms. Larmond's first examination for discovery. Ms. Larmond has no personal knowledge of who applied for the credit card. All she can do is make assumptions or inferences based on the credit card statements, which are addressed to both Mr. and Mrs. Smith, and the Bank's usual practice. This is apparent from her examination for discovery.

[41] At her second examination for discovery, Ms. Larmond was unable to provide a cogent explanation for the Bank's failure to produce the application for the credit card. She said there could be numerous reasons it was not produced, including the date of the application or how the application was done. She could not speak to the actual reason it was not produced.

[42] Both parties referred to *Royal Bank of Canada v. Klassen*, 2013 BCSC 631 [*Klassen*]. In that case the Bank sought summary judgment against Mr. Klassen for the amount owing on a credit card issued to Ms. Faa. Mr. Klassen's evidence was that Ms. Faa gave him a credit card which he used for a few months. His understanding was that he was only an additional user on Ms. Faa's account.

[43] Ms. Larmond was the Bank's affiant in *Klassen*, and she deposed that Mr. Klassen and Ms. Faa filled out and signed the Co-Applicant Form, which Mr. Klassen denied. The Bank failed to produce the Co-Applicant Form, and the Court held at para. 9 that Ms. Larmond's error in saying that Mr. Klassen signed it, combined with the Bank's failure to produce the form, called into question all of the evidence presented by the Bank. The Court accepted Mr. Klassen's evidence, and concluded that there was no written agreement signed by Mr. Klassen. At para. 19 the Court concluded that Mr. Klassen did not apply for the card and never entered into any agreement with the Bank. The Court dismissed the Bank's action.

[44] The Bank submits that *Klassen* is distinguishable from the case at bar. Mr. Klassen was an authorized user, never communicated directly with the Bank, never made any payments on the card, and the statements were sent to Ms. Faa's address, where he did not live. By contrast, the Bank says that Mrs. Smith was a cardholder, used the card, and had statements mailed to her home. Further, she made payments on the card after Mr. Smith's death.

[45] *Klassen* makes clear that the fact a credit card statement is sent to a person at a given address does not by itself mean that they were a co-applicant. At para. 8 of *Klassen*, the Court noted that the Bank's statements and other documents were sent to Mr. Klassen at an address in Kelowna which was not in fact his address. The Bank could not rely on the fact that the statements were addressed to him as evidence that he was a co-applicant.

[46] During her examination for discovery Ms. Larmond conceded that it was possible that Mr. Smith had applied for the card with Mrs. Smith to be an authorized user. She said that was possible "depending on when he applied". She then said that that was not the case based on the Bank notes to which I have already referred, which never refer to Mrs. Smith as an "authorized user", and the fact that she had statements addressed to her. As just discussed, the fact Mrs. Smith had statements addressed to her does not establish that she was a co-applicant. That the Bank referred to her in its records as a co-applicant, or did not refer to her as an

authorized user, does not necessarily mean that the manner in which they referred to her was an accurate reflection of her status.

[47] *Klassen* also establishes that the fact Mrs. Smith used the card does not mean she was a co-applicant. As discussed at para. 15, Mr. Klassen used the card in issue in that case, but he was not held to be a co-applicant.

[48] At para. 21 of *Klassen*, the Court considered the Bank's argument that even if Mr. Klassen did not apply for the card, his use of the card allowed it to take advantage of a notice on the back of the card which stated that "Use of this Visa Card is subject to the terms of the RBC Royal Bank Visa Agreement of which the cardholder acknowledges receipt by such use". In the case at bar, the Bank did not rely on language on the back of the card to establish that Mrs. Smith was subject to the Cardholder's Agreement. But it did argue that her use of the card rendered her liable, relying on the terms of the Cardholder's Agreement. In *Klassen* at para. 21, the Court held that an onerous term in a contract must be brought to the attention of the contracting party, and that the Bank made no attempt to do so in Mr. Klassen's case.

[49] On the evidence before me, the same is true here. Ms. Larmond says that by using the card, Mrs. Smith agreed to be bound by the Cardholder's Agreement. But the evidence does not establish that the Cardholder's Agreement in general, or the notion that by using the card she was liable for the balance owing on the card in particular, was ever brought to Mrs. Smith's attention.

[50] On the evidence before me, the Bank has failed to establish that Mrs. Smith was a co-applicant for the card. As a result, she is not liable under the terms of the Cardholder's Agreement for the balance and accrued interest owing on the card.

[51] While that is sufficient to dispose of this matter, I will also consider whether the Bank has established that Mr. Smith gave express consent for the credit limit on the card to be increased. The Bank relied on the screen shot I have already referred to in support of its position that Mr. Smith gave express consent for the credit limit to

be increased. The screen shot in question reflects the fact that the credit limit was increased over time. I agree with Mrs. Smith, however, that it does not show how the credit limit was increased, or whether or how Mr. Smith consented to those increases. The Bank's submission that because the limit was increased there must have been consent is an unpersuasive exercise in circular logic. The Bank has failed to prove that either Mr. Smith or Mrs. Smith gave express consent to the credit limit being increased. This would mean that, even if Mrs. Smith was a co-applicant, she would be liable only up to the credit limit prior to any increases, \$1,000.

[52] For these reasons, I dismiss the Bank's action. Unless there are circumstances of which I am unaware, Mrs. Smith is entitled to her costs at Scale B. Should there be any issue with respect to costs, the parties are to contact Scheduling within 30 days of the date of this decision to request to appear before me to speak to costs.

"L.M. Lyster J."

LYSTER J.