



## Lawyer forces TD Bank to release trust funds

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A Toronto real estate lawyer was successful recently in forcing the Toronto-Dominion Bank to release funds held in his trust account after the bank wrongly purported to freeze his account to recoup its loss from a fraudulent cheque that had been drawn by another of the lawyer's clients and deposited into the trust account. The court did so on the basis that, among other things, it was the TD Bank that should bear the risk when it paid out funds on a fraudulent cheque and the account contained funds held in trust for other clients that the bank had no right to seize under its banking agreement with the lawyer.

The saga began when the lawyer, Mr. Benjamin, deposited two client cheques totalling \$190,000 into his trust account at TD, and subsequently withdrew the funds to close the client's transaction. Those cheques were later discovered to be forged and the client, a rogue, was nowhere to be found. Not long afterwards, Benjamin deposited over \$330,000 from a different, legitimate client into that trust account. Then, relying on a provision in its banking agreement, TD tried to freeze those funds in an attempt to recover the \$190,000 it lost as a result of the prior forgeries. The Bank's refusal to lift the freeze threatened to put the client's legitimate upcoming transaction, and Benjamin's reputation, in jeopardy. Accordingly, Mr. Benjamin sought and obtained an injunction to require TD to lift its freeze on the funds. Reviewing *Bills of Exchange* and trust law jurisprudence in the context of this motion, the Superior Court<sup>1</sup> granted the injunction and forced TD to release the funds.

In considering whether to force TD to release the funds in Benjamin's trust account, Mr. Justice Perell found that there were two serious issues raised.

Firstly, in addition to being Mr. Benjamin's banker, TD was also the drawee bank that paid out on its customer's forged cheque and, as such, was legally deemed to know its customer's signature. At law, it was TD and not Benjamin that bore the risk of forgery. Secondly, it was clear that TD had frozen trust funds and TD should not be permitted to cause Mr. Benjamin to breach his trust obligations to his client.

Perell J. found that it was clear that to not grant the injunction would cause irreparable harm. Allowing TD to maintain the freeze on funds would have: (1) jeopardized a client's transaction; (2) exposed Mr. Benjamin to claims of professional negligence, breach of trust and professional misconduct; and (3) exposed Mr. Benjamin to damage to his good reputation as a lawyer.

The bank's decision to freeze trust funds was arguably an illegal self-help remedy, and the type of remedy normally only granted by a successful application for a *Mareva* injunction to freeze a defendant's assets pending trial. But here, the bank knowingly seized a third party's money, not assets that belonged to its customer, Mr. Benjamin. When compared with the significant inconvenience faced by Mr. Benjamin, including having to seek alternative ways to fund his legitimate client's transaction, any professional liability claims that he might face, or any actions for breach of contract, it was hardly inconvenient to TD to put an end to its opportunistic decision to freeze funds belonging to an innocent third party.



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<sup>1</sup> [2006] O.J. No. 1253 (S.C.J.) – Link to the case at: <http://www.canlii.org/on/cas/onsc/2006/2006onsc10715.html>