

CANADA / JUDGMENT

Bodnar v. 367463 Alberta Ltd.

2008 BCCA 192

COURT

British Columbia Court of Appeal

DECIDED

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2008 BCCA 192 Bodnar v. 367463 Alberta Ltd. COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: Bodnar v. 367463 Alberta Ltd., 2008 BCCA 192 Date: 20080502 Docket: CA035827

Between: Andrew Bodnar and Jose Bartolome Respondents (Plaintiffs) And The Cash Store Inc., Rentcash Inc., All Trans Credit Union Ltd., Card Capital Inc., 1015005 Alberta Ltd., 3074700 Nova Scotia Ltd., Advance Finance Corporation, Avenir Financial Funding Corp., and Longship Capital Inc. (Defendants) And 367463 Alberta Ltd., Assistive Financial Corp., Bridgeview Financial Corp., 19695 Yukon Inc., Robert John Hankinson, Q.C., Trustee of the Hugh Denham RCA Trust and Seisform Drilling (1957) Ltd. Appellants (Defendants) Before: The Honourable Madam Justice Prowse (In Chambers) J. Sullivan S. Knowles Counsel for the Appellants P. Bennett M. Mounteer Counsel for the Respondents I. Giroday Counsel for the Defendants 1015005 Alberta Ltd., 3074700 Nova Scotia Ltd., Advance Finance Corporation, Avenir Financial Funding Corp. J. Doyle Counsel for the Defendant Longship Capital Inc. Place and Date of Hearing: Vancouver, British Columbia April 24, 2008 Place and Date of Judgment: Vancouver, British Columbia May 2, 2008 Reasons for Judgment of the Honourable Madam Justice Prowse:

- [1] This is an application for leave to appeal from the order of Madam Justice Brown, made January 24, 2008, adding the applicants as defendants to these class action proceedings pursuant to Rule 15(5)(a)(iii) of the Rules of Court, and granting leave to the respondents (the "plaintiffs") to amend their pleadings accordingly. Madam Justice Brown also made a certification order in relation to these applicants which is the subject of a separate appeal as of right.
- [2] The relevant factors to be considered on an application for leave to appeal from an interlocutory order are referred to in *Power Consolidated (China) Pulp Inc. v. B.C. Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.), as follows:
- (a) whether the appeal is prima facie meritorious;
 - (b) whether the point on appeal is of significance to the practice;
 - (c) whether the point is of significance to the action itself; and
 - (d) whether an appeal would unduly hinder the progress of the action.

- [3] The parties' submissions on this application were focussed primarily on the merits of the proposed appeal and the significance of the issues raised to the practice. It is accepted that the points raised are of significance to the action and that an appeal, if leave were granted, would not unduly hinder the progress of the action.
- [4] There are three groups of applicants whom I will refer to as a matter of convenience as the 367463 Alberta group, Longship, and the Avenir group.
- [5] The background giving rise to these claims is set out in detail in the judgment of Madam Justice Brown in *Bodnar v. The Cash Store Inc.*, 2005 BCSC 1228, appeal dismissed, 2006 BCCA 260. At paras. 4-5 of that judgment, resulting in the certification order against the then-named defendants, Brown J. referred to the nature of the action as follows: The focus of this action is loans provided to individuals through Cash Store outlets. The plaintiffs assert that fees charged for these loans are interest within s. 347 of the Criminal Code, exceed the criminal rate of interest, and breach the Trade Practice Act and Business Practices and Consumer Protection Act. The plaintiffs seek recovery of these fees and damages. The Cash Store Inc. is a wholly owned subsidiary of Rentcash Inc. Cash Store began operating in British Columbia in September 2002. Cash Store does not provide funds itself; it obtains those funds from one of nine lenders with whom it has a relationship. Cash Store provides two types of loans; short-term unsecured advances which are due on the customer's next payday, unless they are rolled over; and title loans which are secured by a P.P.S.A. registration on the customer's vehicle and are usually due within approximately 30 days.
- [6] In her reasons for judgment giving rise to the order under appeal, Brown J. set forth the position of the plaintiffs in support of their application to add these applicants as defendants (at para. 3):
- (2) The plaintiffs argue that joinder is appropriate because the claims made against the proposed defendants are the same type of claims that are made against the other defendants, arising out of their participation in the same business, and the common issues raised by the claims against these proposed defendants are the same type of issues that have already been certified with respect to the claims made against the other defendants.
- (3) The plaintiffs have provided evidence which indicates that the proposed defendants provide funds to The Cash Store for the operation of its payday loan business. The plaintiffs say that each of these proposed defendants has received payment from The Cash Store of part of the broker fees received by The Cash Store. Each of the proposed defendants has entered a financier broker arrangement. Those agreements provide that The Cash Store will advance loans which set interest at 59 percent. Each of them contemplates that The Cash Store will collect broker fees in addition to the interest.

- [4] In examination for discovery, Mr. Reykdal, the president and CEO of Rentcash and The Cash Store, said that The Cash Store has provided money to the proposed defendants to ensure that they received a "reasonable rate of return" on the monies advanced to The Cash Store. As Mr. Reykdal described it, "essentially what we have done is we have taken a part of the broker fee that we got from the customer" and "essentially, provide it back to the [proposed defendant] to ensure that they could - they would stay there in the same place."
- [7] Madam Justice Brown gave effect to these submissions in finding that the test for adding defendants pursuant to Rule 15(5)(a)(iii) of the Rules had been met. Rule 15(5)(a)(iii) provides: (5)(a) At any stage of a proceeding, the court on application by any person may (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected (A) with any relief claimed in the proceeding, or (B) with the subject matter of the proceeding, which in the opinion of the court it would be just and convenient to determine as between the person and that party.
- [8] In addressing the merits of their application for leave to appeal, counsel for the 367463 Alberta group (with whom the other applicants agree) submits that, although Madam Justice Brown correctly set forth the test for adding parties pursuant to Rule 15(5)(a)(iii), she erred in her application of that rule to the circumstances before her. In particular, counsel submits that there was no evidence that the applicants received monies at a criminal rate of interest, and that there is evidence on point (provided by Mr. Reykdal) to the contrary. Counsel submits that the evidence of Mr. Reykdal establishes that any "retention payments" made to the lenders were made to compensate them for loans that were not repaid, in which case they could not form part of a criminal rate of interest (which would only apply to repaid loans). Counsel also submits that Brown J. should have refused to add these applicants as defendants on the basis that the plaintiffs were claiming a tracing remedy and that it was not possible in these circumstances (where any monies received had been intermingled with other funds) for the plaintiffs to trace any alleged monies received at a criminal rate of interest into the hands of the applicants.
- [9] Counsel for Longship also submits that there is no evidence that his client loaned monies during the period of time the plaintiffs borrowed monies, and counsel for the Avenir group submits that there is no evidence that his clients loaned money in British Columbia at all.
- [10] In examining the merits of the proposed grounds of appeal, it is important to note that the decision whether to add parties to an action is essentially discretionary and attracts an exacting standard of review. Leave to appeal a discretionary order will only be granted "where the order is clearly wrong, a serious injustice will occur, or the discretion was not exercised judicially or was exercised on a wrong principle" per *Strata Plan LMS 1212 v. Winchester Investments*, 2004 BCCA 500 at para. 2. The standard is even more stringent where the appeal is from the decision of a case management judge who has had conduct of the proceedings for a considerable length of time, as here. (See, *Robak Industries Ltd. v. Gardner*, 2006 BCCA 395 (Donald J.A.).)

- [11] The arguments which the applicants seek to raise on appeal (with the exception of the tracing issue) are substantially the same arguments that were rejected by Madam Justice Brown. In my view, the applicants have not established an arguable case on the merits warranting consideration by this Court.
- [12] Contrary to the submission of the applicants, there is evidence provided by Mr. Reykdal that a portion of the broker fees (which are claimed to form part of the illegal interest) were paid to the lenders on account of repaid loans. While his affidavit contains statements which appear to contradict this evidence, it was not incumbent on Madam Justice Brown to make definitive findings with respect to the credibility or reliability of that evidence on the application before her. Nor was Brown J. required to resolve any apparent inconsistencies between the pleadings and the evidence as suggested by counsel for Longship. Counsel cited no authority for that proposition, and the fact that he suggested there was such a duty, without more, is insufficient to create a meritorious ground of appeal.
- [13] In response to the submission of the Avenir group that they should not have been added as parties because there was no evidence directly tying the loans or payment of brokerage fees to them, the evidence suggests that the method The Cash Store used to account for and allocate these loans and payments was to some extent arbitrary, and that one reasonable conclusion open on the evidence, based on the overall nature of the lending arrangements involving The Cash Store and the lenders, is that all of the applicants received some portion of the broker fees collected from the plaintiffs even if no loans were recorded in their individual names. Again, it was not the purpose of the joinder application to definitively resolve these issues.
- [14] With respect to Longship's submission that it could not be tied to the action because it did not begin making loans until January 2005, which was after date of the transactions involving the original plaintiffs, Brown J. correctly observed that, once the action was certified, the members of the class included borrowers after January 2005.
- [15] Finally, even if there is some merit to the applicants' submission that tracing at law is not an available remedy to the plaintiffs on the facts of this case, the plaintiffs are claiming numerous remedies against the defendants, including tracing in equity, damages and restitution. Success on the tracing issue alone would not effect the order for joinder.
- [16] In my view, it is apparent from her reasons for judgment that, in ordering joinder of these applicants as defendants, Madam Justice Brown accepted, in large part, the submissions of the plaintiffs supporting joinder. At para. 7 of her reasons, Brown J. stated: I am satisfied that there is a degree of relationship between the proposed defendants and the existing parties which relates to the relief, remedy and subject matter of the action and that it would be just and convenient to have the question or issue between the proposed parties and the existing parties determined in the existing proceeding. The essence of this action, as described in my reasons of August 26th, 2005, and the Court of Appeal reasons of May 25, 2006, is that the defendants, including the proposed defendants, are collectively engaged in a

business enterprise making small loans that charge an effective rate of interest that exceed 60 percent per annum contrary to s. 347 of the Criminal Code.

- [17] As already stated, I am not persuaded that the arguments the applicants propose to raise on appeal meet the merits test applied on an application for leave to appeal.
- [18] Nor am I persuaded that any of the issues which the applicants propose to raise on appeal are of any general interest to the practice.
- [19] In the result, I would dismiss the application for leave to appeal. "The Honourable Madam Justice Prowse" Corrigendum to the reasons of The Honourable Madam Justice Prowse - 4 July 2008 Madam Justice Prowse:
- [1] As a result of further submissions by counsel, the last sentence in para. 15 of my reasons for judgment which reads "(I also note that this issue was not raised before Madam Justice Brown)" should be deleted. "The Honourable Madam Justice Prowse"

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