

CANADA / JUDGMENT

Bodnar v. The Cash Store

2009 BCSC 74

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 74 Bodnar v. The Cash Store

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bodnar v. The Cash Store,

2009 BCSC 74

Date: 20090128

Docket: S041348

Registry: Vancouver

Between:

Andrew Bodnar and Jose Bartolome

Plaintiffs

And

The Cash Store Inc., Rentcash Inc.,

All Trans Financial Services Credit Union Ltd., Card Capital Inc.,

367463 Alberta Ltd., 1015005 Alberta Ltd., Assistive Financial Corp.,

Advance Finance Corporation, Bridgeview Financial Corp.,

Seisform Drilling (1957) Ltd., Longship Capital Inc.,

Avenir Financial Funding Corp., 3074700 Nova Scotia Ltd.,

19695 Yukon Inc., and Robert John Hankinson, Q.C.,

Trustee of the Hugh Denham RCA Trust

Defendants

Before: The Honourable Madam Justice Griffin

Reasons for Judgment

In Chambers

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Date and Place of Trial/Hearing:

January 13, 2009

Vancouver, B.C.

- [1] This is an application by the plaintiffs for an order that notice of certification of the proceeding as a class proceeding be approved in a certain form. The motion is brought pursuant to s. 19 of the Class Proceedings Act, R.S.B.C. 1996, c. 50 (the "Act").
- [2] This class proceeding is brought on behalf of people who borrowed small amounts of money from the defendants through what are commonly known as "payday loans" or "title loans". The essence of the claim is that the fees the defendants charged the class members for these small loans amounted to a criminal rate of interest. The proceeding seeks restitution of the allegedly unlawful fees, interest and damages.

[3] This proceeding was certified as a class proceeding on August 26, 2005: see Reasons for Judgment of B.J. Brown J., *Bodnar v. The Cash Store, Inc.*, 2005 BCSC 1228 (the "Certification Judgment"); affirmed 2006 BCCA 260.

[4] The plaintiffs and defendants have agreed for the most part on the form of notice of certification to be given to class members, but have disagreed on one clause that the defendants want inserted in the notice.

[5] Section 19 of the Act sets out the certification notice requirements as follows:

19(1) Notice that a proceeding has been certified as a class proceeding must be given by the representative plaintiff to the class members in accordance with this section.

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

(3) The court must make an order setting out when and by what means notice is to be given under this section and in doing so must have regard to the following:

(a) the cost of giving notice;

(b) the nature of the relief sought;

(c) the size of the individual claims of the class members;

(d) the number of class members;

(e) the presence of subclasses;

(f) whether some or all of the class members may opt out of the class proceeding;

(g) the places of residence of class members;

(h) any other relevant matter.

(4) The court may order that notice be given by

(a) personal delivery,

(b) mail,

(c) posting, advertising, publishing or leafleting,

(d) individually notifying a sample group within the class, or

(e) any other means or combination of means that the court considers appropriate.

(5) The court may order that notice be given to different class members by different means.

(6) Unless the court orders otherwise, notice under this section must

(a) describe the proceeding, including the names and addresses of the representative plaintiffs and the relief sought,

- (b) state the manner in which and the time within which a class member may opt out of the proceeding,
 - (c) state the manner in which and the time within which a person who is not a resident of British Columbia may opt in to the proceeding,
 - (d) describe the possible financial consequences of the proceeding to class members and subclass members,
 - (e) summarize any agreements respecting fees and disbursements
 - (i) between the representative plaintiff and the representative plaintiff's solicitors, and
 - (ii) if the recipient of the notice is a member of a subclass, between the representative plaintiff for that subclass and that representative plaintiff's solicitors,
 - (f) describe any counterclaim being asserted by or against the class or any subclass, including the relief sought in the counterclaim,
 - (g) state that the judgment on the common issues for the class, whether favourable or not, will bind all class members who do not opt out of the proceeding,
 - (h) state that the judgment on the common issues for a subclass, whether favourable or not, will bind all subclass members who do not opt out of the proceeding,
 - (i) describe the rights, if any, of class members to participate in the proceeding,
 - (j) give an address to which class members may direct inquiries about the proceeding, and
 - (k) give any other information the court considers appropriate.
- (7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements.

[emphasis added]

- [6] The defendants say that in order to "describe the possible financial consequences of the proceeding to class members", in accordance with s. 19(6)(d) of the Act, it is necessary to advise class members of the possibility that they may be subject to costs if they elect to proceed with individual claims after the common issues trial. On this basis, the defendants want to insert the following language in the notice:

Class members may be responsible for the defendants' costs associated with any individual proceedings required following the common issues trial, if that class members' individual proceeding are [sic] unsuccessful. The court will decide whether individual proceedings are required after the common issues trial.

- [7] The defendants say that while British Columbia is a no-costs regime for the matters relating to certification and trial of the common issues, there is a possibility that, if individual proceedings are needed after the trial of the common issues, costs can be awarded against individual class members who proceed with individual claims. In this regard, the defendants point to s. 37 of the Act, particularly s. 37(4) which applies to individual class members:

37(1) Subject to this section, neither the Supreme Court nor the Court of Appeal may award costs to any party to an application for certification under section 2 (2) or 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.

- (2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding
- (a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,
- (b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or
- (c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.
- (3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.
- (4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.

[emphasis added]

- [8] The defendants argue that s. 19(6) of the Act is the starting point for any notice, and only with good reason should the court exercise its discretion to vary from the requirements of that subsection. The defendants say it is important to describe the possible financial consequences of the proceeding to class members at the notice stage of the proceeding, so that class members can make an informed decision as to whether or not they should opt out of the proceeding. Since s. 37(4) of the Act allows for possible costs consequences against individual class members if they proceed to a determination of individual claims, then potential class members should receive notice of this in order to make an informed decision as to whether or not to opt out.
- [9] The plaintiffs oppose inclusion of the extra language in the notice. They point out that s. 19 gives the court discretion in terms of the form of notice. The plaintiffs say that on the facts of this case, the possibility that individual class members will need individual proceedings is extremely remote at best, and therefore the language that the defendants seek in the form of

notice is unnecessary. The plaintiffs also point out that, in the unlikely event individual proceedings do become necessary after a trial of the common issues, notice of the possible costs consequences of those individual proceedings can be given then, pursuant to the notice provisions of s. 20 of the Act.

[10] Section 20 of the Act sets out the notice requirements once the common issues have been determined:

20 (1) When, in a class proceeding, the court determines common issues for the class or a subclass, the representative plaintiff for the class or subclass must give notice to the members of the class or subclass in accordance with this section.

(2) Section 19 (3) to (5) applies to notice given under this section.

(3) Notice under this section must

(a) state that common issues have been determined,

(b) identify the common issues that have been determined and explain the determinations made,

(c) if common issues have been determined in favour of the class or subclass,

(i) state that members of the class or subclass may be entitled to individual relief,

(ii) describe the steps that must be taken to establish an individual claim, and

(iii) state that failure on the part of a member of the class or subclass to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court,

(d) give an address to which members of the class or subclass may direct inquiries about the proceeding, and

(e) give any other information that the court considers appropriate.

[emphasis added]

[11] The Certification Judgment certifying the proceeding as a class action, as affirmed on appeal, identified that the determination of the common issues will significantly advance the litigation. The small size of the claims, combined with the complexity of the legal issues, means that it is unlikely that individuals will have an interest in pursuing individual actions outside the class proceedings process. As held by B.J. Brown J. in the Certification Judgment at paras. 58, 60, 62 and 64:

58 Determination of the common issues will significantly advance the litigation. As the plaintiffs argue, the claims of the class members do raise issues which are common to the class as a whole and which do not engage an assessment of evidence that is individual to each class member. In addition, it may be that some of the defences raised can be determined on a class-wide basis, for example, whether electing to obtain the loan funds by use of the cash card is a voluntary payment for the purposes of s. 347(1) of the Criminal Code.

60 There is no evidence that there are members who would have an interest in pursuing individual actions. Indeed, this is unlikely, given the amount involved and the complexity of the litigation.

62 I am satisfied that a class proceeding is the only effective way of proceeding. The individual claims are likely to be small. The cost of pursuing the litigation, given its complexity, is likely to be high and will require expert evidence. If individuals were to pursue individual actions, there would be an unnecessary proliferation of individual actions with the attendant costs and inconvenience to the administration of justice. Proceeding by a class proceeding will avoid the duplication of fact finding and legal analysis.

64 Here, the common issues, as phrased, will substantially advance the litigation. Individual actions are impractical. A class proceeding will preserve judicial resources and avoid a duplication of fact finding and legal analysis. If, as the plaintiffs allege, borrowers are paying interest at a criminal rate, then the third legislative objective, behaviour modification, would be served.

[12] The British Columbia Court of Appeal found that the above conclusions by the Chambers judge in this case were "amply supported": 2006 BCCA 260.

[13] As well, the Certification Judgment accepted as reasonable the plaintiffs' plan for determining individual claims, if successful on a trial of the common issues, namely, by having individual class members complete claims forms and submit them to an independent claims evaluator. B.J. Brown J. in the Certification Judgment, found that the plaintiffs' plan of proceeding was a sufficient plan, describing it as follows at para. 67:

The proposed class management plan is attached to this judgment at Schedule "B". The plaintiffs propose that after the common issues are determined an independent claims evaluator will be appointed by the court. Using the defendants' records, the claims evaluator will determine the amount of interest received at a criminal rate. The claims evaluator will determine each class member's entitlement to payment from the class fund based on claim processing rules developed and approved by the court. The claims evaluator will submit a report to the court setting out each class member's entitlement for approval. This approach is contemplated by the Act in s. 27(1)(b).

[14] I recognize that the plaintiffs' plan of proceeding for individual claims is only a proposal at this stage, and the actual plan will be determined by the court, if necessary, after the common issues trial and after hearing submissions of the parties. The Act gives the court wide powers to determine a cost-effective process for determining individual claims,

including the power to dispense with procedural steps and to provide for special rules for means of proof and admission of evidence (for example, ss. 27, 28, 29). If the plaintiffs are successful on the trial of the common issues, it will be this court's task "to choose the least expensive and most expeditious method of determining the individual issues that is consistent with justice" (s. 27(3)). This task is in keeping with the goals of the Act, namely, to provide access to justice to claimants whose claims would be otherwise uneconomical if they were to proceed by way of individual trial.

- [15] It is very unlikely, on the facts and issues involved in this case, that viva voce evidence and the full panoply of pre-trial and trial procedures will be required to prove individual claims. It may well be that if the plaintiffs are successful on all the common issues, the majority of the individual claims will simply be mathematical calculations based on records and claims submitted by the individual class members.
- [16] Notice of possible costs consequences of individual proceedings at the section 19 certification notice stage would need to address, in this case:
- (a) that the possibility of costs is dependent on individual proceedings being required;
 - (b) that it is the plaintiffs' plan that individual trials will not be required and the court has approved of this plan on a preliminary basis;
 - (c) that any final determination of the process for determining individual claims will await the outcome of the common issues trial, but will be the least expensive and most expeditious method consistent with justice for the parties;
 - (d) that a class member will be entitled to choose whether or not to proceed with an individual claim, if one is required;
 - (e) that "costs" does not necessarily mean actual legal costs but may mean something less;
 - (f) that costs are typically awarded to the successful party, which could be the individual class member or a defendant; and,
 - (g) that there are likely to be greater costs risks to an individual claimant if the claimant elects to opt-out of the proceeding to pursue an individual action.
- [17] The language that the defendants seek to be included in the s. 19 form of notice, namely, that "class members may be responsible for the defendants' costs associated with any individual proceedings", will have the effect of overemphasizing the potential cost consequences to class members, potentially deterring them from participation in the class proceeding and thus depriving them of access to justice. An important factor to keep in mind is that an individual class member will always have the option of deciding to not proceed with an individual claim after the trial of the common issues, if the class member is concerned about the costs implications of that proceeding.

- [18] The notice language proposed by the defendants is not sufficiently neutral because it emphasizes the risk of costs being awarded against an unsuccessful individual claimant, and does not mention that costs may be awarded to a successful individual claimant. It also does not explain what "costs" mean in the sense of whether they are actual legal costs or costs according to a court tariff. It does not highlight that the court will be tasked with coming up with procedures to minimize these costs. It does not explain that any costs will likely be considerably less than the costs that would be incurred if a claimant were to opt out of the proceeding and proceed by way of individual action.
- [19] One of the functions of the notice given pursuant to s. 19 of the Act is to advise class members of important information relevant to the decision of whether or not to opt out. The information should assist the reader in appreciating the advantages or disadvantages of staying in the class proceeding relative to the choice of opting out of the proceeding. The notice should not be so lengthy and so full of convoluted possibilities that it is too difficult for the lay person to understand.
- [20] The possibility of a claimant incurring some costs in connection with an individual claims process after the successful determination of common issues is not typically considered a disadvantage of class proceedings, relative to an individual claim proceeding on its own outside of the class proceeding, as the latter process is well understood to usually be much more costly to the individual claimant.
- [21] In the circumstances of this case, I conclude that any notice of possible costs consequences of individual proceedings is not necessary to assist a class member in weighing the relative advantages or disadvantages of staying in the class proceeding or opting out. As noted by B.J. Brown J. in the Certification Judgment at paragraph 62, the individual claims are likely to be small. Because of this, the choice for the majority of class members is going to be between participating in the class proceeding and deciding later whether or not to participate in an individual claim, or opting out of the class proceeding and not proceeding with any claim at all. The potential costs consequences of the individual claims process is not likely to be a factor at the stage of the decision on whether or not to opt out.
- [22] On the facts of this case, any notice of the potential costs consequences of individual proceedings at this stage is premature and would be so uncertain as to be confusing and distracting from the more important information in the notice of certification.
- [23] I conclude that it would be more appropriate in this case to wait until after the trial of the common issues to give notice to class members of the potential costs of determining individual claims. Once the common issues have been decided, the court and the parties will be able to be more specific about the steps needed to prove individual claims and the potential costs consequences. This information can then be more accurately conveyed to class members in the form of notice required by s. 20 of the Act.

[24] The application by the plaintiffs is to approve the form of s. 19 notice that has been agreed to by all the parties, absent the extra language requested by the defendants as to possible costs consequences of individual claims. The plaintiffs' application is granted.

"S. Griffin, J."

The Honourable Madam Justice S. Griffin

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