
CANADA / JUDGMENT

Bodnar v. The Cash Store Inc.

2008 BCSC 714

COURT

Supreme Court of British Columbia

DECIDED

24 January 2008

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2008 BCSC 714 Bodnar v. The Cash Store Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bodnar v. The Cash Store Inc. ,

2008 BCSC 714

Date: 20080124

Docket: S041348

Registry: Vancouver

Between:

Andrew Bodnar and Jose Bartolome

Plaintiffs

And:

The Cash Store Inc., Rentcash Inc., All Trans Credit Union Ltd.,

and Card Capital Inc.

Defendants

Before: The Honourable Madam Justice Brown

Oral Reasons for Judgment

In Chambers

January 24, 2008

Counsel for the Plaintiffs

P. Bennett

M.W. Mounteer

Counsel for the Defendants The Cash Store Inc. and Rentcash Inc.

W. Branch

Counsel for the Defendant Card Capital Inc.

J.G. Halpin

Counsel for Longship Capital Inc.

A. Hasan

Counsel for 1015005 Alberta Ltd., 3074700 Nova Scotia Ltd., Advance Finance Corporation, and Avenir Financial Funding Corp.

I. Giroday

Counsel for All Trans Credit Union Ltd.

M. Gianacopoulos

Counsel for 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.

J.M. Sullivan

Place of Trial/Hearing:

Vancouver, B.C.

- [1] THE COURT: This matter originally came on for hearing on December 1st, 2006. It is an application by the plaintiff to add certain defendants, to certify the action against the additional defendants, and to add certain common issues.
- [2] At that time the proposed defendants argued that the action should not be certified against them because the plaintiffs had failed to provide evidence to meet the requirements of s. 4 of the Class Proceedings Act; that the plaintiffs must adduce evidence to meet certification requirements and had not done so. I accepted that argument and permitted the parties to file further materials on the certification application. I advised that I would not decide the other applications until the parties filed further materials or advised me that all materials had been filed. The plaintiffs filed further materials including the certification record from the initial application in this action against the original defendants.

- [3] The parties then made further argument on September 26th. The application in the plaintiffs' argument is summarized in my original reasons, which I will quote here for ease of reference:
- [1] The plaintiffs apply for an order adding 367463 Alberta Ltd., 1015005 Alberta Ltd, Assistive Financial Corp, Advanced 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 as defendants; amending the style of cause, writ and statement of claim; granting leave to serve the additional defendants outside of British Columbia. They also ask for a certification order.
- [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."
- [5] The plaintiffs say that the proposed amendments to the statement of claim make claims of unjust enrichment, unconscionable trade practices, and conspiracy against the proposed defendants arising out of their participation in the business of The Cash Store. The plaintiffs say that these are exactly the same claims that are made against the existing defendants with respect to their involvement in that same business.
- [6] the plaintiffs proposed to add five additional common issues:
- (a) whether the proposed defendants have received part of the broker fees;
 - (b) if so, have they been unjustly enriched;

- (c) whether the conduct of the proposed defendants in authorizing The Cash Store to enter agreements that require the payment of interest at a criminal rate and in receiving a partial payment of that interest constitute an unconscionable trade act or practice; and
 - (d) whether the proposed defendants became parties to a conspiracy by assisting The Cash Store and Rentcash in implementing a scheme to provide loans at an unlawful rate of interest;
 - (e) whether the conduct of the proposed defendants justifies an award of punitive or of exemplary damages.
- [4] I will deal first with the application to add the proposed defendants. Rule 15(5)(a)(iii) sets out a two-part test for adding parties. The applicants must establish first there is a degree of relationship between the proposed defendants and an existing party which relates to the relief, remedy or subject matter of the action, and second, if a sufficient relationship exists, that it would be just and convenient to have the question or issue between the existing and proposed parties determined in the existing proceeding.
- [5] The proposed defendants argue that the applicants have not met the two-part test for adding parties set out in Rule 15(5)(a)(iii). They say that the underlying premise of the plaintiffs' action is that a number of lenders, the proposed defendants, received interest and a portion of broker's fees collected by The Cash Store which constitutes receipt of criminal interests contrary to s. 347(1)(b) of the Criminal Code. They say that the plaintiffs do not have evidence that they received interest at a criminal rate; rather, their contracts provided that they would receive interest at a rate which would not exceed the criminal rate of interest. They say that the applicants do not have a personal cause against any of the proposed defendants and that they should not be added (*MacKinnon v. VanCity Savings*). They say that the payments made to them were discretionary payments from The Cash Store and not linked to any sum, whether interest or fees paid or payable by the class or any member of the class.
- [6] Secondly, the proposed defendants argue that it is not just and convenient to add them as defendants; that the plaintiffs have not established that they have a claim that is clearly related to or connected to an existing party and the relief or remedy claimed in or the subject matter of this proceeding, so it would not be just and convenient to add them. They say further that they are not incorporated in British Columbia and do not have registered offices in British Columbia. The contracts which they made with the existing defendants are governed by the laws of Alberta.
- [7] 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.

- [8] The plaintiffs say that the interest charged also breaches provisions of the Trade Practice Act and the Business Practices and Consumer Protection Act. They claim relief including restitutionary remedies and general and punitive damages. The action as certified seeks relief against The Cash Store Inc. and Rentcash Inc. Rentcash is the parent of The Cash Store Inc. The Cash Store provides two types of loans: short-term unsecured advances and title loans which are secured by a PPSA registration. The Cash Store does not provide the funds itself; it obtains the funds from lenders with whom it has an established relationship. In this application the plaintiffs ask to add the lenders, that is, the proposed defendants, to the action and to certify the action against the lenders. Essentially, the plaintiffs say that the lenders received interest and a portion of the broker's fees, thereby receiving interest at a criminal rate; that the lenders have been unjustly enriched; that the terms and conditions upon which the loans were advanced to members of the class constitutes an unconscionable act or practice by the lenders; and that the lenders participated in conspiracy to assist in the implementation of a scheme by providing funds to be loaned as class loans and appointing The Cash Store as agent in loaning those funds.
- [9] The plaintiffs say that The Cash Store, Rentcash and the lenders designed and implemented a business model in which the lenders would provide the lenders' funds to The Cash Store to be advanced by The Cash Store's loans to class members and appoint The Cash Store as agent in lending the lenders' funds on their behalf. They say that the lenders provided the lenders' funds to The Cash Store knowing that those funds would be advanced and authorized The Cash Store to enter into loan contracts on their behalf on terms which required the payment of unlawful loan fees by the cash members to The Cash Store in contravention of s. 347(1) of the Criminal Code. In essence, the plaintiffs say that the lenders and the existing defendants all participated in what was essentially one business. Each had a role in the business of The Cash Store in lending money to the various class members.
- [10] I am satisfied that there is a degree of relationship between the proposed defendants and an existing party which relates to the relief, remedy and subject matter of the action. I am also satisfied that it would be just and convenient to have the question or issue determined in this existing proceeding. As the plaintiffs say, the proposed amendments to the statement of claim make claims of unjust enrichment, unconscionable trade practices and conspiracy against the lenders arising out of their participation in the business of The Cash Store. These are exactly the same claims that have been made against the existing defendants with respect to their involvement in the same business and relating to the same loans.
- [11] This case can be distinguished from *MacKinnon v. Vancouver City Savings Credit Union*. In *MacKinnon v. VanCity*, Mr. MacKinnon advanced a class action against VanCity for overdraft fees paid by Mr. MacKinnon and other members of a class to VanCity arising from their contracts with VanCity. Mr. MacKinnon then applied to add seven other credit unions as defendants. As Madam Justice Ballance said, there was no evidence that any member of the

class had a cause of action against any of the proposed defendants. The claims which Mr. MacKinnon proposed to make against the new credit unions were available to an entirely different set of individuals, the members of those credit unions, and arose from a completely different set of contracts. A determination of the claims raised against VanCity would not determine the claims raised against the proposed defendants. Madam Justice Ballance said that there was nothing to suggest that the claims were related, except for the fact that they arose under the same section of the Criminal Code.

- [12] Although some of the lenders assert here that there is no evidence that they loaned money in British Columbia, all of the proposed defendants are alleged to have received a portion of the brokerage fees paid by the class members.
- [13] Secondly, the plaintiffs say that there is evidence that the funds provided by the lenders were commingled into one or two operating accounts. Although a lender is allocated notionally to a particular store and all of the loans advanced by that store are then recorded in the name of that lender, this does not necessarily mean that the funds advanced by that store are funds received from that lender.
- [14] Further, the plaintiffs say that there is no evidence that monies repaid to the lender in terms of the time and the amounts of those payments are related to the loans advanced and the interest paid in respect of the loans that The Cash Store has reported as being advanced on their behalf.
- [15] Finally, the plaintiffs say that they do not have to establish that the claim against any of the lenders is likely to succeed; rather, on an application to join, the issue is:

The chambers judge hearing an application under this rule must decide whether there may exist between the appropriate parties a question which can be answered or an issue which can be decided by a court of law; that the question or issue is a real one in the sense that it is not entirely frivolous and would result in courts wasting judicial time. It is not the function, in my opinion, to decide whether on any kind of balance it is likely that the plaintiff would be able to prove its allegations or to any other degree beyond showing that there may exist such a question or an issue (*MacMillan Bloedel v. Binstead* (1981), 58 B.C.L.R. 173 (C.A.) at p. 175).

Here I need not weigh the evidence beyond determining that the claim is not entirely frivolous and that it would not result in the court wasting judicial time.

- [16] Longship Capital argues that it only started lending in 2005 after the two plaintiffs borrowed from The Cash Store. However, this action has been certified. The members of the class will have borrowed after January 2005. The class period extends until notice was given to the class, which I understand has not yet occurred.
- [17] Moving now to service ex juris. I am also satisfied that it is appropriate to grant leave to serve the proposed defendants outside of the province. Although none of the companies is registered in British Columbia, there is a real and substantial connection in that the class is residents of British Columbia; the loans were taken in British Columbia from Cash Store

locations in British Columbia with funds advanced by possibly all and certainly some of the defendants, while each of the proposed defendants is alleged to have received a portion of the unlawful interest.

- [18] Moving now to certification. As I have indicated, this court has already certified the action against the existing defendants and certification has been upheld by the Court of Appeal. The issue is whether the action should be certified against the proposed defendants. Section 4(1) of the Class Proceedings Act sets out the requirements for certification. I do not propose to read them now. Everyone here is familiar with s. 4. Here the proposed defendants argued that the requirements for certification are not met. I will address each in turn.
- [19] Do the pleadings disclose a cause of action against the proposed defendants? The proposed defendants argue that there is clear evidence that there is no legal basis for any claim against the respondents. They rely on *Bouchanskaia v. Bayer Inc.* for the proposition that there may be cases in which the court could conclude at this stage that there could not be any merit to a plaintiff's claim. In my view the pleadings do disclose a cause of action. The threshold which the plaintiffs are required to meet is a low one, that is, quoting from *Brogaard v. Canada (Attorney General)* (2002), B.C.L.R. (4th) at 358:

It is beyond dispute that the court will refuse to certify an action on the basis that the pleadings do not disclose a cause of action only if it is plain and obvious that the plaintiffs cannot succeed. The test is similar to the onus on a defendant to strike out a statement of claim for failing to disclose a cause of action on an application pursuant to Rule 19(24) of the Rules of Court. However, on a certification application, the burden is on the plaintiffs to demonstrate affirmatively that a cause of action is properly pled. The threshold is a very low one.

While, as *Bouchanskaia* indicates, there may be cases in which the court could conclude at this stage that there could not be any merit to the plaintiff's claim, I am not able to reach that conclusion on the evidence before me.

- [20] Is there an identifiable class of two or more persons? The respondents argue that the plaintiffs have not tendered evidence that even one of the representative plaintiffs has a cause of action against the proposed defendants. They argue again that there is no evidence that they have lent money at a criminal rate of interest. This argument mischaracterizes the plaintiffs' claim. On the plaintiffs' claim as pled, there is clearly a cause of class of two or more persons that has a claim against the proposed defendants. The plaintiffs' claim is that the broker's fees paid by class members were, in part, paid to the proposed defendants to ensure that they received an acceptable rate of return. The plaintiffs claim that the payment of the broker's fees results in payment by class members of interest at a criminal rate on the class members' loans. Part of that criminal interest has been paid to the proposed defendants through payment to them of broker's fees. They have received a partial payment of interest at a criminal rate contrary to s. 347(1)(b) of the Criminal Code. The plaintiffs do not claim that the proposed defendants themselves directly charged interest at a criminal rate.

- [21] Do the claims raise common issues? Here the proposed defendants argue that, as in *MacKinnon v. National Money Mart*, findings of fact and legal analysis applicable with respect to one defendant would have little or no application to other borrowers and other lenders. They say that, as in *MacKinnon*, the issues here are not common issues, the findings of fact, and legal analysis relevant to the assessment of the liability of The Cash Store or other defendants would have no application to the proposed defendants. Once again they make various arguments with respect to the evidence before the court. They say that there is no evidence that they received broker's fees, no evidence that they received interest at a criminal rate, no evidence that the brokerage fees have linked any retention payments received by them, and no evidence to support the claim of conspiracy.
- [22] Here I am satisfied that the claims do raise common issues. This case can be distinguished from *MacKinnon v. National Money Mart*, as I indicated in my reasons of August 26th, 2005. In *MacKinnon* there were more than 20 defendants operating 18 businesses with many different business models. Each defendant charged fees which may have little or nothing in common with the fees charged by another lender. An individual claimant may have borrowed from only one defendant lender. The court's conclusion with respect to one fee of one lender may have no application beyond a particular borrower and lender.
- [23] By contrast, here we are concerned with only one business model. The thrust of the plaintiffs' claim is that The Cash Store and Rentcash have set up a business where the borrower pays brokerage fees, cash card fees, debit fees and interest to obtain a loan. Each of the claimants will have borrowed following the same Cash Store standard terms and procedures; each will have paid the same or most of the same fees; each will have a claim that the fees which they paid for their loan were unlawful interest. With respect to the proposed defendants, each claimant will also have a claim that the proposed defendants being the lenders received part of a criminal rate of interest, was unjustly enriched, conspired, et cetera. We are dealing with one business model and the answers to the proposed common questions will have application to the proposed defendants. While not every common issue will necessarily have application to every defendant, as I indicated in my earlier reasons, there is no requirement that each common issue must be relevant to each defendant.
- [24] With respect to the evidentiary basis, the plaintiffs are required to adduce evidence for certification requirements, as set out in s. 4 of the Act. A plaintiff is not required to provide evidence to prove all of the allegations in the statement of claim. Certification is not a determination of the merits of the action (*Holick v. Toronto (City)*, 2001 SCC 68). The plaintiffs have adduced evidence to meet this burden. The plaintiffs are not required to provide evidence to prove all of the allegations in the statement of claim. The evidence here is sufficient to establish a rational connection between the class and the common issues asserted against the proposed defendants. The claims are not ridiculous or incapable of proof. It is not plain and obvious that the claims cannot succeed.

- [25] Is a class proceeding the preferable procedure? Here the court must consider the factors listed in s. 4(2) of the Class Proceedings Act and consider all relevant matters, including whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members, whether a significant number of the members of the class has a valid interest in individually controlling the prosecution of separate actions, whether the class proceeding would involve claims that are or have been the subject of any other proceedings, whether other means of resolving the claims are less practical or less efficient, and whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means. These issues were, of course, considered on the original certification application and their determination is equally applicable here.
- [26] The proposed defendants argue that the issues are not common and therefore adding the proposed defendants as defendants to the class proceeding would not result in a fair and efficient resolution of the issues. As I have indicated above, here we are dealing with only one business model. In my view, determining these issues in one proceeding rather than leaving the issues regarding the proposed defendants to a later action is both fair and efficient. There would be substantial overlap of evidence and argument between the two actions. It is much more fair and efficient and a better use of judicial resources to conclude the matter in one action rather than in separate actions.
- [27] Are the plaintiffs suitable representatives? I have already approved of the representative plaintiffs. Although Mr. Bodnar and Mr. Bartolome have only borrowed loans from one Cash Store location which names one of the proposed defendants in their contractual documents, this does not preclude them from representing class members whose class and loans name other lenders. The claims made are generic in the sense that the same type of claim is made against each lender. There is no basis to conclude that plaintiffs cannot actively represent the claims of the class members.
- [28] The defendants argue that the plaintiffs have not produced a plan setting out how they intend to proceed with their claim against the proposed defendants and specifically no plan as to how to trace the retention payments and to prove their claim that the proposed defendants received brokerage fees. They say that the gap in the applicants' plan is fatal to the certification application.
- [29] The plan which the plaintiffs propose to use is the same plan which was certified on August 26th, 2005. That plan is sufficient to address the addition of the proposed defendants. With respect to the defendants' argument that it does not address tracing, retention payments and proving that the proposed defendants received broker fees, the plan adequately addresses the issue in that it proposes that common issues will be addressed at the summary trial proceeding and, to the extent that the court determines that the common issues cannot be determined on a summary trial that the court shall fix at a trial for common issues, that if any or all of the common issues are resolved in favour of the class, that the parties will convene for argument pursuant to s. 27 of the Class Proceedings Act to determine the

appropriate course for remaining issues. Therefore, the applications are granted.

Brown J.

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Prepared on 29 October 2026 · Esheria