

CANADA / JUDGMENT

Bodnar v. The Cash Store Inc.

2011 BCSC 667

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 667 Bodnar v. The Cash Store Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bodnar v. The Cash Store Inc.,

2011 BCSC 667

Date: 20110524

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 S. Griffin

Reasons for Judgment -

Application to Change Settlement Administrator

In Chambers

Counsel for the Plaintiff:

Paul R. Bennett

Mark W. Mounteer

Counsel for The Cash Store Inc.:

Timothy Pinos

Susan M. Precious

Place and Date of Hearing:

Vancouver, B.C.

March 16, 2011

Place and Date of Judgment:

Vancouver, B.C.

May 24, 2011

Introduction

- [1] Following a Court-approved settlement, the plaintiffs in this class proceeding complain that The Cash Store Inc. ("Cash Store") has failed to properly fulfill its obligations to administer the settlement in accordance with the settlement terms. The plaintiffs accordingly seek the Court's intervention.

Background

- [2] This is a class proceeding, in which the plaintiff advanced a claim that the defendants had charged and collected illegal fees in connection with loans made to members of the class ("Class Members"). These loans are often referred to as "payday loans".
- [3] On February 2, 2010, this Court approved the settlement of this Action by Order of Dickson J. (the "Approval Order"). At the same time, this Court approved the settlement of David Wournell v. 1152919 Alberta Ltd. and others, Supreme Court of British Columbia, Vancouver Registry No. S081994 (the "Wournell Action"). These reasons are indexed at 2010 BCSC 145.

- [4] The settlement approved by the Court was on the terms set out and agreed to by the parties in an Amended Settlement Agreement and Release, dated May 12, 2009 (the "Approved Settlement Agreement").
- [5] Pursuant to the Approved Settlement Agreement and the Orders of this Court, the Cash Store was appointed as the Settlement Administrator.
- [6] In short, the Settlement Administrator's role under the Approved Settlement Agreement is to "disseminate Class Notice, review, evaluate, process and pay claims made by the Settlement Class Members" (clause 1 (r) of the Approved Settlement Agreement). All costs of administration of the settlement are to be borne by three corporate defendants.
- [7] An independent third party was to be selected by mutual agreement of the parties to review the claims process (clause 33 of the Approved Settlement Agreement). The Claims Process Reviewer's costs were to be borne by three corporate defendants, but were to be capped (clause 35). The Claims Process Reviewer was to prepare a report and file it with the Court when the review of the claims process was complete (clause 36).
- [8] By the time of the Approval Order, the parties had agreed to appoint Epiq Systems Inc. ("Epiq") as the Claims Process Reviewer, and this was made a term of the Approval Order.
- [9] Epiq's function would be to audit the administration of the settlement. Based on Epiq's report and the completion of the claims process, the defendants could apply to have the action and related actions dismissed, with prejudice (clause 48).
- [10] There was also a class proceeding in Ontario subject to a court-approved settlement (the "Ontario Settlement"). The terms of the Ontario Settlement were different than the terms of the Approved Settlement Agreement.
- [11] Some confusion arose as to whether a B.C. claimant might participate in the Ontario Settlement. Without needing to examine that in detail, it is sufficient to observe that as a result of these complications, the parties in the within proceeding agreed to an amendment to the Approved Settlement Agreement, by way of an Amending Agreement, dated November 12, 2009 (the "First Amending Agreement").

The Parties' Positions

- [12] The Cash Store has distributed Class Notice, and claims have been made by Class Members. However, the plaintiffs submit that the Cash Store has not acted competently, or in good faith, in its role as Settlement Administrator in processing these claims.
- [13] The plaintiffs seek an order removing the Cash Store as Settlement Administrator and substitution of Epiq, or another independent party, in its place.
- [14] The plaintiffs seek other related orders, all with the stated goal of seeing that the settlement is properly administered. For example, the Cash Store has taken the position that the plaintiffs are not entitled to review a full scope of documentation and evidence relied on by

it in processing or denying claims, nor is Epiq entitled to share this information with the plaintiffs. Class counsel have already found errors in the Cash Store's settlement administration and so the plaintiffs wish to have full access to this information so that class counsel can properly monitor what happens with the settlement administration.

- [15] The Cash Store admits to having made some mistakes in administering the settlement but it denies that it has acted in bad faith. It also says that there are some legitimate differences of opinion as to interpretation of the Approved Settlement Agreement which this Court should resolve, namely:
1. can Cash Store revise the database of accepted claims to exclude claimants to whom it has already given notice that it has accepted their claims?
 2. can Cash Store take into account certain fees charged to class members as Price Protection Plan (PPP) or cash card charges, when calculating the offset amount that the Cash Store does not have to include in class members' claims?
- [16] The Cash Store opposes removing it as Settlement Administrator, and argues this would effectively be amending the Approved Settlement Agreement which it says the Court does not have jurisdiction to do.
- [17] However, the Cash Store does submit that it would be willing to work more closely with Epiq and take its guidance from Epiq on how Cash Store can better fulfill its function as Settlement Administrator.

Problems in Administering the Settlement

- [18] The Approval Order approved of the timelines set out in the Approved Settlement Agreement for Cash Store to give notice to the settlement class; for class members to make claims; and for Cash Store to advise claimants of the outcome of their claims, the latter of which was to occur by October 5, 2010.
- [19] Cash Store says that it received and processed claims, and then sent out notice of entitlement letters to Class Members by October 15, 2010 (the "Entitlement Letters").
- [20] After the Entitlement Letters were sent, plaintiffs' counsel received emails and telephone calls from Class Members complaining of errors in the calculations of their claims set out in the Entitlement Letters. Based on their conversations with those Class Members, class counsel came to believe that several significant errors had been made by the Cash Store in its role as Settlement Administrator, resulting in significant under-valuation of claims.
- [21] Class counsel immediately contacted counsel for the Cash Store, by email message on October 19, 2010. This email message alerted the Cash Store to the problem of its significant under-valuation of claims.

- [22] Class counsel also pointed out to the Cash Store that the Entitlement Letter was worded badly and could confuse class members; and that the Cash Store had apparently disconnected its answering machine, making it impossible for class members to file appeals (the Cash Store refutes that this happened).
- [23] Ultimately, on October 27, 2010, the Cash Store admitted that it had used the wrong formula in calculating individual members' entitlements. The Cash Store had used a formula that was based on the Ontario Settlement, rather than the formula based on the settlement of the within action. This mistake substantially under-valued B.C. class members' claims, such that they would only receive approximately 13 percent of what they were entitled to receive.
- [24] Class counsel asked to be involved and to have Epiq involved in figuring out how to rectify the errors. As part of its investigation of errors, class counsel asked for and received from Epiq the Cash Store database that had been used by Cash Store to send out entitlement letters in October 2010 (the "October Database"). This database identified those claimants who had received an Entitlement Letter advising them their claim had been approved (although the Entitlement Letter advised of an incorrect and under-valued approved claim).
- [25] It has to be kept in mind that class members had a limited opportunity to appeal their notices of entitlement -- they were required to do so by November 15, 2010. Not being satisfied that the mistakes were being dealt with by the Cash Store in a timely way, class counsel prepared an application for directions from this Court, and included in the relief sought an order removing the Cash Store as Settlement Administrator.
- [26] The affidavit evidence prepared and delivered by class counsel in support of their application set out in detail the mistakes they had encountered in the Settlement Administration, including not only the calculation errors, but the fact that people who claimed to have provided claim letters to the Cash Store had received no notice of entitlement.
- [27] On this latter point, class counsel deposed that they have been contacted by more than 40 class members who advised them that they had filed a claim in the settlement, but had not received an entitlement letter. The affidavit evidence from class counsel attached confirming courier receipts, e-mail exchanges, and fax confirmations to support these assertions. Yet these people were not included in the October Database and had not received any acknowledgement of the claims they had made.
- [28] Furthermore, the affidavit evidence of class counsel set out their belief that the methodology used by the Settlement Administrator to calculate the Class Members' entitlement of interest was rounded down to the lowest half year, and had resulted in an understatement of the total interest due to Class Members by approximately 10 percent.

- [29] In addition, class counsel set out in his affidavit that a number of Class Members had received multiple entitlement letters, each with a different refund amount. These letters were inconsistent. For example, one Class Member received one letter stating he was entitled to a refund, and then another letter stating he would receive nothing because of an outstanding loan.
- [30] An additional concern raised by class counsel was that the Cash Store had also overlooked claims of Class Members who, at the Cash Store's erroneous instigation, had made claims in the Ontario Settlement. These Class Members were to be deemed to have been part of the B.C. Settlement. However, the October Database did not include some of these claimants.
- [31] In response, the Cash Store provided an as yet unsworn affidavit of William Johnson to class counsel, advising that it would be sworn in substantially the same form and filed shortly (although apparently it never was). That unsworn affidavit stated that Cash Store had received claims forms from in excess of 6,300 claimants, of which approximately 5,400 were eligible for benefits. Admitting to the calculation errors, the unsworn affidavit stated at paragraph 33 that Cash Store would undertake the following processes to correct the errors:
- (a) Eliminate the prior calculations from its systems, and the vouchers that were already generated in partial payment of the claims;
 - (b) Modification of the formula in the program;
 - (c) Regenerate the calculations and the vouchers;
 - (d) Test and verify the results; and
 - (e) Regenerate the entitlement letters that must be sent to all claimants with the recalculated amounts.
- [32] The unsworn affidavit of Mr. Johnson also stated that the Cash Store would attempt to address the other errors.
- [33] The plaintiffs agreed to adjourn their application for directions based on the Cash Store's representations that it would address the problems in a timely way, according to agreed deadlines. Epiq was to be involved in reviewing the Cash Store's re-calculation of Class Member entitlements, including any set off amounts and its review of the missing claims. As well, the parties were to attempt to reach agreement as to the form of communication to be sent out to Class Members concerning the errors made and their revised entitlements.
- [34] This led to a period of time where class counsel sought assurances that the Cash Store was addressing the problems, and they received those assurances verbally and by email. Class counsel was led to believe that the Cash Store was re-calculating and thereby increasing the amounts payable on those claims already determined to be eligible, and adding those claims where the claimants asserted they had made a claim within the required time period, but their claims had been overlooked by the Cash Store.

- [35] The Cash Store did not meet any of the deadlines it had agreed to meet to address the problems with its administration of the settlement.
- [36] Class counsel became concerned about the Cash Store's slow progress and kept pressing the Cash Store to respond, suggesting that there was no good reason the re-calculations should take so long.
- [37] The Cash Store's counsel replied in part by asserting that the Cash Store did not have in place the same resources as it had in place when it initially processed the claims.
- [38] Ultimately, class counsel were so concerned about the delays that they decided they would re-visit their application to this Court for directions. The Cash Store responded and the two sides came to an agreement which they put before me on February 17, 2011, the "Second Further Amending Agreement dated for reference February 16, 2011" (the "Second Amending Agreement"). By consent order, this Second Amending Agreement was approved by the Court on February 17, 2011.
- [39] The Second Amending Agreement appeared to address the errors which class counsel had been pressing the Cash Store to correct. It provided that claimants who asserted by way of an appeal form that they made a claim during the claims period, would be deemed to have made a claim in time. In other words, it allowed for the expansion of claims made to include additional claims where it was alleged that they had been overlooked.
- [40] The second matter the Second Amending Agreement addressed was the Cash Store's provision of a corrected settlement database to Epiq by February 25, 2011 and provision of a random selection of records so that the calculations of entitlements and the inclusion of claimants could be tested by Epiq. If the Cash Store determined that it would be unable to meet the deadline, then Epiq could attend at the Cash Store's office, at the Cash Store's cost, until the database was provided.
- [41] The database was not provided on the agreed upon date.
- [42] The database was provided to Epiq sometime around February 27, 2011 (the "February Database"). The Cash Store refused to provide the February Database to class counsel and refused to consent to Epiq sharing it with class counsel.
- [43] Class counsel were given a small sample of calculated entitlements from the February Database. From this sample, class counsel immediately suspected something was wrong and so wrote to the Cash Store's counsel, seeking answers.
- [44] In an email message dated February 28, 2011, class counsel raised the following concerns about the February Database with counsel for the Cash Store and with Epiq:

1. The total claims according to the October Database, which was admittedly under-inclusive, were \$13,591,825.55. The calculations provided by the Cash Store with respect to the February Database indicated that the total claims were now lower. Counsel stated the obvious point that: "[the] amount should be higher now that the missing claims are added in".
2. The information provided did not include sufficient documentation to enable class counsel to review the accuracy of Cash Store's calculation of offsets. Based on some examples, class counsel was of the view that the offset amounts looked higher than they should have been. In this regard, he raised the point that the Cash Store was not entitled to offset any fees, including cash card fees, in the calculations, nor insurance fees, nor NSF fees.

[45] On February 28, 2011, the Cash Store's counsel advised class counsel for the first time that they had decided to remove previously approved claims from the database. They gave no explanation as to why they did so. He wrote in an email message to class counsel:

[I] can advise that the change in the settlement database arises as a consequence of my client's review of the claims to ensure qualified claimants were included and to correct the database where persons were incorrectly included.

[46] Not only did the Cash Store refuse to provide class counsel with a copy of the February Database, it demanded return of the October Database.

[47] Ultimately, on March 2, 2011, class counsel learned that while 425 new claimants were added to the database since the Entitlement Letters were sent (addressing the problem of the Cash Store's failure to include in the October Database all claims made), Cash Store had then removed 876 claimants from the February Database. In other words, 876 claimants who had been part of the October Database and had received Entitlement Letters approving their claim, were now said by the Cash Store to be disentitled to any claim.

[48] Thus, while the problem with the October Database was the under-inclusion and under-valuation of claims, which was supposed to be the problem that the Cash Store was addressing in the several months since October, by February 2011 Cash Store managed to create a new database with an even smaller number of accepted claims, all the while refusing to provide class counsel with details as to how it had reached the new conclusions to reject claims that it had once approved.

[49] Class counsel asserts the following points in relation to the Cash Store's February Database, that:

- (a) the Cash Store has acted improperly in removing claims which it had previously approved;
- (b) the Cash Store has failed to take reasonable steps to cross-reference loans taken by class members where the class member's loan applications involved slight variations in name (for example, "Bill" versus "William");

- (c) the Cash Store has wrongly refused to provide information on those claimants whose claims have been denied, making it impossible for the Claims Process Reviewer to audit the correctness of these denials;
- (d) in calculating entitlements, the Cash Store has wrongly deducted amounts it is not permitted to deduct; and,
- (e) the Cash Store has acted in bad faith and in any event, has been so incompetent in its handling of the administration of the settlement that neither the Class Members nor the Court can have any confidence in it.

Revision of the Cash Store's Database to Exclude Claims Previously Approved

- [50] Dealing with the first point, the issue is whether Cash Store, after approving claims in the October Database and sending out Entitlement Letters to those claimants, can later change its mind and deny some of the same claimants their claims, which is what it seeks to do in excluding 876 previously approved claimants from the February Database.
- [51] The Approved Settlement Agreement sets out the mechanics for making and approving Class Members' claims. Clause 30 of the Approved Settlement Agreement provides:

Settlement Class Members who wish to make a claim must complete, sign and submit a Claim Form in the form attached as Schedule F to the Settlement Administrator within the Claims Period, together with a copy of the same Identification Document that was provided by the Settlement Class Member when he or she applied for the Class Loan, or the current replacement of that Identification Document. If the Settlement Class Member provides a form of Identification Document that is different than the form of Identification Document provided at the time of the Class Loan, the Settlement Administrator will either:

- (a) accept the claim if the Settlement Administrator is satisfied that the claimant is the same person who took the Class Loan in relation to which a claim is being made; or
- (b) advise the Settlement Class Member of the original form of Identification Document required to confirm identification.

[***Bold italics in original.***]

- [52] The Cash Store notified those Class Members who were part of the October Database that it had accepted their claims. It did so by way of the Entitlement Letter identifying that claims were approved. In doing so, the Cash Store had determined, pursuant to clause 30(a) of the Approved Settlement Agreement, that it was "satisfied that the claimant is the same person who took the Class Loan in relation to which a claim is being made". Thus, class members who received the Entitlement Letter stating that their claim was approved were in effect given notice that they had met all the requirements under the Approved Settlement Agreement for making a claim.

[53] Prior to the hearing of this application, the Cash Store did not explain to class counsel the basis for excluding previously-accepted claims from the February Database.

[54] However, in an affidavit made on March 14, 2011, Mr. Johnson, on behalf of the Cash Store, explained Cash Store's position. He asserted that once errors were found in the initial calculation of entitlements by under-inclusion of claims, "and in light of Class Counsel's close scrutiny of the settlement administration, Cash Store committed to ensuring an accurate accounting of settlement benefits in the revised database". He explained that in effect the Cash Store decided to be more particular about the identification documents provided by claimants, and so had gone back to exclude claimants who did not provide the same form of identification document as provided at the time they took out their loans.

[55] Mr. Johnson stated in his affidavit as follows:

81. In the course of this review it was determined that 876 of the claimants had not provided the form of identification that they had provided to Cash Store at the time they acquired their original loan, as required by paragraph 30 of the Settlement Agreement.
82. Accordingly, Cash Store has not at this time included them in the Settlement Database, but instead is corresponding with those claimants in accordance with paragraph 30(b) to advise them of the correct ID required. Attached hereto and marked as Exhibit "C" is a true copy of the letter Cash Store will be sending to these claimants.

[Bold in original.]

[56] Mr. Johnson went on to assert in his affidavit that "it would be unfair to Cash Store" to require Cash Store to add individuals to the database while preventing Cash Store from excluding persons from that database where they did not advance a claim in accordance with the terms of the Approved Settlement Agreement.

[57] Unfortunately, Mr. Johnson's evidence as to why Cash Store excluded previously-included claims reveals an attitude on the part of the Cash Store which lends some force to class counsel's assertions that the Cash Store is not an impartial and fair settlement administrator. Cash Store's evidence suggests two propositions: first, that class counsel's rigour in checking the administration of claims motivated Cash Store to be vigilant in reviewing the eligibility of previously-approved claims; and second, that it would be unfair to require Cash Store to acknowledge under-included valid claims but to not allow Cash Store to go back and find reasons to exclude over-included claims. Both assertions are clearly disingenuous and without merit.

[58] First, class counsel were of course not interested in having previously approved claims now removed from the database. They were only interested in making sure that claims that had wrongly been excluded were added to the database.

- [59] Second, the suggestion by the Cash Store that it could exclude previously-approved claimants who did not provide the same identification documents as at the time of their original loans is an obvious misreading of subparagraph 30(b) of the Approved Settlement Agreement, and ignores subparagraph 30(a). The fact is that when the Cash Store initially accepted claims and provided Entitlement Letters, listing the approved claims in the October Database, the Cash Store must have made a determination that it was "satisfied that the claimant is the same person who took the cash loan in relation to which a claim is being made" pursuant to paragraph 30(a) of the Approved Settlement Agreement. The Cash Store is only entitled, pursuant to paragraph 40 of the Approved Settlement Agreement, to ask for additional documentation from a claimant if it is not satisfied as to the identity of the claimant. Clearly, Cash Store originally concluded that it was satisfied that the claimants were the same persons who took out the cash loans in relation to which their claims were being made, when it sent Entitlement Letters out to people accepting claims.
- [60] The Approved Settlement Agreement does not allow the Cash Store to appeal itself and revoke its own approval of claims. I conclude that Cash Store is not entitled, under the Approved Settlement Agreement, to revise the database of accepted claims to exclude claimants to whom it has already given notice, by way of the Entitlement Letters, that it has accepted their claims.
- [61] Thus, the Cash Store acted wrongly and contrary to its duties as Settlement Administrator in removing 876 claimants from the October Database, when it prepared the February Database. All of the claimants who were originally approved and formed part of the October Database of approved claims should be included in the February Database of approved claims.

Cash Store's Failure to Take Reasonable Steps to Cross-Reference Loans Taken by Class Members

- [62] The loan applications required the applicant to fill out his or her social insurance number (SIN). The forms also included other information, such as current employer, bank, and references. This required information was in addition to the loan applicant's name, address, date of birth, and typically, driver's licence number.
- [63] A typical Cash Store customer might have made several loan applications over time. In doing so, they may have made slight variations in some of the information they provided from application to application, or there may have been slight variations in the information taken down by a Cash Store employee.

- [64] Class counsel has pointed to a number of examples where Class Members had slight variations in the personal information they provided when they applied for loans, but also had either the same or similar name or address, and the same birth date, SIN, or driver's license number on their loan applications, yet the Cash Store has not recognized these as loans to the same person. Class counsel say that the Cash Store has not taken reasonable steps to cross-reference loans to the same persons.
- [65] A typical example will be someone with the same last name being referred to on one of his loan applications as "Bill" and on another application as "William" but with the same address, SIN, and driver's licence numbers on both applications. Another example will be where the person's address might have used the word "Street" on one application and shortened this to "St." on another.
- [66] In processing claims under the settlement, the Cash Store appears to have not allowed for these slight variations in information. Class counsel have found many examples where the Cash Store has failed to recognize that a single claimant had more than one loan and thus should be entitled to a bigger claim.
- [67] From a sample of twenty such individuals who had more than one loan application but whose claims were not allowed with respect to the totality of their loan applications, class counsel has calculated that approximately \$69,000 in broker fees have been excluded from the claims. This sample contains sufficient information from which I can and do conclude that it ought to have been relatively easy for Cash Store to cross-reference the known information and confirm that the person was the same person and had more than one loan, despite slight differences in other information on the loan application form.
- [68] Class counsel have raised this issue with the Cash Store numerous times and I conclude on the evidence that the Cash Store has not made a serious effort to address it.
- [69] I am satisfied that Cash Store has failed to take reasonable steps to cross-reference loans taken by Class Members where the Class Member's loan applications involved slight variations in personal information, whether it be a slight variation in name, address, or other information. This has resulted in an understatement by Cash Store in the calculation of some Class Member's claims.

Cash Store's Refusal to Provide Information on Those Claimants Whose Claims Have Been Denied

- [70] In the February Database, the Cash Store has refused to provide information on those claimants whose claims it has denied.
- [71] I accept the submissions of the plaintiffs that failure to provide the information impedes an audit of the correctness of these denied claims. This information should be available to the Claims Process Reviewer and to class counsel.

- [72] Cash Store's refusal to provide this information is an indication that the Cash Store is not prepared to be transparent about how it has administered the settlement. It reflects poorly on the Cash Store's suitability to administer the settlement.

Cash Store's Deduction of Amounts it is Not Permitted to Deduct

- [73] The Approved Settlement Agreement sets out the explanation of how a Class Member's claim is to be calculated, at paragraph 23:

Each Settlement Class Member will be entitled to claim from the Settlement Fund an amount calculated as the total amount of Broker Fees paid by the Settlement Class Member in respect of that Settlement Class Member's Class Loans, plus interest at 3.5% per annum on those Broker Fees from the date the Broker Fees were paid running to the first day of the Claims Period, compounded semi-annually (collectively, the "Claim"), from which Claim certain deductions in relation to outstanding loans and Approved Legal Expenses will be made as set out below.

[Bold in original.]

- [74] The Approved Settlement Agreement then sets out a formula for calculating the net settlement benefit to be paid to Class Members, once approved legal expenses and the total of number of claims made is calculated.
- [75] Clause 25 of the Approved Settlement Agreement provides that the Settlement Administrator may apply any "Outstanding Principal" owed by the settlement Class Member against the Class Member's net settlement benefit, according to a certain formula. "Outstanding Principal" is defined in clause 1(n) of the Approved Settlement Agreement as follows:

"Outstanding Principal" means the amount of any Short-term Loan actually received by a Settlement Class Member which has not been repaid, net of any Broker Fees or other fees paid by the Settlement Class Member upon receipt or extension of said loan.

[Bold in original.]

- [76] In October 2010, when the Entitlement Letters were first sent out, class counsel wrote to counsel for the Cash Store advising that the Cash Store had made errors in its calculations of the amounts that it had offset for unpaid loans, i.e. the Outstanding Principal.
- [77] It was not until February 2011 that the Cash Store provided information that indicated it was deducting certain fees in its calculation of the offset for "Outstanding Principal", namely a fee in relation to insurance, known as the price protection plan (PPP), and fees in relation to cash cards.

- [78] The Cash Store admits that it has taken these fees into account in calculating the offsets to a Class Member's claim under the Approved Settlement Agreement. The Cash Store says that this is a legitimate issue of interpretation of the Approved Settlement Agreement, and seeks the Court's ruling on the proper interpretation of the agreement. It says it is entitled to deduct these fees because these were fees that the Cash Store was collecting for third party providers.
- [79] In my view, the definition of "Outstanding Principal" at clause 1(n) of the Approved Settlement Agreement makes it abundantly clear that no fees paid by any settlement Class Member may be deducted. It does not matter whether the fee was collected by Cash Store but related to a service provided by some third party. The definition refers to any "fees paid" and is not limited to some smaller category of "fees received by Cash Store for its own benefit only".
- [80] The Cash Store knew when it negotiated and entered into the Approved Settlement Agreement that it had collected a variety of fees from customers. If the Cash Store wished to distinguish between types of fees in the calculation of Class Members' claims, then it could have sought to make these distinctions in the language of the agreement. It did not do so. All that may be deducted by the Cash Store is the Outstanding Principal, meaning the amount of any short-term loan actually received by a settlement Class Member which has not been repaid, net of any broker fees "or other fees paid" by the settlement Class Member. This language could not be clearer, and surely was drafted so broadly so as to avoid any dispute as to what type of fee might be offset.
- [81] I conclude that it is not appropriate for the Cash Store to deduct PPP fees or cash card fees from the calculation of Class Members' claims.
- [82] I also observe that Cash Store chose to deduct these fees without disclosing these deductions in its initial information produced to class counsel or Epiq. It seems to me indicative of an attitude on the part of the Cash Store that only if class counsel persist in investigating what the Cash Store has done, will Cash Store eventually disclose information revealing that it has attempted to reduce the size of the Class Members' claims. It should have been evident to the Cash Store that at best there was an issue as to whether it could deduct these fees, and it ought not to have done so without either agreement of class counsel or a court order. The Cash Store did not handle this issue in a straightforward manner.

Bad Faith on the Part of the Cash Store

- [83] Dealing with the allegation of bad faith, class counsel assert that the reason for the Cash Store's numerous failures to properly administer the settlement has to do with a formula in the Approved Settlement Agreement that will allow the Cash Store a substantial cash reversion if the total claims accepted fall below a certain threshold.

- [84] In summary, the Settlement Fund pursuant to the Approved Settlement Agreement, and as determined by KPMG, was set at \$18,799,807.33. The net Settlement Fund after deduction of the Approved Legal Expenses (fees, disbursements and tax) of \$6,436,526.72 amounts to \$12,363,280.61, which for ease of reference I will describe as the "Threshold Amount".
- [85] The Amended Settlement Agreement provides two different methods of calculating a Class Member's refund depending on the total claims made in the Settlement:
- (a) if the total quantum of claims made is less than the Threshold Amount, then the Class Members together bear a share of the Approved Legal Expenses; and the Cash Store is entitled to a reversionary amount of the balance remaining in the Settlement Fund ("Reversionary Interest"); but
 - (b) if the total quantum of claims made exceeds the Threshold Amount, then each Class Member receives more than under (a) above, as they each receive a pro-rata share of the Settlement Fund remaining after payment of the Approved Legal Expenses. No Reversionary Interest will remain to be paid to the Cash Store.
- [86] The plaintiffs submit that the motive for the Cash Store seeking to disentitle claims, or undervalue claims, was so that the total claims would be below the Threshold Amount and the Cash Store would obtain a substantial Reversionary Interest.
- [87] When the Cash Store sent Entitlement Letters to claimants based on the October Database, the miscalculations by the Cash Store meant that the claims were below the Threshold Amount, and would have resulted in the Cash Store obtaining a Reversionary Interest in the millions of dollars under the first method of calculation of claims if no one had raised the alarm about the miscalculations.
- [88] However, if the calculations in the Entitlement Letters based on the October Database had been correct, then it was clear that the total claims were well in excess of the Threshold Amount. The Class Members' claims would have been calculated under the second method and there would have been no Reversionary Interest going back to the Cash Store.
- [89] Once it was pointed out by class counsel in October 2010 that the Cash Store had erroneously calculated claims, the Cash Store undertook to properly calculate the claims. It was during this period of time, from October 2010 to February 2011, that it appears that the Cash Store worked to find ways to reduce the number and amount of the claims in the October Database. When it finally produced the February Database, it had calculated the total claims to be just narrowly under the Threshold Amount. Of course it did so by removing 876 claims from the database, and by its other improper handling of claims as noted above.

- [90] Class counsel says the inference is irresistible that the Cash Store was acting in bad faith in putting together the February Database so as to reduce claims below the Threshold Amount, thereby allowing it to obtain a Reversionary Interest of in excess of \$4.2 million. In other words, it cannot be a mere coincidence or mere negligence that the Cash Store under-included claims and under-valued claims so as to get the total claims just under the Threshold Amount.
- [91] Class counsel has made a compelling argument based on the circumstantial evidence that suggests that the Cash Store has acted in bad faith. Not only has the Cash Store deliberately attempted to exclude previously approved claims from the February Database, it has been exceptionally reluctant to disclose information that would allow class counsel to determine the correctness of these exclusions and to determine other under-valuations of claims.
- [92] I note that the plaintiffs have reserved the right to bring contempt of court proceedings against the Cash Store. I am reluctant to make bad faith findings on this application if it is not necessary to do so. It is sufficient for me on this application to find, and I do so, that the Cash Store has acted without the necessary degree of diligence and competence which it should have brought to bear to the role of Settlement Administrator. It has been extremely careless and cavalier in fulfilling its duties.
- [93] The affidavit evidence filed by Cash Store on this application suggests that Cash Store has not had the personnel it needed to devote to the job. The Affidavit of Mr. Steven Wu states that he is the person with primary responsibility for administration of the settlement but he says that the matter has been "extremely time consuming" and has imposed a "significant administrative burden" on his department. He identifies that he has faced "significant difficulty"...in administering the settlement". I read Mr. Wu's evidence as an admission that Cash Store is not up to the job it agreed to do when it accepted the Court's appointment as Settlement Administrator.
- [94] Simply put, it will now be very difficult for this Court, or Class Members, to have any confidence that the conclusion of the settlement administration will be properly handled by the Cash Store, given what has occurred to date. The Cash Store has not taken its obligations seriously and has not been forthright when questioned about its methods and calculations. On its own admissions it has made errors and has not assigned sufficient resources to administer the settlement. It has caused significant delay in the payment out of claims to Class Members and were it not for the diligence of class counsel, Class Members would have been deprived of their correct entitlement under the settlement and the Cash Store would have created a windfall for itself.
- [95] The plaintiffs seek removal of the Cash Store as Settlement Administrator. The Cash Store says that I do not have jurisdiction to make such an order. This leads me to the question of what is the scope of this Court's supervisory jurisdiction with respect to this class proceeding and settlement administration.

The Court's Supervisory Jurisdiction

- [96] There is little doubt that this Court has jurisdiction to supervise the administration of the settlement of this class proceeding.
- [97] The court has the jurisdiction to enforce any settlement of litigation: *Son v. Kim*, 2009 BCSC 776; Law and Equity Act, R.S.B.C. 1996, c. 253, s 10.
- [98] Supervising the administration of a settlement is consistent with the court's broad powers. The court's wide supervisory powers generally were the subject of comment by the Supreme Court of Canada in *Doucet-Boudreau v. Nova Scotia*, 2003 SCC 62 at paras. 71-72 in the context of Charter remedies:

In several different contexts, courts order remedies that involve their continuing involvement in the relations between the parties (see R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at paras. 1.260-1.490). Superior courts, which under the Judicature Acts possess the powers of common law courts and courts of equity, have "assumed active and even managerial roles in the exercise of their traditional equitable powers" (K. Roach, *Constitutional Remedies in Canada* (loose-leaf), at para. 13.60). A panoply of equitable remedies are now available to courts in support of the litigation process and the final adjudication of disputes. For example, prejudgment remedies developed in such cases as *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (C.A.), and *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55 (C.A.), involve the court in the preservation of evidence and the management of parties' assets prior to trial. In bankruptcy and receivership matters, courts may be called on to supervise fairly complex and ongoing commercial transactions relating to debtors' assets. Court-appointed receivers may report to and seek guidance from the courts and in some cases must seek the permission of the courts before disposing of property (see Bennett on *Receiverships* (2nd ed. 1999), at pp. 21-37, 443-45). Similarly, the courts' jurisdiction in respect of trusts and estates may sometimes entail detailed and continuing supervision and support of their administration (see D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at pp. 904-9; Oosterhoff on *Wills and Succession* (5th ed. 2001), at pp. 27-28). Courts may also retain an ongoing jurisdiction in family law cases to order alterations in maintenance payments or parenting arrangements as circumstances change. Finally, this Court has in the past remained seized of a matter so as to facilitate the implementation of constitutional language rights: see *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Re Manitoba Language Rights Order*, [1985] 2 S.C.R. 347; *Re Manitoba Language Rights Order*, [1990] 3 S.C.R. 1417; *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212. Lower courts have also retained jurisdiction in s. 23 cases: *British Columbia (Association des parents francophones) v. British Columbia* (1996), 139 D.L.R. (4th) 356 (B.C.S.C.), at p. 380; *Lavoie*, supra, at pp. 593-95; *Société des Acadiens du Nouveau-Brunswick Inc. v. Minority Language School Board No. 50* (1983), 48 N.B.R. (2d) 361 (Q.B.), at para. 109.

The difficulties of ongoing supervision of parties by the courts have sometimes been advanced as a reason that orders for specific performance and mandatory injunctions should not be awarded. Nonetheless, courts of equity have long accepted and overcome this difficulty of supervision where the situations demanded such remedies (see Sharpe, *supra*, at paras. 1.260-1.380; Attorney-General v. Birmingham, Tame, and Rea District Drainage Board, [1910] 1 Ch. 48 (C.A.), *aff'd* [1912] A.C. 788 (H.L.); Kennard v. Cory Brothers and Co., [1922] 1 Ch. 265, *aff'd* [1922] 2 Ch. 1 (C.A.)).

[99] A class proceeding may be added to the list of situations where the courts have traditionally exercised a supervisory role. The very nature of a class proceeding invokes the court's supervisory powers, due to the absence of the majority of the class members from active involvement in the proceeding.

[100] The Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA] confirms the court's broad supervisory power at s. 12:

The court may at any time make any order it considers appropriate respecting the conduct of the class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[101] As explained by the Ontario Court of Appeal in *Fantl v. Transamerica Life Canada*, 2009 ONCA 377 [Fantl], the court has a supervisory role from the beginning to the end of class proceedings, including in the implementation of a settlement. As held at para. 39:

The existence of the absent class members, among other factors, is the reason that the court's supervisory jurisdiction is engaged from the inception of an intended class proceeding. It continues throughout the "stages" of the proceeding until a final disposition, including the implementation of the administration of a settlement or, where applicable, a resolution of all individual issues.

[102] A class proceeding may not be settled without approval of the court on terms the court considers appropriate: s. 35 of the CPA.

[103] Here, one of the terms of settlement, approved by the Court, was the following term contained in the Approved Settlement Agreement at paragraph 55:

The Court shall retain continuing and exclusive jurisdiction over the Parties hereto, including the Plaintiffs and all Settlement Class Members, and over the administration and enforcement of the Settlement and the benefits to the Plaintiffs and Settlement Class Members hereunder, notwithstanding that the Related Actions may have been dismissed pursuant to paragraph 48 of this Agreement.

[104] This term was incorporated into the Approval Order approving the settlement, which also states in paragraph 18:

The parties shall be at liberty to apply for further directions with respect to any matters arising under the Agreement, over which this Court retains continuing jurisdiction.

[105] Also consistent with the court's ongoing supervisory role is clause 56 of the Approved Settlement Agreement:

Any disputes or controversies arising with respect to the interpretation, enforcement, or implementation of this Agreement must be made by motion to the Court.

[106] The question arises as to where the court's supervisory power ends.

[107] The Approved Settlement Agreement provides at paragraph 51:

This Agreement and its attachments shall constitute the entire Agreement of the Parties and shall not be subject to any change, modification, amendment, or addition without the express written consent of counsel on behalf of all Parties to the Agreement. This agreement supersedes and replaces all prior negotiations and proposed agreements, written or oral.

[108] Similar language was included in the class proceeding settlement agreement which was the subject of a decision of the Manitoba Court of Queen's Bench, *Gray v. Great-West Lifeco Inc.*, 2011 MBQB 13. There the settlement agreement provided that it could not be modified or amended except on consent of all parties, but the settlement agreement also provided that the court retained jurisdiction with respect to "implementation and enforcement" of the terms of the settlement agreement. The Court did not dispute that it had a supervisory function and jurisdiction over the implementation and administration of the settlement, citing the aforementioned proposition from *Fantl*. However, the Court held this power did not extend to altering the date for filing claims forms set by the settlement agreement as this would amount to amending the settlement agreement.

[109] However, the court's supervisory role must have some substance to it if it is to have any meaning or weight. It seems to me that while a court cannot vary or amend the material terms of a settlement without the agreement of the parties to the settlement, a court may vary the procedural or administrative aspects of the implementation of a settlement without such agreement where to do so would not change the ultimate liability of the payor defendants nor would it change the scope of the entitlements owing to class members under the terms of settlement.

[110] In my view, changing the person appointed as Settlement Administrator would not be an amendment to the material terms of the parties' contract, but would be in keeping with the parties' intentions to have the court supervise the settlement, as set out in the Approved Settlement Agreement.

[111] The definition of Settlement Administrator in the Approved Settlement Agreement is as follows:

- (r) "Settlement Administrator" means a person or group of persons employed by Cash Store designated by Cash Store, Rentcash and AB Co. to disseminate Class Notice, review, evaluate, process and pay claims made by the Settlement Class Members pursuant to this Settlement and to fulfill all other duties ascribed to the Settlement Administrator pursuant to this Agreement;

[Bold in original.]

- [112] What is significant about that definition of Settlement Administrator is that the parties agreed on what the job of the Settlement Administrator was (essentially processing claims), and did not see it as necessary to name who it was that might fulfill this role. It need only be a person or group of persons that the Cash Store employs.
- [113] The Approved Settlement Agreement anticipated that the Settlement Administrator would need to be approved by court order: see clause 3 of the Approved Settlement Agreement.
- [114] The form of Order that the parties agreed to, as referred to in clause 3 of the Approved Settlement Agreement, was attached as Schedule A to the agreement. The attached form of Order left blank the actual identity of the person to be appointed as the Settlement Administrator. This would suggest that the parties understood that the identity of the Settlement Administrator was not as critical as the role of that person, and the identity would need to be approved by the Court in its supervisory role.
- [115] By the time the Court did grant approval of the Approval Order, the form of which was agreed to by the parties, the Order stated at clause 13:

The Cash Store Inc. is appointed as the Settlement Administrator, pursuant to paragraph 1(r) of the Agreement.

- [116] There was no need for the parties to expressly have the Court appoint a Settlement Administrator, other than as recognition that the Settlement Administrator was to perform an important function that was subject to the Court's supervision. I conclude that the parties to the Approved Settlement Agreement recognized the importance of the Court's supervisory role and that the Court would need to be satisfied that the person named as Settlement Administrator was appropriate. The parties must therefore have equally recognized and accepted the fact that there might be consequences imposed by the Court if the Settlement Administrator failed to perform its functions properly.
- [117] The parties' understanding and intention that the Court might impose consequences if the Settlement Administrator failed in its duties, is in keeping with clause 55 of the Approved Settlement Agreement, whereby the parties agreed that the Court would retain "continuing and exclusive jurisdiction" over the parties and "over the administration and enforcement of the Settlement". Surely if the parties intended that jurisdiction, they intended it to have some substance, and must have intended that it would include the jurisdiction to remedy any mechanical or administrative problems with the settlement, including, if necessary, replacement of the Settlement Administrator.

- [118] A contrary interpretation would result in the situation where, if I was to conclude that the Settlement Administrator was incompetent and could not perform its intended function, I could not make an order replacing it. This conclusion would mean that in such a situation the Class Members would be left in the position of having to treat the settlement as repudiated or breached, and possibly having to start a new class action proceeding seeking remedies for such a repudiation or breach. This would be an absurd result and in my view, would be quite contrary to the goal of access to justice which is the overriding goal of class proceedings.
- [119] In my view, it was a necessary implied term of the Approved Settlement Agreement that if the Settlement Administrator failed to perform its function, the Court, in the exercise of its continued supervisory function, could substitute a different person or give directions to ensure that the settlement administration was carried out in accordance with the Approval Order and the settlement terms.
- [120] The evidence tendered by the Cash Store reveals its inability to validly carry out the administration of the settlement, hindering its ability to give effect to the bargain struck between the parties. The Cash Store could point to no prejudice if it was removed as Settlement Administrator. The Cash Store cannot reasonably assert that despite its inability to administer the settlement, its continuation as Settlement Administrator is paramount to the Class Members' right to monies owing under the agreement. The appointment of a new Settlement Administrator would not be a substantive amendment to the agreement. Indeed, such a change more accurately carries out what the parties agreed to: the fair, efficient and accurate resolution of valid claims.
- [121] I conclude that based on the circumstances in this case, I do have continuing supervisory jurisdiction to replace the Settlement Administrator. Such an order is part of the court's continuing jurisdiction over the administration and enforcement of the settlement.

Remedy

- [122] The applicant seeks an order that Cash Store be removed as Settlement Administrator and Epiq substituted in its place.
- [123] The Approved Settlement Agreement required the Cash Store to designate a person or a group of persons employed by it, to fulfill the duties of the Settlement Administrator. Clearly it was implied that the Cash Store would employ sufficient competent persons to fulfill these duties.
- [124] I conclude that the reference to persons "employed by" the Cash Store did not mean that these persons had to be Cash Store "employees", as they equally could be independent contractors hired by Cash Store to perform the services.

- [125] On the evidence reviewed above, I conclude that whoever Cash Store has employed, that person or those persons have not competently fulfilled the duties of the Settlement Administrator. Neither this Court nor Class Members can have any remaining confidence in the Cash Store's willingness and ability to competently fulfill the duties of Settlement Administrator.
- [126] The only person who has been put forward by the parties on this application as having the ability to fulfill the duties undertaken by Cash Store as Settlement Administrator, is Epiq. Epiq is willing to perform this function.
- [127] The Cash Store was unable to point to any prejudice to it that would be caused by substituting Epiq as Settlement Administrator.
- [128] I therefore consider it appropriate to remove Cash Store as Settlement Administrator, and substitute Epiq, by directing that the Cash Store employ Epiq as that person or group of persons required to fulfill the duties of Settlement Administrator, pursuant to clause 1(r) of the Approved Settlement Agreement.
- [129] At the same time, I direct that Cash Store cooperate with Epiq to the extent necessary to satisfy Epiq that it has all necessary information in order to ensure that the role of Settlement Administrator is properly fulfilled. The administration of this settlement has gone on too long and it is important that it be completed as soon as possible.
- [130] In this regard, I further order that:
- (1) Within 14 days of this Order, the Cash Store shall provide Epiq with:
 - (a) an updated settlement database, which shall include for each file the Class Member's drivers license number, SIN, and date of birth;
 - (b) all claims forms received;
 - (c) copies of any correspondence sent to Class Members;
 - (d) copies of any correspondence received from Class Members;
 - (e) any correspondence sent to employees of the Cash Store concerning the administration of the settlement;
 - (f) any documents or records relating to the acceptance or rejection of a claim; and
 - (g) any further records required by Epiq to perform the functions of Settlement Administrator, including any records required to enable Epiq to cross-reference multiple loan applications made by a single person.
 - (2) The Cash Store will provide to Epiq any other records requested by Epiq as soon as possible and no later than within seven days of any such request;

- (3) Within 14 days of this Order, Epiq will report to the Cash Store and class counsel as to the timeline it foresees is needed to complete the administration of the settlement; and if the parties cannot agree on these timelines, then the parties are to seek the further direction of this Court;
- (4) The cash portion of the settlement fund presently held in trust by the Cash Store shall be transferred to a designated Canadian agent of Epiq, in trust, such agent to be approved by class counsel or, failing approval, this Court;
- (5) Epiq shall send a letter to all claimants, in a form to be approved by the Court, setting out the events that have occurred since October 2010, and explaining any new processes or timelines to complete the administration of the settlement;
- (6) Epiq, in administration of the settlement, shall take such steps as it considers necessary to correct any under-inclusion of claims or under-valuation of claims by Cash Store, and in this regard, shall consider the errors in the Cash Store's processing of claims and failure to cross-reference claims and records, as reviewed in these Reasons for Judgment;
- (7) Epiq will not exclude any claims previously accepted by the Cash Store and will:
 - (a) include as claimants under the settlement all Class Members whose claims were accepted by the Cash Store pursuant to the October Database and any additional claimants accepted by the Cash Store pursuant to the February Database;
 - (b) limit any amount of set-off of Class Members' claims to the amount of the outstanding principal actually received by a Class Member, net of broker fees or any other fees paid by the Class Members, including net of PPP fees or cash card fees, as required by the Approval Order; and
 - (c) send out revised Entitlement Letters in a form approved by class counsel or as ordered by this Court;
- (8) Class counsel will be entitled to request and receive from Epiq or the Cash Store any and all information concerning the settlement administration, including any information or data received by Epiq from the Cash Store;
- (9) The fees of Epiq, as approved by class counsel in advance, shall be paid as a first charge on the cash portion of the settlement fund; and
- (10) The plaintiffs shall be at liberty to apply for a further order that:
 - (a) any costs paid to Epiq for its services as Settlement Administrator be reimbursed by the Cash Store;
 - (b) the costs of this application, and all other court proceedings required to enforce the settlement be awarded to the plaintiffs and payable by the Cash Store as special costs; and

- (c) seeks any other remedy arising out of the breach by the Cash Store of the terms of the Approval Order and Approved Settlement Agreement, including, but not limited to, a citation for contempt.

"S. Griffin, J."

The Honourable Madam Justice S. Griffin

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