TAB 9

Case Name:

Bodnar v. The Cash Store Inc.

Between
Andrew Bodnar and Jose Bartolome, plaintiffs, and
The Cash Store Inc., Rentcash Inc., All Trans Credit Union Ltd., and Card Capital Inc., defendants

[2005] B.C.J. No. 1904

2005 BCSC 1228

142 A.C.W.S. (3d) 30

67 W.C.B. (2d) 53

Vancouver Registry No. S041348

British Columbia Supreme Court
Vancouver, British Columbia

Brown J.

Heard: April 18 and 19, 2005.
Judgment: August 26, 2005.

(73 paras.)

Civil procedure -- Parties -- Class or representative actions -- Certification -- Common interests -- Representative plaintiff -- Disposition without trial -- Dismissal of action -- Time for applying -- Commercial law -- Consumer protection -- Loan transactions.

Application by Bodnar and Bartolome to certify their action as a class proceeding, and to be appointed representative plaintiffs. The defendants were the Cash Store, a business that provided money to customers on a short-term basis, All Trans Credit Union, the source of the funds, and Card Capital, the company providing cash cards Cash Store customers could use to obtain the funds they borrowed from ATM machines. The members of the proposed class of plaintiffs were residents of British Columbia who had borrowed money from any Cash Store location in the province and had been charged what was alleged to be a criminal rate of interest. They sought restitution of unlawful interest, damages for unlawful conspiracy and damages for unconscionable trade acts and practices. Bodnar obtained a $300 loan with a one-month term from the Cash Store, which he repaid in full after rolling it over for five months. He paid $470 in broker fees, $40 in interest, $12 in transaction fees and a $10 cash card fee. Bartolome obtained several short term loans from the Cash Store. Each time he

was charged a 22.54 percent broker fee and after the first loan, over $2 in transaction fees. An actuary gave an opinion that, including the broker and transaction fees as interest, the effective annual interest rate Cash Store was charging was over one million percent. He also gave the example of a loan advanced on October 28 for $104, repaid in full on November 7 for $105, which had an effective annual interest rate of more than 79 percent. Bodnar and Bartolome presented a plan for dealing with the individual entitlement of each proposed plaintiff after the common issues were settled. Cash Store had not provided an estimate of the number of potential plaintiffs, but disclosed it operated 22 locations in British Columbia, as well as more in other provinces. Two other class proceedings were proposed for Ontario and Alberta but had not yet been certified. All Trans moved for a dismissal of the action against it. The plaintiffs had not conducted examinations for discovery yet.

HELD: Application allowed. The action was certified as a class proceeding and Bodnar and Bartolome were appointed representative plaintiffs. The pleadings disclosed a reasonable cause of action. The class definition was not overly broad, even though it included persons who made no payments on their loans, because these persons would have paid broker fees. Card Capital and All Trans were not prejudiced because some potential plaintiffs did not use a cash card to obtain their loans, because there were very few of them. The potential plaintiffs shared a common interest in that they each borrowed money subject to the same terms and conditions, and presumably paid the same fees. It was not necessary for the Court to look into individual circumstances facing each plaintiff to determine the action. Individual actions would be impractical. The plan for dealing with the entitlement to compensation of each individual plaintiff was adequate. All Trans's application was adjourned pending discovery of documents and examination for discovery.

Statutes, Regulations and Rules Cited:

Business Practices and Consumer Protection Act, S.B.C. 204, c. 2, ss. 8, 8(3)(a), 8(3)(b), 8(3)(c), 8(3)(d), 105, 171

British Columbia Supreme Court Rules, Rules 18A

Class Proceedings Act, R.S.B.C. 1996, c. 50 , ss. 4, 4(1), 4(1)(e), 4(1)(e)(i), 4(1)(e)(iii), 4(2), 27(1)(b)

Criminal Code, R.S.C 1985, c. C-46, ss. 347, 347(1)

Trade Practice Act, R.S.B.C. 1996, c. 457, ss. 4, 22(1)

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Counsel for the Defendant Card Capital Inc.: R.J. Lesperance J.C. Halpin

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BROWN J.:--

INTRODUCTION

1 The plaintiffs apply to certify this proceeding as a class proceeding pursuant to s. 4 of the Class Proceedings Act, R.S.B.C. 1996, c. 50, and to be appointed as representative plaintiffs for the class proceeding. The proposed class is all residents of British Columbia who have borrowed money as a "payday loan" or a "title loan" from a Cash Store location and: (1) have repaid the loan and the standard "broker fee" charged by the Cash Store on the due date of the loan; (2) for loans advances prior to March 2004, have repaid those amounts within 157 days of the loan advance or the last extension ("rollover") of the loan; (3) for loans advanced subsequent to March 2004, have repaid those amounts within 173 days of the loan advance or the last rollover of the loan; or (4) have rolled over the loan at least five times; (collectively, the "class loans") as of the date notice is given to the class of this class proceeding.

2 The plaintiffs allege that the fees charged to them and to other members of the class for their loans contravene s. 347 of the Criminal Code, R.S.C. 1985 C-46, as interest is charged and paid at a criminal rate, a rate that exceeds 60% per annum.

3 The plaintiffs seek restitution of unlawful interest, damages for unlawful conspiracy, and damages for unconscionable trade acts and practices:

(a) a declaration that the broker fees charged by the Cash Store in relation to the class loans are interest within the meaning of and for the purpose of s. 347(1) of the Criminal Code;
(b) a declaration that the standard form loan agreements used by the Cash Store to advance the class loans are unlawful as contrary to s. 347(1) of the Criminal Code;
(c) a declaration that certain fees charged by Card Capital and All Trans and paid by class members in order to obtain the class loans (the "debit fee") are interest within the meaning of s. 347 of the Criminal Code;
(d) a declaration that all unlawful interest paid by the class members in respect of the class loans, and received by the defendants, is held in a constructive trust for the benefit of the plaintiffs and other class members;
(e) an accounting or restitution to the class members of all unlawful interest paid by the class members in respect of the class loans;
(f) damages for unconscionable trade acts and practices pursuant to s. 22 (1) of the Trade Practice Act, R.S.B.C. 1996, c. 457 and ss. 105 and 171 of the Business Practices and Consumer Protection Act, S.B.C. 204, c. 2, against each of the defendants;
(g) damages for conspiracy against each of the defendants;
(h) punitive damages against each of the defendants; and
(i) interest.

BACKGROUND

4 The focus of this action is loans provided to individuals through Cash Store outlets. The plaintiffs assert that fees charged for these loans are interest within s. 347 of the Criminal Code, exceed the criminal rate of interest, and breach the Trade Practice Act and Business Practices and Consumer Protection Act. The plaintiffs seek recovery of these fees and damages.

5 The Cash Store Inc. is a wholly owned subsidiary of Rentcash Inc. Cash Store began operating in British Columbia in September 2002. Cash Store does not provide funds itself; it obtains those funds from one of nine lenders with whom it has a relationship. Cash Store provides two types of loans: short term unsecured advances which are due on the customer's next payday, unless they are rolled over; and title loans which are secured by a P.P.S.A. registration on the customer's vehicle and are usually due within approximately 30 days.

6 In a typical transaction, when a borrower enters a Cash Store location for the first time to obtain a loan, the borrower is required to complete a standard form loan application. Under the standard terms of the loan application, the borrower pays the Cash Store a brokerage and documentation fee of 22.54% of the loan principal (after March 2004 the broker fee was increased to 25% of the loan principal advanced). The Cash Store then finds a lender for the borrower from one of the nine lenders with which it has a brokerage relationship. Each of these lenders has an agreement with the Cash Store in which the Cash Store is retained to carry out various functions in connection with advancing loans to borrowers and management of the loans. These agreements also provide that interest must be charged on the loans at 59% per annum. The loan term cannot be more than eighteen days, unless it is secured against a motor vehicle, in which case it cannot be more than thirty-five days. If unsecured, the maximum loan amount is $500 or one-third of the borrower's two week take home pay, and if secured the maximum initial loan amount is $3,000.

7 The terms are the same, regardless of which lender provides the loan. Each borrower must pay: (a) interest at a stated rate of 59% per annum (which the plaintiffs have calculated to be in excess of 60%) and (b) a broker fee of 22.54% or 25% of the principal of the loan.

8 To obtain the loan, the borrower is required to complete Cash Store's standard form lending documents which include a disclosure statement, a promissory note, two directions to pay and wage assignments (in favour of both the Cash Store and the lender). The borrower is provided with a customer receipt which sets out the principal advanced, the broker fee and interest payable, and the loan due date.

9 In a typical transaction, the borrower is provided with a Cash Store cash card which allows the borrower to obtain cash from an automated teller machine. The loan principal is deposited to the cash card. The borrower is charged a $10 fee to obtain the cash card, and then retains the cash card for future Cash Store loans. (There is a dispute in the evidence as to whether all loans are made available through cash cards, as Rentcash indicates in its 2003 annual report, or whether borrowers have an option to obtain the loan by way of a cheque, wire transfer, or cash card.)

10 The Cash Store cash cards are provided by Card Capital. Card Capital provides pre-paid cash cards to various outlets to allow their customers to access cash. Card Capital lists as its "partners" the Cash Store Inc., Payroll Loans, Instaloans, and Q.T. Cash. Each time the Cash Store loads a Cash Store cash card with a loan advance, Card Capital charges the borrower $0.50, and when the borrower obtains cash by withdrawing funds at an automated teller, Card Capital charges the borrower $1.90.

11 The cash cards are provided to Card Capital by All Trans Credit Union Ltd. pursuant to an agreement of November 9, 2001. Pursuant to this agreement, Card Capital was retained by All Trans to carry out the functions necessary to manage the card database, including performing specified responsibilities of All Trans as the card issuer. In exchange for providing debit card facilities to Card Capital, All Trans receives $0.20 for each cash card transaction from Card Capital.

12 Again, in a typical situation, where the borrower wishes to receive a fixed amount net, the Cash Store will add $4.00 to the amount of the loan to cover these amounts: $2.40 to Card Capital, $1.50 to the third party operating the automated teller machine.

13 The individual plaintiffs have provided evidence of their dealings with the Cash Store. Mr. Bodnar obtained one loan from the Cash Store on March 19, 2003 of $300. He rolled that loan over five times. He repaid it in full on July 11, 2003. He paid $470.43 in broker fees, $40.13 in interest, and $12.40 in Card Capital transaction fees, plus a $10 cash card fee.

14 Mr. Bartolome obtained several short term loans from the Cash Store. The first time he obtained his loan in cash because the location had just opened and did not yet have cash card facilities. The second time he was provided with the loan through a cash card, although he asked for cash. Each time, he was charged a 22.54% broker fee and, after the first loan, $2.40 in transaction fees.

15 The plaintiffs have provided actuarial opinion evidence from Mr. Ian Carp, F.S.A., F.C.I.A. It is Mr. Carp's opinion that, considering a specified loan to Mr. Bartolome on October 28, 2003, if the broker fee and Card Capital transaction fees are included in interest under the Criminal Code provisions, then the effective annual interest rate is 1,125,187%. Secondly, if $104 is advanced on October 28, 2003 and $105.68 is repaid on November 7, 2003 (i.e. only the monies described as interest in the agreement are considered), then the effective annual interest rate is 79.48%.

16 Mr. Carp also opines that if the broker fee is considered as interest, then any loan that is rolled over five times or more will result in an effective annual rate of interest which exceeds 60% per annum.

17 He also opines that if the brokerage fee is interest, then a broker fee of 22.54% will result in an effective annual rate of interest in excess of 60% if the loan is repaid within 153 days of the loan advance; a 25% broker fee will result in an effective annual rate of interest in excess of 60% if the loan is repaid within 173 days of the loan advance.

18 The defendants have not, to date, provided an estimate of the number of potential class members. However, there are 152 Cash Store locations in Canada, 22 of which are in British Columbia. For the six month period ending December 31, 2004, Rentcash received $20,543,604 in broker fees, which, if divided proportionally across the country, is approximately $3,081,540 in British Columbia.

THE REQUIREMENTS FOR CERTIFICATION

19 Section 4(1) of the Class Proceedings Act provides that the court must certify a proceeding as a class proceeding if the following requirements are met:

(a) the pleadings disclose a cause of action;
(b) there is an identifiable class of 2 or more persons;
(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
(e) there is a representative plaintiff who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

Do the Pleadings Disclose a Cause of Action?

20 The threshold which the plaintiffs are required to meet is a low one:

> 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.
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> [Brogaard v. Canada (Attorney General) (2002), 7 B.C.L.R. (4th) 358, 2002 BCSC 1149 at [paragraph] 30]

21 I am satisfied that the pleadings do disclose a cause of action. Indeed, the defendants do not argue that they do not.

Is There an Identifiable Class of Two or More Persons?

22 The plaintiffs propose that the class for this proceeding is defined as: all residents of British Columbia who have borrowed money as a "payday loan" or a "title loan" from a Cash Store location and (1) have repaid the loan and the standard broker fee charged by the Cash Store on the due date of the loan; (2) for loans advances before March 2004, have repaid those amounts within 157 days of the loan advance or the last extension of the loan; (3) for loans advanced after March 2004, have repaid those amounts within 173 days of the loan advance or the last extension of the loan; or (4) have rolled over the loan at least five times; (collectively, the class loans) as of the date notice is given as a class proceeding.

23 The defendants object to the class definition.

24 The Cash Store and Rentcash argue that the class definition is overly broad in that it includes people who have never paid any amounts on their loans and defines a class member as a person who has borrowed money from a Cash Store location. They argue that a Cash Store location is not the entity that provides loans.

25 Card Capital argues that the class is overly broad in that it would include people who may have taken loans but not used a card to obtain the loan. Card Capital argues that it will be required to defend an action against a class which includes people to whom Card Capital cannot be liable and that it is prejudiced as a result.

26 The purpose of a class definition is: (1) to identify those people who have a potential claim for relief against the defendant(s); (2) to define the parameters of the lawsuit so as to identify those

persons who are bound by its result; and (3) to describe those who are entitled to notice: see Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 at 175 (Ont. Ct. Gen. Div.).

27 I am satisfied that the class is adequately defined. The purpose of the class definition, as Bywater indicates, is to identify the claimants. Defining the claimants as those who obtained a loan from a Cash Store location adequately identifies those individuals. It is not necessary for the purpose of identifying individuals to name the legal entity which provided the funds.

28 Secondly, I accept the plaintiffs' argument that the class definition is not overly broad because it includes people who have never paid any amount on their loans, but have rolled the loan over at least five times: those who have rolled the loan over five times have paid broker fees for each rollover and, arguably (the Plaintiffs say), have paid an amount greater than the principal of the loan plus interest at the rate of 60%.

29 Third, even if not all borrowers obtained their loans by means of a cash card, and may not have a claim against Card Capital or All Trans, they would still have a claim for the broker fees paid to the Cash Store and would properly be included in the class. It is not necessary for each member of the class to have a claim against each defendant (Campbell v. Flexwatt Corp. (1997), 44 B.C.L.R. (3d) 343 (C.A.)).

30 Further, this does not prejudice Card Capital or All Trans because they would not be defending claims made by such individuals and, based on the evidence before me, there would be few, if any, in this category.

Do the Claims Raise Common Issues?

31 The common issues which the plaintiffs propose are:

(1) Do the broker fees charged by the Cash Store constitute interest as defined by and for the purpose of s. 347 of the Criminal Code, either in whole or in part?
(2) If yes, do the agreements pursuant to which these broker fees have been collected constitute an agreement to receive interest at a criminal rate?
(3) If yes, has the collection of broker fees from class members resulted in payment of interest at a criminal rate?
(4) If yes, has the Cash Store been unjustly enriched?
(5) If the Cash Store has received a payment of interest at a criminal rate:

    (a) were the class loans at the direction of and for the benefit of Rentcash?
    (b) were the broker fees received paid in whole or in part to Rentcash? and
    (c) did Rentcash direct the transfer, use or otherwise receive the benefit of the broker fees?

(6) If the answer to any one of question (5) is yes, then has Rentcash been unjustly enriched?
(7) If the Cash Store or Rentcash have been unjustly enriched:

(a) do those defendants hold the benefit in trust for the class members?
(b) are those defendants liable to account to class members?

(8) Do the debit fees charged by Card Capital and All Trans constitute interest as defined by s. 347 of the Criminal Code?
(9) If yes, have Card Capital and All Trans received a payment of interest at a criminal rate?
(10) If yes, then have Card Capital and All Trans been unjustly enriched by receipt of interest at a criminal rate?
(11) If the answer to question (9) is yes, have either the Cash Store or Rentcash been unjustly enriched by the debit fees?
(11A) Does the card cash fee charged by the Cash Store constitute interest as defined by s. 347?
(11B) If the answer to (11A) is yes, then has the Cash Store received a payment of interest at a criminal rate?
(11C) If the answer to (11B) is yes, were the cash card fees received by the Cash Store paid in whole or in part to Rentcash?
(11D) If the answers to (11B) or (C) is yes, then has either the Cash Store or Rentcash been unjustly enriched by the cash card fees?
(12) If the defendants have been unjustly enriched by the debit fees or cash card fees, then:

(a) do those defendants hold the benefit that they have received in trust for class members?
(b) are those defendants liable to account to class members for the benefit and all profits earned?

(13) If the Cash Store class loans offend s. 347 of the Criminal Code, does that constitute an unconscionable act or practice within s. 4 of the Trade Practice Act and s. 8 of the Business Practices and Consumer Protection Act regardless of whether the other factors set out in subsections 3(a) through (d) are present?
(14) If Rentcash directed or had the benefit of payment of interest at a criminal rate, did the conduct of Rentcash constitute an unconscionable act or practice within the meaning of s. 4 of the Trade Practice Act and s. 8 of the Business Practices and Consumer Protection Act, regardless of whether the other factors set out in subsections 3(a) through (d) are present?
(15) If All Trans and Card Capital have received a payment of interest at a criminal rate, does their conduct constitute an unconscionable act or practice within s. 4 of the Trade Practice Act and s. 8 of the Business Practices and Consumer Protection Act, regardless of whether the other factors listed in subsection (3)(a)-(d) are present?
(16) Are those defendants liable for damages to class members who have suffered loss or damage because of an unconscionable act or practice?
(17)

Did the Cash Store and Rentcash conspire to implement a scheme to provide loans to class members in order to earn profits on the class loans at an unlawful rate of interest?

(18) If the Cash Store and Rentcash conspired to implement a scheme to provide class loans to class members at an unlawful rate of interest, did All Trans and Card Capital subsequently become parties to that conspiracy by agreeing to assist?

(19) Are the defendants jointly and severally liable for damages as a result of an illegal conspiracy?

(20) Does the conduct of the defendants justify an award of punitive or exemplary damages?

(21) If the conduct justifies an award of punitive or exemplary damages, what is the appropriate amount of damages to be awarded?

(I have paraphrased the common issues. The complete text of the proposed common issues is attached to these Reasons as Schedule "A")

32 The defendants argue that the issues are not common:

(a) the court is bound by MacKinnon v. National Money Mart Co., [2005] B.C.J. No. 399, 2005 BCSC 271;

(b) the issues cannot be determined without considering the claimants individual circumstances;

(c) the issues are not common to all defendants;

(d) not all borrowers use a cash card, so not all issues are common to the class;

(e) debit fees must be considered individually, apart from all other fees and interest;

(f) the Plaintiffs have not established an evidentiary basis against Card Capital and All Trans.

I will deal with each of these in turn.

MacKinnon

33 The circumstances of MacKinnon are quite different from these. In MacKinnon there were more than twenty defendants, operating eighteen 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 conclusions with respect to one fee of one lender may have no application beyond a particular borrower and lender. In those circumstances, I concluded that the issues, as phrased, were not common issues.

34 By contrast, here, we are concerned with only one business model. The thrust of the plaintiffs' claim is that Cash Store and Rentcash have set up a business where the borrower pays brokerage fees, cash card fees and debit fees to obtain a loan. The plaintiffs assert that each of the fees is interest and is in breach of s. 347 of the Criminal Code. 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.

Individual Inquiries

35 The defendants argue that the criminal interest rate issues are not truly common because they necessarily involve an inquiry into the individual circumstances of each class member. The defendants argue that a borrower chooses when broker's fees will be incurred, chooses whether to receive funds using a cash card and chooses how many debit transactions will be made. They say that the resulting fees are incurred voluntarily, that voluntariness is a defence. They say that the court must determine whether the payments were made voluntarily and that this will require the court to look at the claimant's individual circumstances.

36 I am not satisfied that these issues necessarily require the court to look at individual circumstances. Whether choosing to pay broker's fees, or choosing to receive funds by cash card, or choosing to repeatedly use a cash card, thereby incurring fees, constitutes a voluntary payment at law is an issue which can be considered on a class-wide basis. In the event that the court determines that the voluntariness issue cannot be decided for the entire class, it would constitute a defence to an individual's claim, but would not detract from the commonality of the criminal interest rate issues: whether the fees are illegal interest and related questions could be determined, would move the litigation forward, with voluntariness to be considered at the individual issues stage.

37 The defendants argue that the unjust enrichment issues also necessarily involve an inquiry into each individual claimant's circumstances. The defendants say that to establish unjust enrichment, a plaintiff must show that the defendant has been enriched, the plaintiff has suffered a corresponding deprivation and that there is no juristic reason for the deprivation. They say that this inquiry must be conducted case by case. They say also that they will raise a "change of position" defence which, too, requires a case-by case analysis.

38 The plaintiffs rely on Garland v. Consumers Gas Co., [2004] 1 S.C.R. 629, 2004 SCC 25: "Where the defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert it would be unjust to return the enrichment to the Plaintiff." (para. 65) The plaintiffs argue:

> (1) as a question of law, one who receives payment of interest at a criminal rate has been unjustly enriched, and in the circumstances of this case, cannot establish a reason to deny recovery;
> (2) the only individual circumstance identified by the defendants is a claimant's knowledge that the loan breaches s. 347, which, as a matter of law is not a circumstance that the court can consider (Kiriri Cotton Co. Ltd. v. Dewani, [1960] A.C. 192 (P.C.)); materiality of the knowledge issue can be determined at the common issues trial;
> (3) an issue may not be certified only where the court is satisfied that any attempt to answer the issue on a class-wide basis must fail because, as a matter of law, the court must refer to individual circumstances.

39 I accept the plaintiffs' arguments on this point. This case is akin to Elms v. Laurentian Bank of Canada, [2001] B.C.J. No. 1284 (A.A.), 2001 BCCA 429, where the court said at para. 44:

> The investors' characterization of their claim suggests that the issues of whether there is a duty of care, the scope of that duty, and whether there is a fiduciary duty are issues that are capable of extrapolation to each member of the class or subclass. The investors' argument is that Oliver had a duty, in the absence of reliance, based on the relationship Oliver had with all investors.

> Because the investors claim that any individual differences do not affect the nature of Oliver's duty to each of them, the resolution of this issue would be applicable to all members of the class. Similarly, the investors argued that the Bank had the same duty to each of them regardless of a particular investor's individual circumstances. They note that the documents by which each of them opened the R.R.S.P.'s with the Bank were identical. The resolution of the question of whether the Bank breached a duty of care or a fiduciary duty in these circumstances would be capable of extrapolation to each member of the class and would clearly move the litigation along significantly.

40 As in Elms, on the plaintiffs' theory, no individual inquiry is required. The plaintiffs may fail on this issue, but I am not satisfied at this point that the issue necessarily cannot be decided without an individual inquiry.

41 With respect to the trade practice/unconscionable transaction issues, the defendants again argue that the court must conduct an individual inquiry, that the issue cannot be determined class-wide.

42 Section 8 of the Business Practices and Consumer Protection Act provides:

> (2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.
>
> (3) Without limiting subsection (2), the circumstances that the court must consider include the following:
>
> (a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;
>
> (b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
>
> (c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;
>
> (d) that, at the time the consumer transaction was entered, there was no reasonable probability of full payment of the total price by the consumer;
>
> (e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
>
> (f) a prescribed circumstance.
>
> [Section 4 of the Trade Practice Act is substantially the same.]

43 The plaintiffs do not propose to prove breach of the trade practices legislation and unconscionability by reference to individual circumstances. The plaintiffs have been careful to limit these issues, so that they are determined without reference to subsections (3)(a) to (d), which require individual considerations. In other words, the plaintiffs' theory is that, regardless of individual circumstances, charging/receiving fees in breach of s. 347 is necessarily unconscionable.

44 In Knight v. Imperial Tobacco Company Ltd., [2005] B.C.J. No. 216 (S.C.), 2005 BCSC 172, this court certified a claim against the defendant, where the plaintiff alleged that the marketing of light and mild cigarettes constituted a deceptive trade practice. The plaintiff asserted that it could satisfy the required element of reliance without reference to individual circumstances. The court said at para. 36:

> I am not at all convinced that this theory of causation of damages which has had some measure of success in American jurisdictions would succeed in a British Columbia action under the TPA, but I am not prepared at the certification stage to pronounce it plain and obvious that it will fail. The cause of action under s. 22(1)(a) and s. 171(1) should be allowed to proceed to trial as framed, and for the purposes of certification I will assume that the plaintiff will not be proving reliance on the alleged deceptive acts and practices of the defendant by individual members of the proposed class.

45 Here, too, the plaintiffs will not rely on individual circumstances to establish an unconscionable practice. They may not succeed in this approach, but I am not satisfied that the issues should not be certified.

Commonality of Issues - Defendants

46 The defendants argue that the issues are not properly common issues because there is no commonality of issues across defendants, there are issues which specifically address one or more of the defendants.

47 There is no requirement that each common issue must be relevant to each defendant. Rather,

> The essence of a class action is the commonality of the issues between the plaintiffs and one or more of the defendants. A resolution of the common issues does not have to be determinative of liability or supportive of the relief sought. It need not produce the same result for all members of the class. It must, however, advance the litigation forward. ...
>
> [McDougall v. Collinson, [2000] B.C.J. No. 571, 2000 BCSC 398 at para. 86]

Use of Cash Card

48 The defendants argue that not all borrowers received their loans through cash cards and therefore not all borrowers would be interested in the Card Capital and All Trans issues. The evidence before me does not disclose any individual who did not receive a loan by way of cash card. Although Mr. Bartolome received his first loan in cash, all of his other loans were by cash card. Second, Rentcash in its 2003 annual report says that all advances to customers are loaded onto cash cards. There is no evidence to suggest that there are individuals who received loans other than by cash card

such that protection of the interests of those sub-class members requires that they be separately represented.

Debit Fees

49 Card Capital argues that the debit fees must be considered independent of interest, broker fees and other fees charged. This is a substantive legal argument and does not affect the commonality of the issue.

Evidentiary Basis

50 Card Capital and All Trans argue that the evidentiary basis is not sufficient, that there is no evidence to support the conspiracy issue against Card Capital and All Trans, and no evidence that All Trans receives a portion of the debit fees.

51 The defendants rely on Hollick v. Toronto (City), [2001] 3 S.C.R. 158, 2001 SCC 68. There the Court said at paras. 15 - 16 and 24 - 25:

> In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
>
> 16 It is particularly important to keep this principle in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": Report on Class Actions, supra, vol. III, at p. 862. Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclos[e] a cause of action": see Class Proceedings Act, 1992, s. 5(1)(a). Thus the certification stage is decidedly not meant to be a test of the merits of the action: see Class Proceedings Act, 1992, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also Caputo v. Imperial Tobacco Ltd. (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally Report of the Attorney General's Advisory Committee on Class Action Reform, at pp. 30-33.
>
> ...
>
> 24 In Taub v. Manufacturers Life Insurance Co. (1998), 40 O.R. (3d) 379 (Gen. Div.), the representative sought to bring a class action on behalf of the residents in her apartment building, alleging that mould in the building was exposing the residents to health risks. The representative provided no

> evidence, however, suggesting that the mould had been found anywhere but in her own apartment. The court wrote (at pp. 380-81) that "the CPA requires the representative plaintiff to provide a certain minimum evidentia[ry] basis for a certification order" (emphasis added). While the Class Proceedings Act, 1992 does not require a preliminary merits showing, "the judge must be satisfied of certain basi[c] facts required by s. 5 of the CPA as the basis for a certification order" (p. 381).
>
> 25 I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in Taub held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the Report of the Attorney General's Advisory Committee on Class Action Reform clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see Branch, supra, at para. 4.60.

52 As this extract indicates, the plaintiffs are required to adduce evidence of the certification requirements - s. 4 of the British Columbia 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.

53 There are formal agreements setting out the terms upon which Card Capital and All Trans provide the services used by the Cash Store. Card Capital was aware that the cards were being used to facilitate loans. When a borrower receives the loan funds through a card, he or she enters a contract with Card Capital for the use of the card which discloses that the card is used for a Cash Store loan.

54 Mr. Alexander, the Chief Executive Officer of All Trans, deposes that because All Trans is not a member of the Credit Union Central of Ontario it is able to issue multiple debit cards to a single member, in this case Card Capital. In November of 2001 he met with Jeff Smith of Card Capital to discuss a Card Capital business proposal. Card Capital proposed that All Trans would issue multiple debit cards to Card Capital. He understood that Card Capital would use the debit cards as pre-paid cash cards. In its agreement with Card Capital, All Trans irrevocably retains Card Capital to carry out all of the functions necessary to manage the cash card base, including processing all transactions requested using a cash card, determining whether to authorize the completion of a transaction. All Trans provided Card Capital with sufficient card numbers to allow the issuance of 99,999,999 distinct cash card numbers.

55 All Trans receives $.20 for each cash card transaction from Card Capital.

56 This evidence is sufficient to establish a rational connection between the class and the common issues asserted against these defendants. The claims are not ridiculous or incapable of proof; it is not plain and obvious that the claims cannot succeed. The plaintiffs have met the evidentiary burden.

Is a Class Proceeding the Preferable Procedure?

57 Here, the court must consider the factors listed in s. 4(2) of the Class Proceedings Act. The court must consider all of the relevant matters, including:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> (d) whether other means of resolving the claims are less practical or less efficient;
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Do the common issues predominate?

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.

59 Counterclaims may be advanced, but this does not preclude certification. As the court noted in Metera v. Financial Planning Group, [2003] A.J. No. 468, 2003 ABQB 326 at para. 69:

> It should be noted that it would be extremely rare for a class proceeding to contain only common issues, with no individual issues to be determined. Class proceedings are usually bifurcated. First there is a hearing or trial to determine the common issues, and then a procedure must be devised to resolve the individual issues. This is the normal situation, and the presence of individual issues should not be overemphasized, the question always being whether a class proceeding is the preferable way to resolve what common issues there are. ...
>
> Do a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions?

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.

Are the claims the subject of other proceedings?

61 I understand that there are two other proposed class proceedings, one in Ontario and one in Alberta. Neither of these has been certified.

> Are other means of resolving the class members' claims less practical and less efficient? Would the administration of the class proceeding create greater difficulties than those likely to be experienced if relief were sought by other means?

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.

63 As has been frequently noted, there are three main advantages to class proceedings: (1) they serve judicial economy by avoiding unnecessary duplication of fact finding and legal analysis; (2) they improve access to justice for claims that would be uneconomical to pursue individually; and (3) they serve efficiency in justice by ensuring that wrongdoers or potential wrongdoers face the consequences of harm caused and modify their behaviour accordingly.

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.

Are the Plaintiffs Suitable Representatives?

65 Section 4(1)(e) requires that the court determine that there is a representative plaintiff who:

> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

66 From the evidence before me, it appears that the plaintiffs would vigorously prosecute the claim and have an interest in common with proposed class members with respect to the common issues. There is no evidence to suggest that they would be in conflict, or could not fairly and adequately represent the interests of the class members in respect of the common issues. Indeed, the defendants do not dispute that the plaintiffs satisfy the requirement of s. 4(1)(e)(i) and s. 4(1)(e)(iii).

67 The focus of the defendants' argument is with respect to the second requirement. The defendants argue that the plan put forward by the plaintiffs is not a proper case management plan. The defendants argue that the plaintiffs have not adduced any evidence as to how they propose that the individual issues will be dealt with after the common issues are determined. 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).

68 As this court has noted in Fakhri v. Alfalfa's Canada, Inc. (c.o.b. Capers Community Market), [2003] B.C.J. No. 2618, 2003 BCSC 1717 at para. 77:

> The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members. ...

69 I am satisfied that the plan in this case is sufficient for these purposes.

PRE-TRIAL APPLICATION: ALL TRANS CREDIT UNION LTD.

70 All Trans argues that the action against it should be dismissed pursuant to Rule 18A.

71 The plaintiffs say that they have not yet had an opportunity to conduct examinations for discovery. There has been no discovery of documents. They say that it is a reasonable inference, based on the evidence before the court, that a portion of the fees paid to Card Capital flows through to All Trans Credit Union, and therefore All Trans receives part of the alleged unlawful interest. They say there is evidence to support the allegations of conspiracy. The plaintiffs say that the summary trial application is premature and could proceed after they have had examinations for discovery of All Trans and Card Capital.

72 The plaintiffs will require discovery of documents at the examination for discovery of All Trans and Card Capital to allow them to effectively respond to All Trans' summary trial application. I will adjourn this application pending discovery of documents and discovery of these parties.

CONCLUSION

73 The plaintiffs' application is granted. All Trans' summary trial application is adjourned, pending discovery of documents and examination for discovery of a representative of Card Capital and All Trans.

BROWN J.

* * * * *

SCHEDULE "A"

Common Issues

1. Do the Broker Fees charged by the Cash Store constitute interest as defined by and for the purpose of s. 347 of the Criminal Code, either in whole or in part?
2. If the answer to (1) is yes, then do the agreements or arrangements pursuant to which those Broker Fees have been collected from Class Members constitute an agreement or arrangement to receive interest at a criminal rate, contrary to s. 347(1)(a) of the Criminal Code?
3. If the answer to (1) is yes, then has the collection by The Cash Store of Broker Fees from Class members in relation their Class Loans, resulted in the payment by Class Members to and the receipt by The Cash Store of a payment or partial payment of interest at a criminal rate, contrary to s. 347(1)(b) of the Criminal Code?
4. If the answer to (3) is yes, then has the Cash Store been unjustly enriched by the collection of those Brokers Fees from the Class Members?
5. If The Cash Store has received a payment of interest at a criminal rate from Class Members in respect of the Class Loans, then:

    (a) were the Class Loans advanced by The Cash Store to the Class Members at the direction and for the benefit of Rentcash?
    (b) were the Broker Fees received by The Cash Store paid in whole or in part to Rentcash? And
    (c) did Rentcash direct the transfer, use, or otherwise have the benefit of the Broker Fees collected by The Cash Store from the Class Members?

6. If the answer to any one of (5)(a) to (c) is yes, then has Rentcash been unjustly enriched by the payment by Class Members of interest at a criminal rate in respect of their Class Loans?
7. If The Cash Store or Rentcash have been unjustly enriched by the payment by Class Members of interest at a criminal rate in respect of the Class Loans"

    (a) Do those Defendants hold the benefit they have received as a result of this unjust enrichment in trust for those Class Members who provided that benefit to those Defendants? and
    (b) are those Defendants liable to account to those Class Members for the benefit received from them and all profits earned therefrom?

8. Do the Debit Fees charged by Card Capital and All Trans and paid by the Class Members to obtain the Class Loans from The Cash Store constitute interest as defined by s. 347 of the Criminal Code, either in whole or in part?
9. If the answer to (8) is yes, then have Card Capital and All Trans received a payment or partial payment of interest at a criminal rate as a result of the Debit Fee paid by the Class members to obtain the Class Loans?
10. If the answer to (9) is yes, then have Card Capital and All Trans been unjustly enriched by the receipt of interest at a criminal rate from the Class Members?
11.

If the answer to (9) is yes, then has either The Cash Store or Rentcash been unjustly enriched by the Debit Fees charged by Card Capital and All Trans and paid by Class Members?

11A. Does the Cash Card Fee charged by the Cash Store and paid by the Class members in respect of their Class Loans constitute interest as defined by s. 347 of the Criminal Code either in whole or in part?

11B. If the answer to 11A is yes, then has the Cash Store received a payment or partial payment of interest at a criminal rate as a result of the Cash Card Fees paid by the Class members in respect of their Class Loans?

11C. If the answer to 11B is yes, were the Cash Card Fees received by the Cash Store paid in whole or in part to Rentcash or did Rentcash transfer use or otherwise have the benefit of those Cash Card Fees?

11D. If the answer to 11B or 11C is yes, then has either the Cash Store or Rentcash been unjustly enriched by the Cash Card Fees charged by the Cash Store and paid by Class members?

12. If All Trans, Card Capital, The Cash Store, or Rentcash have been unjustly enriched by the Debit Fees or the Cash Card Fees paid by the Class Members in order to obtain the Class Loans:

    (a) do those Defendants hold the benefit they have received as a result of this unjust enrichment in trust for those Class Members who provided that benefit to those Defendants? and
    (b) are those Defendants liable to account to those Class Members for the benefit received from them and all profits earned therefrom?

13. If the answer to (1) or (2) is yes, does the provision by The Cash Store of the Class Loans to Class Members on terms that offend s. 347(1)(a) of the Criminal Code, or the receipt by The Cash Store of interest at a criminal rate in respect of those Class Loans, constitute unconscionable acts or practices within the meaning of s. 4 of the Trade Practices Act and s. 8 of the Business Practices and Consumer Protection Act, irrespective of whether the factors set out in ss. (3)(a) through (d) of those sections are present in any individual case?
14. If the answer to any one of (5)(a) to (c) is yes, then does such conduct of Rentcash constitute unconscionable acts or practices within the meaning of s. 4 of the Trade Practices Act and s. 8 of the Business Practices and Consumer Protection Act, irrespective of whether the factors set out in ss. (3)(a) through (d) of those sections are present in any individual case?
15. If All Trans and Card Capital have received a payment or partial payment of interest at a criminal rate as a result of Debit Fees paid to Card Capital by Class Members in order to obtain the Class Loans, then does such conduct of

Card Capital and All Trans constitute unconscionable acts or practices within the meaning of s. 4 of the Trade Practices Act and s. 8 of the Business Practices and Consumer Protection Act, irrespective of whether the factors set out in ss. (2)(a) through (d) of those sections are present in any individual case?

16. If the answer to (13), (14) or (15) is yes, are those Defendants liable for damages to those Class Members who have suffered any loss or damage because of the unconscionable act or practice, pursuant to s. 22(1) of the Trade Practices Act and s. 105 and 171 of the Business Practices and Consumer Protection Act?
17. If the Cash Store has advanced the Class Loans to Class Members on terms which are prohibited by s. 347(1)(a) of the Criminal Code or has collected interest at a criminal rate from Class Members in respect of the Class Loans advanced to them, contrary to s. 347(1)(b) of the Criminal Code, then did The Cash Store and Rentcash conspire to implement a scheme to provide those Loans to the Class Members in order to earn profits on the Class Loans at an unlawful rate of interest?
18. If The Cash Store and Rentcash conspired to implement a scheme to provide the Class Loans to the Class Members in order to earn profits on those Payday Loans at an unlawful rate of interest, then did All Trans and Card Capital subsequently become parties to that conspiracy by agreeing to assist The Cash Store and Rentcash in the implementation of the scheme by providing debit card facilities and other services in order to facilitate and enable The Cash Store to charge and receive interest on the Class Loans at a criminal rate?
19. If any or all of the Defendants conspired to provide the Class Loans to the Class Members at an unlawful rate of interest, then are those Defendants jointly and severally liable for damages to those Class members who have suffered loss or damage as a result of that illegal conspiracy?
20. If the Cash Store has advanced the Class Loans to Class Members on terms which are prohibited by s. 347(1)(a) of the Criminal Code or has collected interest at a criminal rate from Class Members in respect of the Class Loans advanced to them, contrary to s. 347(1)(b) of the Criminal Code, and if Rentcash, Card Capital, or All Trans has participated I and has been unjustly enriched by, or conspired with the Cash Store in respect of, these Loan transactions with Class Members, then does the conduct of the Defendants justify an award of punitive or exemplary damages?
21. If the conduct of any of the Defendants justifies an award of punitive or exemplary damages, what is the amount of punitive or exemplary damages to be awarded?

SCHEDULE "B"

No. S041348
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ANDREW BODNAR and JOSE P. BARTOLOME

PLAINTIFFS

AND:

THE CASH STORE INC., RENTCASH INC., ALL TRANS CREDIT UNION LTD. and CARD CAPITAL INC.

DEFENDANTS

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50

AMENDED CASE MANAGEMENT PLAN

The plaintiffs propose the following Case Management Plan should certification be granted:

NOTICE

1. A hearing will be held to settle the terms and manner of giving Notice to Class members, and the forms of the opt-in notices and the opt-out notices and the date for their delivery, within 60 days from the date this action is certified as a class proceeding (the "Certification Date").
2. The Notice to the Class will be published, delivered or otherwise circulated within 90 days of the Certification Date.

DISCOVERY

3. In terms of any discovery required:

   Each party will deliver Lists of Documents relating to the certified common issues within 90 days of the Certification Date.

   A schedule of Examinations for Discoveries relating to the certified common issues shall be set at a Case Management Conference held within 60 days of the Certification Date and those examinations shall be completed pursuant to that schedule within 180 days from the Certification Date.

EXPERT REPORTS

4. The Plaintiffs will deliver any further expert reports in relation to the certified common issues within 180 days of the Certification Date.
5.

The Defendants will deliver their expert reports in relation to the certified common issues within 60 days following the receipt of the Plaintiffs' expert reports.

6. The Plaintiffs will deliver any reply reports within 30 days of the receipt of the Defendant's expert reports.

CASE MANAGEMENT AND INTERLOCUTORY APPLICATIONS

7. There will be a Case Management Conference before the Case Management Judge every two months, unless the parties and the Court agree that such a hearing is not required.
8. Pursuant to s. 14(1) of the Class Proceedings Act, the Case Management Judge shall hear all interlocutory applications either at the regular Case Management Conferences or on a date for hearing secured at a Case Management Conference or through Trial Division.
9. All materials in support of an interlocutory application shall be delivered and signed in accordance with Rule 51A of the Rules of Court.

COMMON ISSUES TRIAL

10. The Plaintiffs propose to resolve the common issues through a summary trial application pursuant to Rule 18A to be held within one year of the Certification Date. A schedule for the delivery of Affidavits and Arguments shall be set at a Case Management hearing within 180 days of the Certification Date.
11. In the event any of the common issues are determined to be unsuitable for resolution upon the summary trial, a date shall be fixed for the trial of the remaining common issues within 120 days of Judgment on the summary trial application.

INDIVIDUAL ISSUES DETERMINATION

12. If the Defendants are wholly successful on the common issues, the case will be at an end and no individual issues determination will be required.
13. The Plaintiffs propose that if any or all of the common issues are resolved in favour of the Class, then the parties will convene for argument under section 27 of the Class Proceedings Act to determine the appropriate course for any remaining issues. At this time the Plaintiffs intent to present the following process:

    (a) After the determination of the common issues, the parties and the Court will consider whether there are any issues remaining that may be determined as secondary common issues.
    (b) The Defendants will be required to account for all monies received as Broker Fees or Debit Fees from Class members in relation to Class Loans that were repaid on the due date of the loan. These monies will be placed in a trust fund for the benefit of the Class members (the "Class Fund"), together with any award of punitive damages made on behalf of the Class.

(c) An independent Claims Evaluator will be appointed by the Court. Using the Defendants' records, the Claims Evaluator shall determine the amount of interest received at a criminal rate in relation to all other Class Loans that were not repaid on the due date of the loan using Claim Processing Rules developed by the parties and agreed upon by the Court. The Claims Evaluator will submit a report to the Court setting out the unlawful amount collected by each Defendant in relation to these other Class Loans. Upon approval of that report by the Court, the Defendants will be required to account for all unlawful amounts received in relation to all Class Loans that were not repaid on the due date of the loan. These monies will be placed in the Class Fund for the benefit of the Class members.

(d) Notice will be given to all Class members of the completion of the common issues trial and will include instructions on making a claim against the Class Fund using claim forms to be approved by the Court.

(e) The Claims Evaluator shall then determine each Class member's entitlement to payment from the Class Fund based on the 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.

(f) If any Class member disputes a Class member's entitlement as determined by the Claims Evaluator, they must set out in writing the basis for that dispute along with supporting evidence. Class Counsel will review and attempt to resolve the Class member's dispute.

(g) Any disputed claim that cannot be resolved will be referred to an independent Referee appointed by the Court. The Referee shall determine the dispute on the basis of the written evidence presented, unless the Referee concludes that an oral hearing is necessary for a just determination. A report of the Referee's determination of disputed claims will be submitted to the Court for approval.

SUMMARY

1.	Certification Date plus 60 days	Hearing on Notice
2.	Certification Date plus 90 days	Delivery of Notice
3.	Certification Date plus 90 days	Delivery of List of Documents
4.	Certification Date plus 180 days	Examinations for Discovery concluded
5.	Certificate Date plus 180 days	Delivery of

		Plaintiffs' Reports
6.	Certification Date plus 240 days	Delivery of Defendants' Reports
7.	Certification Date plus 270 days	Delivery of Plaintiffs' Reply Reports
8.	Certification Date plus 1 year	Summary Trial

TAB 10

Case Name:

Bodnar v. Payroll Loans Ltd.

Between
Andrew Bodnar, Plaintiff, and
Payroll Loans Ltd., Payroll Loans (Vancouver) Ltd., Pay Credit (B.C.) Ltd., Pay Credit (Vancouver) Ltd., Hornby Loan Brokers (B.C.) Inc., Thurlow Capital (B.C.) Inc., Hornby Management Inc., Thurlow Management Inc., David Ash, David Feller, Brent Stickland, Praveen Varsnyey, Sokhie Puar and Patrick Warren, Defendants

[2006] B.C.J. No. 1705

2006 BCSC 1132

151 A.C.W.S. (3d) 771

Vancouver Registry No. L051078

British Columbia Supreme Court
Vancouver, British Columbia

Brown J.

Heard: June 15 and 16, 2006.
Judgment: July 24, 2006.

(75 paras.)

Commercial law -- Banking -- Loans -- Interest -- The plaintiff successfully applied to certify a class proceeding on behalf of those who had borrowed money on a payroll loan from the defendants, alleging that the fees charged amounted to a criminal interest rate -- The issues proposed were common and suitable for a class proceeding, the plaintiff would vigorously pursue the claim, and it was the preferable procedure.

Civil procedure -- Parties -- Class or representative actions -- Certification -- Common interests -- Members of class -- Representative plaintiff -- The plaintiff successfully applied to certify a class proceeding on behalf of those who had borrowed money on a payroll loan from the defendants, alleging that the fees charged amounted to a criminal interest rate -- The issues proposed were common and suitable for a class proceeding, the plaintiff would vigorously pursue the claim, and it

was the preferable procedure.

The action was certified as a class action -- The plaintiff applied to certify a class proceeding on behalf of those who had borrowed money on a payroll loan from the defendants, alleging that the fees charged amounted to a criminal interest rate of over 60 per cent annually -- HELD: The action was certified as a class action -- The issues proposed were common and suitable for a class proceeding, and was the preferable procedure in this case -- The court was satisfied the plaintiff would vigorously pursue the claim, and had common issues and interests with proposed class members -- The court found the following: the pleadings did disclose a cause of action; there was an identifiable class, that of all B.C. residents who had borrowed money as a "payroll loan" from the defendants and who had repaid the loan in full and the standard "Brokerage Fee" within 128 days of the loan advance; there were sufficient common issues, and the variations did not detract from the commonality of these; whether punitive damages should be awarded could be decided on a class-wide basis.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4, s. 12

Criminal Code, s. 347

Trade Practice Act,

Counsel:

Counsel for the plaintiff, P. Bennett and M. Mounteer

Counsel for the defendants, Loan Brokers (B.C.) Inc., Thurlow Capital (B.C.) Inc., Hornby Management Inc., Thurlow Management Inc., David Feller, Praveen Varsnyey and Sokhie Puar, W.K. Branch and L. Brasil

Counsel for the defendants, Payroll Loans Ltd., Payroll Loans (Vancouver) Ltd., Pay Credit (B.C.) Ltd., Pay Credit (Vancouver) Ltd., David Ash, D. Gruber and D. Neave

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BROWN J.:--

Introduction

1 The plaintiff applies to certify this proceeding as a class proceeding pursuant to s. 4 of the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50, and to be appointed as the representative plaintiff for the class proceeding. The proposed class is:

> All residents of British Columbia who have borrowed money as a "Payroll Loan" from a business carrying on under the name Payroll Loans or Mogo (collectively "PRL") and have repaid the loan in full and the standard "Brokerage Fee" to PRL within 128 days of the loan advance. (collectively the "Class Loans").

2 The plaintiff alleges that the fees charged to him and to other members of the class for their loans contravene s. 347 of the ***Criminal Code***, R.S.C. 1985, c. C-46, as interest is charged and paid at a criminal rate, a rate that exceeds 60% *per annum*.

3 The plaintiff seeks restitution of unlawful interest, damages for unlawful conspiracy, and damages for unconscionable trade acts and practices. In particular, the plaintiff seeks:

(a) a declaration that brokerage fees charged by PRL are interest within the meaning and for the purpose of s. 347 of the ***Criminal Code***;
(b) a declaration that the standard form loan agreements used by PRL are unlawful;
(c) a declaration that all brokerage fees received by the defendants are held in constructive trust for the benefit of the class members;
(d) an accounting and restitution to the members of the class for brokerage fees received;
(e) damages for unconscionable trade acts and practices;
(f) damages for conspiracy;
(g) punitive damages; and
(h) interest.

Background

The Payroll Loans Business

4 A number of corporate entities and individual directors have been involved in the PRL business that is the subject of this action.

5 In November 1995, the defendant David Ash incorporated what is now called Pay Credit (B.C.) Ltd. with a view to providing short-term small capital loans. In 1996, Mr. Ash restructured the business of Pay Credit (B.C.) Ltd. so that it continued as a lender and a second company, now known as Payroll Loans Ltd., was set up to act as a credit reference company. In early 1998, Mr. Ash again restructured the PRL business so that Payroll Loans Ltd. acted as a loan broker instead of as a credit reference company. In 2003 Payroll Loans (Vancouver) Ltd. and Pay Credit (Vancouver) Ltd. were formed as part of a planned reorganization of the PRL business.

6 Mr. Ash was at all material times the sole officer and director of the defendants Payroll Loans Ltd., Pay Credit (B.C.) Ltd., Payroll Loans (Vancouver) Ltd., and Pay Credit (Vancouver) Ltd. (collectively the "PRL Companies").

7 In approximately October 2003 the assets of Payroll Loans Ltd. and Pay Credit (B.C.) Ltd. were sold to Hornby Management Inc. and its wholly owned subsidiary, Hornby Loan Brokers (B.C.) Inc.

8 The shares of Hornby Management Inc. are owned by David Feller and the Varsnyey family. Mr. Feller and Praveen Varsnyey acted as directors and officers of Hornby Management Inc. and Hornby Loan Brokers (B.C.) Inc. between August 26, 2003 and October 1, 2004. From October 1, 2004 to March 20, 2006, Mr. Feller was the sole officer and director of both companies.

9 Hornby Loan Brokers (B.C.) Inc. carried on brokerage services from the retail branches acquired from the PRL Companies. It did not, however, act as lender. A separate entity, Thurlow Capital (B.C.) Inc. granted the loans brokered by Hornby Loan Brokers (B.C.) Inc.

10 Thurlow Capital (B.C.) Inc. is a wholly owned subsidiary of Thurlow Management Inc. Until January 1, 2004 the defendants Sokhie Puar and Patrick Warren were the sole officers and directors of Thurlow Capital (B.C.) Inc. and Thurlow Management Inc., although it is alleged Patrick Warren was not active in this role. After January 1, 2004 Sokhie Puar was the sole officer and director of Thurlow Capital (B.C.) Inc. and Thurlow Management Inc. I refer to Hornby Management Inc., Hornby Loan Brokers (B.C.) Inc, Thurlow Capital (B.C.) Inc. and Thurlow Management Inc. collectively as the "Thurlow/Hornby Companies".

11 The plaintiff alleges that although the corporate entities have changed over the class period, standard operating procedures with respect to the PRL business have remained consistent. Under those procedures:

(a) Loans were provided from retail locations under the trade name "Payroll Loans".

(b) In order to obtain a PRL loan, a borrower was required to complete a standard form document which contained two parts: a loan agreement with a corporate entity designated as the lender, and a broker agreement with a corporate entity designated as the broker. The broker agreement required that the borrower pay a loan broker's fee (the "Brokerage Fee"), which was a fixed amount, depending on the amount of the loan (for all first time loans the Brokerage Fee charged exceeded 18% of the principal amount advanced). The loan agreement required the borrower to pay interest at 1.13% per week, calculated from the date of the advance to the date of repayment of the loan.

(c) The term of the loan provided was set in relation to the borrower's next scheduled pay day, up to a maximum of 35 days.

(d) Loans were advanced in $100 increments up to a maximum of $1,000. The maximum amount of the Payroll Loan advanced to a borrower was determined in relation to the amount the borrower would receive on the borrower's next scheduled pay day.

(e) The borrower was required to provide PRL with a signed post-dated cheque payable on the due date of the Payroll Loan and in the amount of the Payroll Loan, the applicable interest, and the Brokerage Fee. The cheque was held by PRL as security for repayment of the loan. If the borrower failed to repay the Payroll Loan on or before the due date by cash or debit transaction, the post-dated cheque was deposited by PRL in repayment.

12 Starting in December 2005, the Hornby/Thurlow Companies started a discount program for repeat borrowers. Under the program, if a loan was repaid on or before the due date by cash or debit transaction and immediately re-borrowed, the fees and interest paid by the borrower would be reduced for the subsequent loan. Each consecutive time the borrower re-borrowed, the total fees would be reduced by a further $1 per $100 advanced (to a maximum discount of $15 per $100 advanced). These reductions would be made pursuant to a standard form contract between PRL and the borrower executed at the time of the loan advance.

13 In or about November 2005, PRL stopped operating under the name "Payroll Loans" and began operating under the trade name "Mogo". The standard operating procedures appear to have remained the same.

The Plaintiff

14 The plaintiff, Andrew Bodnar, obtained various Payroll Loans which qualify as class loans. For example, on March 28, 2000 Mr. Bodnar borrowed $500 from PRL. He signed a standard form lending document that contained both a loan agreement with Pay Credit (B.C.) Ltd. and a broker agreement with Payroll Loans Ltd. Pursuant to the terms of the lending document, Mr. Bodnar was required to pay $593.43 on April 7, 2000. This included $85.50 in Brokerage Fees and $7.93 in interest. On April 16, 2004 Mr. Bodnar borrowed $800 from PRL. He signed a standard form lending document that contained both a loan agreement with Thurlow Capital (B.C.) Ltd. and a broker agreement with Hornby Loan Brokers (B.C.) Ltd. On April 30, 2004 Mr. Bodnar paid PRL $999.10 by debit transaction. This payment included $181 in Brokerage Fees and $18.10 in interest.

Actuarial Evidence

15 The plaintiff has provided three expert reports setting out the actuarial evidence of Mr. Ian Karp, F.S.A, F.C.I.A.

16 With respect to Mr. Bodnar's first transaction, referred to above, Mr. Karp opines that if Brokerage Fees are included in the calculation of interest, then the effective annual interest rate of Mr. Bodnar's loan was 57,747%. With respect to the transaction for a loan taken out on April 16, 2004, Mr. Karp suggests the effective annual rate of interests was 33,264%.

17 In his report of June 16, 2005 Mr. Karp shows that a fee equal to 18% of the principal advanced will result in an effective annual rate of interest in excess of 60% where the principal amount of the advanced loan is repaid with that fee within 128 days of the loan advance. This will result regardless of how many payments are made in repayment. In his report of May 26, 2006, Mr. Karp shows that if a loan is repaid within 35 days along with an amount equal to 15% of the principal advanced (the lowest fee possible under the discount program), the effective annual rate of interest will still always exceed 60%.

Statistical Evidence

18 Between 1996 and October 2003 PRL provided Payroll Loans to more than 8,497 different borrowers in British Columbia. Of these, 5350 failed to make payment on the due date of at least one of their loans, but only 404 defaulted on their first loan such that a partial or total loss was taken on the loan. Between October 2003 and December 31, 2005 PRL provided Payroll Loans to more than 44,302 different borrowers in British Columbia.

The Requirements for Certification

19 Section 4(1) of the ***Class Proceedings Act***provides that the court must certify a proceeding as a class proceeding if the following requirements are met:

(a) the pleadings disclose a cause of action;
(b) there is an identifiable class of 2 or more persons;
(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
(e) there is a representative plaintiff who

(i) would fairly and adequately represent the interests of the class,
(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

20 I review these requirements in turn.

Do the Pleadings Disclose a Cause of Action?

21 In determining if the pleadings disclose a cause of action, the threshold the plaintiff must meet is a low one. As stated in ***Brogaard v. Canada (Attorney General)*** (2002), 7 B.C.L.R. (4th) 358, 2002 BCSC 1149 at [paragraph] 30:

> 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.

22 With the exception of certain claims made against the directors, the claims made in this action are identical to those recognized in ***Bodnar v. The Cash Store Inc.***, [2005] B.C.J. No. 1904, 2005 BCSC 1228, aff'd [2006] B.C.J. No. 1171, 2006 BCCA 260. This claim differs from ***Bodnar*** in respect of the joint and several liability of the directors of the PRL Companies and the Hornby/Thurlow Companies. However, in ***Ayrton v. PRL Financial (Alta.) Ltd.***(2005), 370 A.R. 141, 2005 ABQB 311, aff'd 57 Alta. L.R. (4th) 1, 2006 ABCA 88, a case that involved the operation of the PRL business in Alberta, LoVecchio J. concluded in response to an application by an individual defendant to strike the claim that "[t]he allegations of fact in this case, assuming they are proven, are the type that might convince a court to lift the corporate veil" ([paragraph] 32).

23 Therefore, when recent decisions with respect to Payroll Loans in this and other jurisdictions are considered, namely ***Bodnar, Ayrton***and ***McCutcheon v. The Cash Store Inc.***, [2006] O.J. No. 1860, it cannot be plain and obvious that the plaintiff's claim cannot succeed. It follows that the pleadings do disclose a cause of action. Indeed, the defendants did not argue otherwise.

Is there an Identifiable Class of Two or more Persons?

24 As noted above, the plaintiff's proposed class is:

> All residents of British Columbia who have borrowed money as a "Payroll Loan" from a business carrying on under the name Payroll Loans or Mogo (collectively "PRL") and have repaid the loan in full and the standard

"Brokerage Fee" to PRL within 128 days of the loan advance. (collectively the "Class Loans").

25 The purpose of a class definition is threefold: (1) to identify those people who have a potential claim for relief against the defendant(s); (2) to define the parameters of the lawsuit so as to identify those persons who are bound by its result; and (3) to describe those who are entitled to notice: ***Bywater v. Toronto Transit Commission***(1998), 27 C.P.C. (4th) 172 at 175 (Ont. Ct. Gen. Div.); see also ***Western Canadian Shipping Centres Inc. v. Dutton***, [2001] 2 S.C.R. 534, 2001 SCC 46 at [paragraph] 38.

26 I am satisfied that there is an identifiable class of two or more persons in this case. A proposed class member can tell with a minimum of effort, and on objective terms, whether he or she is a member of the proposed class.

Do the Claims raise Common Issues?

27 Under s. 4(1)(c) of the ***Class Proceedings Act*** the court must determine if the claims of the class members raise common issues. The common issues which the plaintiff proposes are:

(a) Do the Brokerage Fees charged by PRL constitute interest as defined by and for the purpose of s. 347 of the *Criminal Code*, either in whole or in part?

(b) If the answer to (a) is yes, then do the standard form agreements pursuant to which those Brokerage Fees have been collected from Class members constitute agreements or arrangements to receive interest at a criminal rate, contrary to s. 347(1)(a) of the *Criminal Code*?

(c) If the answer to (a) is yes, then has the collection by PRL of those Brokerage Fees in accordance with the terms of the standard form agreement on which the Payroll Loans have been advanced by PRL to Class members, together with any charge expressly stated by those agreements to be interest, resulted in the payment by Class members, and the receipt by the PRL Companies, or any one of them, of interest at a criminal rate, contrary to s. 347(1)(b) of the *Criminal Code*?

(d) If the answer to (c) is yes, have those Defendants been unjustly enriched by the collection of those Brokerage Fees from the Class members?

(e) If the PRL Companies have received a payment of interest at a criminal rate from Class members in respect of the Class Loans, then:

  (i) were the Class Loans advanced by the PRL Companies to the Class members at the direction and for the benefit of Ash?

  (ii) were the Brokerage Fees received by the PRL Companies paid in whole or in part to Ash? and

  (iii) did Ash direct the transfer, use, or otherwise have the benefit of the Brokerage Fees collected by the PRL Companies from the Class members?

(f) If the answer to any one of (e)(i) to (iii) is yes, then has Ash been unjustly enriched by the payment by Class members of interest at a criminal rate in respect of their Class Loans?

(g) If the Hornby/Thurlow Companies have received a payment of interest at a criminal rate from Class members in respect of the Class Loans, then:

(i) were the Class Loans advanced by the Hornby/Thurlow Companies to the Class members at the direction and for the benefit of Feller, Varsnyey, Puar, or any one or more of them?

(ii) were the Brokerage Fees received by the Hornby/Thurlow Companies paid in whole or in part to Feller, Varsnyey, and Puar, or any one or more of them? and

(iii) did Feller, Varsnyey, Puar, or any one or more of them direct the transfer, use, or otherwise have the benefit of the Brokerage Fees collected by the Hornby/Thurlow Companies from the Class members?

(h) If the answer to any one of (g)(i) to (iii) is yes, then have Feller, Varsnyey, Puar, or any one or more of them been unjustly enriched by the payment by Class members of interest at a criminal rate in respect of their class Loans?

(i) If the answer to (d), (f), or (h) is yes:

(i) Do those Defendants hold the benefit they have received as a result of this unjust enrichment in trust for those Class members who provided that benefit to those Defendants? and

(ii) Are those Defendants liable to account to those Class members for the benefit received from them and all profits earned therefrom?

(j) If the answer to (b) or (c) is yes, does the provision by the PRL Companies and the Hornby/Thurlow Companies, or any one of them, of the Class Loans to Class members on terms that offend s. 347(1) of the *Criminal Code*, or the receipt by the PRL Companies and the Hornby/Thurlow Companies, or any one of them, of interest at a criminal rate in respect of those Class Loans, constitute an unconscionable act or practice within the meaning of s. 4 of the *Trade Practices Act* and s. 8 of the *Business Practices and Consumer Protection Act*, irrespective of whether the factors set out in s. (3)(a) through (d) of those sections are present in any individual case?

(k) If the answer to any one of (e)(i) to (iii) or (g)(i) to (iii) is yes, then does such conduct of Ash, Feller, Varsnyey, Puar, or any one or more of them, constitute unconscionable acts or practices within the meaning of s. 4 of the *Trade Practices Act* and s. 8 of the *Business Practices and Consumer Protection Act*, irrespective of whether the

factors set out in ss. (3)(a) through (d) of those sections are present in any individual case?

(l) If the answer to (j) or (k) is yes, are those Defendants liable for damages to those Class members who have suffered any loss or damage because of the unconscionable act or practice, pursuant to the *Trade Practices Act* s. 22(1) and the *Business Practices and Consumer Protection Act* s. 105 and 171?

(m) If the answer to (b) or (c) is yes, then did the Defendants (or any combination thereof) conspire to implement a scheme to provide those Loans to the Class members in order to earn profits on the Class Loans at an unlawful rate of interest?

(n) If any or all of the Defendants conspired to provide the Class Loans to the Class members at an unlawful rate of interest, then are those Defendants jointly and severally liable for damages to those Class members who have suffered loss or damage as a result of that conspiracy?

(o) If the answer to (b) or (c) is yes, then is Ash jointly and severally liable for the acts of the PRL Companies, or any of them, in advancing Class Loans on terms that offend s. 347(1)(a) of the *Criminal Code* or received interest in respect of the Class Loans at a criminal rate, contrary to s. 347(1)(b) of the *Criminal Code*.

(p) If the answer to (b) or (c) is yes, and if Ash has participated in and been unjustly enriched by or conspired with the PRL Companies in respect of the Class Loans, then does the conduct of any of those Defendants justify an award of punitive or exemplary damages?

(q) If the answer to (b) or (c) is yes, then are Feller, Varsnyey, and Puar, or any one or more of them, jointly and severally liable for the acts of the Hornby/Thurlow Companies, or any of them, in advancing Class Loans on terms that offend s. 347(1)(a) of the *Criminal Code* or received interest in respect of the Class Loans at a criminal rate, contrary to s. 347(1)(b) of the *Criminal Code*.

(r) If the answer to (b) or (c) is yes, and if Feller, Varsnyey, and Puar, or any one or more of them, have participated in and been unjustly enriched by or conspired with the Hornby/Thurlow Companies in respect of the Class Loans, then does the conduct of any of those Defendants justify an award of punitive or exemplary damages?

(s) If the answer to (p) or (r) is yes, what is the amount of punitive or exemplary damages to be awarded?

28 I note that the plaintiff amended the common issues to remove Patrick Warren, a named defendant who was a director and officer of Thurlow Capital (B.C.) Inc. and Thurlow Management Inc. The plaintiff does not seek certification against him, as there is evidence that Mr. Warren was not involved in the management of the business and on January 1, 2004 relinquished all of the shares that he had owned.

29 The defendants argue that the issues are not common. They say that the circumstances in this case are closer to ***MacKinnon v. National Money Mart Company et al.,*** [2005] B.C.J. No. 399, 2005 BCSC 271, than they are to ***Bodnar***, in that there are multiple, independently owned companies with multiple business purposes and models, varying loan agreements, and a discount program that

reduced the Brokerage Fee for repeat borrowers. They also submit that the issues cannot be determined without considering the claimant's individual circumstances. I will deal with each of these arguments in turn.

(a) Is this case similar to ***MacKinnon v. National Money Mart Company et al.****?*

30 In ***MacKinnon,*** certification was sought against more than twenty defendants, operating eighteen businesses, with many different business models. Each defendant charged a fee, which may have had 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 conclusions with respect to the fee charged by one lender may have had no application beyond a particular borrower and lender. In those circumstances, I concluded that the issues, as raised, were not common.

31 Here, the defendants argue that the circumstances are similar to those of ***MacKinnon***. First, they submit there was no common ownership of the corporate defendants, as there was an asset transfer between Payroll Loans Ltd. and Pay Credit (B.C.) Ltd., and Hornby Management Inc., not a share transfer. Second, they emphasize that the defendants carried on business with multiple business purposes and models. To this end, they argue that the PRL Companies adopted one business model, which they describe as:

(i) provision of short-term loans with no additional charges (beyond interest);
(ii) credit reference fee charged by a separate company;
(iii) brokerage services provided by one company, loans provided by a separate company.

Whereas the Thurlow/Hornby Companies pursued a different business model, described as:

(i) brokerage fees set pursuant to a schedule with changes to the rate schedule; the lender is Thurlow with whom there is no common ownership;
(ii) discount program introduced in or about December 2005 with decreasing brokerage fees with each new loan.

32 Third, they argue that loan agreements under the PRL business were more varied than those at issue in ***Bodnar***. In particular, they point to the fact that documentation used by the defendants did not include an "entire agreement clause". They say there is evidence that agreements were varied or supplemented through verbal agreement.

33 Finally, they say that the existence of the discount program creates a complexity not present in ***Bodnar***. As discussed above, under that program, customers could pay as little as 15% in Brokerage Fees on subsequent loans. The defendants say that the plaintiff's class definition assumes that a Brokerage Fee of 18% or greater was charged, and that therefore, where a loan was repaid in the 128 day time frame, it is not necessarily the case that an illegal rate of interest will have been charged.

34 I accept the plaintiff's submissions that PRL effectively operated one business over the class period, operating first under the name Payroll Loans and then under the name Mogo. Although the business changed hands during the class period, the business model and fee structure remained essentially the same.

35 Further, I do not agree with the submission that the defendants' multiple business purposes and models make this action inappropriate for class certification. I am not satisfied that the business practices or standard form agreements vary so widely that there is no commonality. The defendants have not identified any change to the standard form of loan agreement which is material to the claims advanced.

36 With respect to the defendants' argument regarding the oral variation of loan agreements, there is no evidence that the standard form agreements were varied at the date the loan was entered into. Ms. Erin Feller, in her affidavit of May 31, 2006 says:

> The customer service representatives are authorized by Thurlow Capital to verbally amend the terms of a loan agreement for any given loan, based on the borrower's circumstances, prior to or on the due date of the loan. These changes typically include extending the term of the loan by a few days or to the person's next pay period without charging any additional interest or fees.
>
> It is very common for borrowers to contact the customer service representatives prior to or on the due date of their loans and request extensions of a few days, often Friday to Monday. This occurs primarily due to the personal circumstances of each borrower.

37 The defendants also filed two affidavits from borrowers, the first from Chad Saalfeld. In his affidavit, Mr. Saalfeld says:

> I generally arranged for repayment of each of my loans to be due on a Friday. I selected Friday as the due date as that was the day of the week on which I usually received my paycheque from my employer. ... Certain, but not all of my loan agreements with Pay Credit, changed the written terms by extending the specified loan due dates by as many as five days beyond that set out in the written loan agreement documents. I recall that verbal terms were included in my loan agreements with Pay Credit on approximately four occasions during the period from 2001 to 2003. For example, on the occasions when I determined that my employer would not be issuing me a paycheque on a Friday - and instead would issue the cheque on the following Monday or Tuesday - verbal terms were included which extended the due date of the loan by three to five days, that is to the Monday, Tuesday or Wednesday of the following week, so that I could make the repayment personally and in cash ... in addition, verbal terms were incorporated into my loan agreements when I was working outside the lower mainland area such that it was not possible for me to go personally to the Payroll Loan branch in Surrey to repay my loan on the due date specified in the written terms. In those circumstances, the Payroll Loans representatives and I agreed that the due date of the loan in issue would be extended from a Friday to the following Tuesday or Wednesday so that I could again attend and pay the amount owed in cash.

38 The second affidavit is from Mr. Dawson. Mr. Dawson also indicates that "on two occasions, verbal terms were included in ... loan agreements with Pay Credit which changed the written terms by

extending the specified loan due dates set out in the written loan agreement documents." The plaintiff has, however, filed an additional affidavit from Mr. Dawson in which he elaborates, saying:

> Each time I borrowed a loan from Payroll Loans the same procedure was followed. I would be asked by the customer service representative how much I wanted to borrow and the date of my next scheduled payday. The Customer Service Representative would enter this information into a computer system and print out a one-paged standard form lending document .... The computer would automatically set the due date of the loan to be my next scheduled payday....
>
> ...
>
> As I deposed in the 2004 Affidavit, on at least two occasions the term of the loan I obtained was extended.
>
> On the first occasion, I called Payroll Loans a few days before my loan was due and explained that I would not be able to come in to re-borrow my loan until the Monday following my payday because my father was ill ...
>
> On the second occasion, I called Payroll Loans immediately before my loan was due and explained that I was unable to get off work before the Payroll Loans location closed, and therefore, could not come into the location to re-borrow my loan until the following day.

39 I understand from these affidavits that Payroll Loans from time to time agreed to give the borrower extra time to attend to repay his or her loan. There is no affidavit which indicates that the standard loan agreements were varied at the time they were granted.

40 I accept the plaintiff's submission that variations made after the loan is granted are not relevant in determining if an agreement for credit violates s. 347. Section 347 considers credit charges at the time the transaction is entered into: ***Garland v. Consumer's Gas***, [1998] 3 S.C.R. 112; ***Degelder Construction v. Dancorp Developments***, [1998] 3 S.C.R. 90. Variations to the loan agreement made after the date of contract are not relevant in determining if an agreement for credit violates s. 347. Further, those who received a short extension within which to pay their loan will come within the class definition nonetheless, because they would have repaid the loan and the standard Brokerage Fee within 128 days of the loan advance. I am therefore not satisfied that the variations of which I have evidence detract from the commonality of the issues.

41 With respect to the discount program, the reduced Brokerage Fee only applies to repeat borrowers. The Brokerage Fee is reduced from 18% for future loans if a borrower has repaid three loans in cash or debit card on their respective due dates. Therefore, before a borrower would receive a Brokerage Fee of less than 18%, the borrower must have repaid at least three loans, together with a flat fee of more than 18%. Accordingly, each borrower would have at least three loans which would qualify as class loans before the brokerage fee would fall to 15%. In addition, Mr. Karp's report of May 26, 2006 indicates that a brokerage fee of 15% repaid in 35 days, if that brokerage fee is interest, will still result in the payment of a criminal rate of interest.

(b) Do the common issues require individual inquires?

42 The defendants also argue that the issues proposed by the plaintiff are not truly common issues because they necessarily involve an inquiry into the individual circumstances of each class member.

43 The defendants argue that issues dealing with unjust enrichment, unconscionable acts and practices contrary to the ***Trade Practice Act,*** and punitive damages will require an individualized inquiry.

44 The arguments with respect to unjust enrichment and unconscionable acts and practices were made and dismissed in ***Bodnar***at [paragraph]s 37-45. The defendants' arguments cannot succeed on these points and are dismissed for the same reasons as those given in ***Bodnar***.

45 With respect to punitive damages, in ***Reid v. Ford Motor Company,*** [2003] B.C.J. No. 2489, 2003 BCSC 1632 and ***Fakhri v. Alfalpha's Canada Inc*** (2004), 34 B.C.L.R. (4th) 201, 2004 BCCA 549, the applicability of punitive damages was found to be a common issue. On the plaintiff's theory, whether punitive or exemplary damages apply is at least partly a common issue. As noted in ***Fakhri***, there are two stages in deciding a punitive damage claim: first, the defendant's behaviour is assessed to determine if it is deserving of a punitive response (the common issue), and second, the effect of that behaviour on individual class members is examined ([paragraph] 23). Here, the plaintiff's theory for damages hinges largely on the conduct of the defendants. Whether punitive damages should be awarded can therefore be determined on a class-wide basis. Other damage questions can be determined at a later stage. As the Court of Appeal noted in ***Fakhri*** at [paragraph] 26 the ***Class Proceedings Act*** contemplates such a flexible approach.

46 In light of the foregoing, I am persuaded that the issues proposed by the plaintiff are common and suitable for a class proceeding. I adopt the words of LoVecchio J. in ***Aryton***where he held, with respect to a similar argument:

> In my view, the claims in this case raise similar issues of fact and law that, once resolved, will advance the class members' claims in a meaningful way. The class members have all been advanced loans by the Defendants under a nearly identical scheme whereby they are required to pay a brokerage fee on top of interest for their loan. There is one central issue to their claims that, once resolved, will advance the class members' claims in a meaningful way.
>
> That issue is whether the brokerage fee constitutes interest under s. 347 of the *Criminal Code*. If the answer is yes, there are other questions that follow regarding the receipt of that interest and what remedies flow from the receipt of that interest, that can be answered. It may be that at this stage the class members should be divided into sub-groups depending on whether they paid their loans on time, were granted an extension of a few days, or were granted an extension of a few months. However, the factual and legal issues for the court to determine regarding these sub-groups, such as the availability of notional severance, or a juristic reason for the Defendants' enrichment, can be determined based on the circumstances of a representative for those subgroups. ([paragraph]s 85-86)

Is a Class Proceeding the Preferable Procedure?

47 A class proceeding must, in the words of s. 4(1)(d), be the preferable procedure for the fair and efficient resolution of the common issues. Here, the court must consider the factors listed in s. 4(2) of the ***Class Proceedings Act***:

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
(d) whether other means of resolving the claims are less practical or less efficient;
(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

(a) Do the Common Issues Predominate?

48 The defendants argue that, as in ***MacKinnon***, individual issues overwhelm the common issues, such that a class proceeding is not the preferable proceeding. They say that even if a particular form of agreement is found to constitute an agreement to receive interest at a criminal rate, to resolve a member's claim the Court will be required to look to individual circumstances because:

(a) In various cases the agreements were varied orally at the time of execution or later;
(b) The court will have to determine for each individual the date of the advance of the principal and the date of repayment. Small payments may have been made from time to time and the court will have to determine what interest, if any, has been received;
(c) In some cases, payment will be made after collection procedures are initiated and the court will have to consider what portion of the payment is principal, what portion interest and what portion costs;
(d) Defences will be raised to each of the claims: *res judicata* for some claims; voluntariness of payments exceeding 60%;
(e) With respect to trade practice claims and punitive damages, the defendants will raise individual circumstances in defence to these claims: were the individuals fully informed, were they under pressure, etc.;
(f) The defendants and third parties may bring counter-claims against the plaintiffs for unpaid amounts: borrowers may borrow on more than one occasion and may repay in full on one occasion and not on another;
(g) The court will be required to investigate for each individual whether compensatory or punitive damages are appropriate and a proper amount.
(h) Depending on the individual agreement, it may be just for the court to apply the principle of notional severance to cure the illegality.

49 Counsel for the PRL Companies also submits that certification of the proposed common issues does not promote access to justice or judicial efficiency, which are considerations that inform the preferability inquiry: see ***Hollick v. City of Toronto***, [2001] 3 S.C.R. 158 at [paragraph]s 32-34.

50 In my view, a class proceeding is the preferable procedure in this case. As I note above, this case is very different from ***MacKinnon***. That proposed class action concerned many more defendants carrying on a range of different businesses under materially different business models. Furthermore, the class definition in ***MacKinnon***was very broad:

> All persons who have borrowed money as a Pay Day loan, defined as a loan payable on the borrower's next scheduled pay day or in any event within 60 days of the loan advance from any of the businesses operated by the defendants either directly or through the operation of a franchise system between January 29, 1997 and the date the action is certified as a class proceeding.

51 It was in this context that I said in ***MacKinnon*** that the individual issues overwhelmed the common issues.

52 By contrast, here, because of the narrowness of the class definition, on the plaintiff's theory every person will necessarily have paid interest at a criminal rate. On the plaintiff's theory, resolution of the common issues will necessarily advance each person's claim. Further, it may be that some of the defences raised can be determined on a class-wide basis, for example, the voluntariness issue. Counterclaims may be advanced in this action, but this does not preclude certification. As the Court noted in ***Metera v. Financial Planning Group*** (2003), 12 Alta. L.R. (4th) 120, 2003 ABQB 326 at [paragraph] 69:

> It should be noted that it would be extremely rare for a class proceeding to contain only common issues, with no individual issues to be determined. Class proceedings are usually bifurcated. First there is a hearing or trial to determine the common issues, and then a procedure must be devised to resolve the individual issues. This is the normal situation, and the presence of individual issues should not be over-emphasized, the question always being whether a class proceeding is the preferable way to resolve what common issues there are. ...

53 With respect to the argument that a class proceeding is not preferable because it does not accord with the objectives set out in ***Hollick***, I note that in similar proceedings, the courts have found that the three policy objectives of the ***Class Proceedings Act*** were served by certifying the action: see ***Aryton*** at [paragraph]s 93-97; ***Bodnar*** at [paragraph]s 63-64; ***McCutcheon*** at [paragraph] 77.

> *(b) Do a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions?*

54 There is no evidence that there are individuals who would have an interest in pursing individual actions.

> *(c) Are the Claims Subject of Other Proceedings?*

55 There are no other proceedings in British Columbia which relate to the subject matter of this proceeding. A class proceeding against PRL has been certified in Alberta.

> *(d) Are other means of resolving the class members' claims less practical or less efficient?*

56 As in ***Bodnar***and ***Aryton***, the individual claims for class members are for modest amounts. They would be at most a few thousand dollars. This plaintiff does not have the financial means to pursue an individual action. It is likely that others in the class would be in a similar situation: without the resources to pursue expensive litigation for a modest recovery. As I said in ***Bodnar***:

> 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. ([paragraph] 62)

> *(e) Would the administration of the class proceeding create greater difficulties than those likely to be experienced if relief were sought by other means?*

57 I am not satisfied that the administration of the class proceedings would create difficulties not present if a different form of relief were pursued.

Is the Plaintiff a Suitable Representative?

58 Section 4(1)(e) requires that the court determine that there is a representative plaintiff who:

> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

59 Counsel for the Thurlow/Hornby Companies argues that Mr. Bodnar is not an appropriate representative because of his motivation and credibility. They say that because he knew that the interest rate being charged by PRL might well constitute an illegal rate of interest, having commenced an earlier action against another loan company, he manufactured the lawsuit against the Thurlow/Hornby Companies which he now presents to the court for certification. They say that given such a motivation, certifying this class proceeding would not meet the objectives of class proceedings discussed in ***Hollick.***

60 Mr. Bodnar has filed an affidavit in which he swears that he borrowed further loans in 2004 because he was struggling financially and did not believe he would be able to receive a loan from a conventional lender; that he went to PRL because he had borrowed numerous loans from the business

in the past and was familiar with its procedures; and that he did not obtain the 2004 loans with the intention of commencing an action in respect of those loans.

61 There is no basis in the materials before me to conclude that Mr. Bodnar was seeking to manufacture a lawsuit. Indeed, there would be no reason for Mr. Bodnar to borrow from PRL in order to create a cause of action because, at that time, Mr. Bodnar knew Mr. MacKinnon was already pursuing a potential class proceeding against Payroll Loans.

62 Accordingly, I am not satisfied that Mr. Bodnar's motivation is suspect, or that this is a basis for rejecting him as a representative plaintiff. I note that in ***Aryton***, the Alberta Court of Appeal said:

> The appellants submit that [Mr. Aryton] took out the Hornby and Thurlow loan with full knowledge of the purported illegality and unconscionability of the loans.
>
> Without determining the issue of whether the appellants are estopped from raising this new objection on appeal, the appellants have not demonstrated that Mr. Aryton cannot fairly and adequately represent a class as required. ... While his knowledge of the loans at the time he took out the loan from Hornby and Thurlow made Mr. Aryton atypical of the other defendants, he was in a similar and typical position when he took out the loan from Payroll and PRL Financial. ...
>
> While Mr. Aryton may have sought a loan from Hornby and Thurlow for the purpose of creating a cause of action against them, that action is not in conflict with the common issues and interests of other prospective class members. ([paragraph]s 15-17)

63 The defendants have provided me with a recent decision of the Ontario Superior Court of Justice, ***Arabi v. The Toronto Dominion Bank***, [2006] O.J. No. 2072, 2006 CanLii 16833. There Madam Justice Ellen MacDonald said:

> ... if it is established that the transaction was deliberately orchestrated, this fact may be a reason to refuse certification. (at para. 44)

64 I am not satisfied that Mr. Bodnar took out the loan with the purpose of creating a cause of action against the Thurlow/Hornby Companies. Indeed, the evidence is otherwise.

65 I am satisfied on the evidence before me that the plaintiff will vigorously prosecute this claim and has, on the common issues, interests in common with proposed class members.

66 A plan that the plaintiff has provided is attached as Schedule "B". It is essentially the same plan as was provided in ***Bodnar*** and is acceptable.

67 I note that the parties have adjourned the issue of who should receive notice of this action to a later date.

Conclusion

68 I conclude that the plaintiff's action should be certified as a class action.

Application of Mr. Ash

69 Mr. Ash argues that the action against him should be dismissed pursuant to Rule 18A.

70 The plaintiff says that he has not had an opportunity to conduct examinations for discovery. There has been no discovery of documents.

71 The nature of the claims against Mr. Ash is such that the plaintiff will require discovery of documents and an examination for discovery of Mr. Ash to allow him to effectively respond to Mr. Ash's summary trial application.

Payroll Loans Ltd. and Pay Credit B.C. Ltd. Application to Strike the Claim as an Abuse of the Process of Court

72 The Payroll Loans Ltd. and Pay Credit (B.C.) Ltd. apply to strike this action on the basis that Mr. MacKinnon seeks similar relief against them in the ***MacKinnon*** action. They say that Mr. Bodnar is the privy of Mr. MacKinnon and that this action is an abuse of the process of the court.

73 Until an action is certified, in my view it is not appropriate to describe Mr. Bodnar as the privy of Mr. MacKinnon. Until the action is certified, each is an individual plaintiff. It is only when the action is certified that the representative plaintiff conducts the action on behalf of the class.

74 It is always possible that more than one plaintiff will commence a proposed class action against the same defendants, seeking similar relief. In such a case, the ***Class Proceedings Act*** provides in s. 12 that the court may make any order it considers appropriate respecting the conduct of class proceedings. There has been no application made before me pursuant to s. 12. Section 13 provides that the court may at any time stay any proceeding related to the class proceeding on the terms the court considers appropriate. Again, there has been no application made before me pursuant to s. 13.

75 As it happens, Mr. Bodnar and Mr. MacKinnon share the same counsel. It may be appropriate, now that the ***Bodnar*** action has been certified to stay the ***MacKinnon*** action, or it may be that the ***MacKinnon*** action should be consolidated with the ***Bodnar*** action. Be that as it may, the ***Bodnar*** action does not constitute an abuse of process.

BROWN J.

TAB 11

Case Name:

Ayrton v. PRL Financial (Alta.) Ltd.

Between
Jacob Ayrton, As Representative Plaintiff, plaintiff,
and
PRL Financial (Alta.) Ltd., Payroll Loans (Alberta) Ltd., Hornby Loan Broker (Alberta) Inc., Thurlow Capital (Alberta) Inc., David Feller, Praveen Varshney, Sokhie Puar, Patrick Warren and David Ash, defendants

[2005] A.J. No. 466

2005 ABQB 311

[2006] 2 W.W.R. 536

52 Alta. L.R. (4th) 106

370 A.R. 141

11 C.P.C. (6th) 28

139 A.C.W.S. (3d) 626

2005 CarswellAlta 550

Docket: 0301 15879

Alberta Court of Queen's Bench
Judicial District of Calgary

LoVecchio J.

Heard: February 18, 2005.
Judgment: April 22, 2005.

(108 paras.)

Civil procedure -- Actions -- Joinder of causes of action and consolidation -- Parties -- Class or representative actions -- Certification -- Common interests -- Members of class -- Representative plaintiff -- Striking out parties --Corporations and associations law -- Corporations -- Legal

personality -- Lifting the corporate veil.

Application by the plaintiff Ayrton for certification of the present action as a class action and for consolidation of two actions. The defendant Ash, the director of the defendant PRL Financial, sought an order to be struck as a party to the action. Ayrton had obtained several payday loans from PRL Financial. In the present action, Ayrton claimed that the cumulative amounts he was required to pay for interest and other administrative charges constituted a criminal rate of interest. He then commenced another action against Hornby, Thurlow arguing that these defendants also charged a criminal rate of interest and violated the Fair Trading Act. Hornby, Thurlow had purchased the assets of PRL. These defendants were also parties to the present action and the same claims were made against them in both actions. The statement of claim in the present action alleged that Ash, as director, authorized or acquiesced in the conduct of PRL and was thus jointly and severally liable.

HELD: Application by Ayrton allowed. Application by Ash dismissed. The action was not struck out as against Ash. The allegations against him were the type that might convince a court to lift the corporate veil. The issue of Ash's personal liability was an issue to be determined at trial. The action could properly proceed as a class action. The defined class, as proposed by Ayrton, consisted of individuals who borrowed money as a payday loan from PRL within a certain time frame and were charged interest and a brokerage fee. This definition provided objective criteria for membership in the class based on borrowing and repayment of a loan, and the class was related to the common issue of whether criminal rates of interest were charged. The claims in this case raised similar issues of fact and law and advanced the class members' claims in a meaningful way. The issue of whether the brokerage fee charged constituted a criminal rate of interest was a central issue to all members' claims. The fact finding and legal analysis in this case would be shared by the class members. In the context of the entire claim, common issues predominated over individual issues. Ayrton met the requirements to be a representative plaintiff. The two actions were consolidated since they shared the same issued of law and fact. Consolidation would also remove concerns about duplicity. The defendants Hornby, Thurlow were struck from the present action to remove further duplicity.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court Rule 42, Rule 129, Rule 129(d), Rule 129(1)(a), Rule 229

Class Proceedings Act s. 1(e), s. 5, s. 5(1)(a), s. 5(1)(b), s. 5(1)(c), s. 5(1)(d), s. 5(1)(e), s. 5(2)(a), s. 5(2)(b), s. 5(2)(c), s. 5(2)(d), s. 5(2)(e), s. 5(3), s. 8

Consumer Credit Transactions Act, R.S.A. 1985, c. C-22.5

Criminal Code, R.S.C. 1985, c. C-46 s. 347, s. 347(1), s. 347(1)(a), s. 347(1)(b)

Fair Trading Act, R.S.A. 2000 c. F-2, s. 13(3), s. 98(3)

Judgment Interest Act, R.S.A. 2000, c. J-1

Limitations Act, R.S.A. 2000, c. L-12

Trade Practice Act, R.S.B.C. 1996, c. 457

Counsel:

Mr. William E. McNally of McNally Cuming Raymaker for the Plaintiff Jacob Ayrton

Mr. A. Webster Macdonald, Jr., Q.C. and Mr. S.B. Gavin Matthews of Blake, Cassels & Graydon LLP for the Defendants PRL Financial (Alta.) Ltd., Payroll Loans (Alta.) Ltd., and David Ash.

Mr. Todd Lee of Miles Davison LLP for the Defendants Hornby Loan Broker (Alta.) Inc., Thurlow Capital (Alta.) Inc., David Feller, Praveen Varshney, Sokhie Puar, and Patrick Warren.

REASONS FOR JUDGMENT

LOVECCHIO J.:--

Introduction

1 Jacob Ayrton has on several occasions obtained loans, commonly referred to as "payday loans", from the Defendant companies. Payday loans are generally short-term (being due around the borrower's next scheduled payday) and require the borrower to pay both interest at a stipulated rate and some other administrative charges.

2 Mr. Ayrton says that the cumulative amounts he was required to pay on these payday loans constitute a criminal rate of interest. On October 8, 2003, Mr. Ayrton filed a Statement of Claim in this Court against Payroll, PRL and Mr. Ash asking this Court to:

a) declare that the Brokerage Fees charged by the corporate Defendants is interest within the meaning of s. 347 of the Criminal Code[1] and that the agreements made by the corporate Defendants for payday loans are void because they resulted in the receipt of interest at a criminal rate contrary to s. 347 of the Criminal Code;

b) declare that the agreements made by the corporate Defendants for payday loans failed to comply with the Fair Trading Act[2] and are void;

c) order an accounting of all monies received by the Defendants, or one or any of them, and order repayment or damages of all monies received by the Defendants;

d) award statutory damages from the Defendants, or one or any of them, in the amount equal to the lessor of $500 or 5% of the maximum outstanding balance of the Payday Loan and financial charges as provided by s. 98(3) of the Fair Trading Act;

e) award punitive and/or exemplary damages;

f) award interest on all amounts found to be owing pursuant to the Judgment Interest Act.[3]

3 The Statement of Claim was filed by Mr. Ayrton as a Representative Plaintiff in a proposed class proceeding.

4 The Defendants do not agree with these assertions and do not accept that this is an appropriate case for certification as a class proceeding.

Case Management

5 On May 26, 2004, I was appointed by the Associate Chief Justice as the Case Manager of this proceeding and, as will be detailed below, another similar proceeding.

The Parties to these Proceedings, the Payroll Loan Procedure and the Proceedings to Date

6 The following brief chronology will help to explain the parties involved in this action, their relationship to each other, the nature of the loans and the proceedings to date.

7 In March of 2003, Mr. Ayrton obtained a payday loan from Payroll Loans at one of their retail outlets. Payroll brokered the loan for a lender, PRL Financial. David Ash is the sole director of Payroll and PRL.

8 In October, 2003, Hornby Loan Broker purchased the assets of Payroll. Hornby carried on business in the same retail outlets that had been used by Payroll.

9 In February of 2004, and on later dates, Mr. Ayrton obtained payday loans from Hornby. Hornby had brokered these loans for a lender, Thurlow Capital. The directors of Hornby are David Feller and Praveen Varshney. The directors of Thurlow are Sokhie Puar and Patrick Warren.

10 In order to obtain the loans with the Defendant companies, Mr Ayrton was required to sign two standard form agreements. One form was a Broker Fee Agreement with the broker of the loan. Both Payroll and Hornby's Broker Fee Agreements required Mr. Ayrton to pay a brokerage fee of approximately 20% of the loan. For example, Mr. Ayrton was charged a brokerage fee of $95 on a loan of $500.

11 The other form that Mr. Ayrton was required to sign was a loan agreement with the companies actually extending credit, either PRL or Thurlow. The loan agreement disclosed the rate of interest on the loans. Both PRL and Thurlow charged interest at the rate of 1.13 % per week, or approximately 59% per annum. For example, Mr. Ayrton was charged $11.32 in interest for a two-week loan of $500.

12 As already noted, Mr. Ayrton filed a Statement of Claim in this Court against Payroll, PRL, and Mr. Ash on October 8, 2003. Mr. Ayrton filed the Statement of Claim as the Representative Plaintiff in a proposed representative action under Rule 42 of the Alberta Rules of Court.

13 On April 19, 2004, Mr. Ayrton filed an Amended Statement of Claim in this Court. The Amended Statement of Claim adds the Defendants Hornby, Thurlow, and their respective Directors, to the Statement of Claim. The Amended Statement of Claim alleges that these corporate Defendants, authorized by their respective Directors, also charged a criminal rate of interest and violated the Fair Trading Act. This claim will be referred to as Action #1.

14 On August 10, 2004, Mr. Ayrton filed a new Statement of Claim in this Court against Hornby, Thurlow and their respective directors, as a Representative Plaintiff in a proposed class proceeding under the Class Proceedings Act.[4] The Statement of Claim echoes the allegations made against these Defendants in the Amended Statement of Claim of April 19, 2004. This second claim will be referred to as Action #2.

These Applications

15 As part of the Case Management process, I heard three applications on February 18, 2005. They were:

(1) Mr. Ash applied to be struck from the claim under Rule 129 of the Alberta Rules of Court, the alleged basis being the Statement of Claim does not disclose any cause of action against him;
(2) Mr. Ayrton applied to have the two proceedings certified as class proceedings; and
(3) Mr. Ayrton applied under Rule 229 of the Alberta Rules of Court to consolidate this action with the other proceeding.

Decision

16 For the reasons which follow:

(1) the Defendant Ash will not be struck from the Statement of Claim;
(2) these proceedings will be certified as a class proceeding with Mr. Ayrton as the Representative Plaintiff; and
(3) Action #1 and Action #2 will be consolidated and, as an ancillary matter to the consolidation, the Defendants Hornby, Thurlow, and their respective Directors will be struck from Action #1.
(1) The Application to Strike the Defendant Mr. Ash

Discussion

17 Rule 129 (1)(a) of the Alberta Rules of Court allows a court to strike pleadings in an action if the pleadings do not disclose a cause of action. This rule is in place to relieve parties from litigation which is needless or doomed to fail. The principles governing an application to strike a statement of claim for failure to disclose a cause of action are relatively settled. In brief, the Court must assume that the allegations of fact made by the Plaintiff are true. The Court then determines whether those facts disclose a cause of action in law. The burden of proof to have pleadings struck rests on the Applicant, and it will only be done in the clearest of cases.[5]

18 So, the question that arises in this Application is whether, assuming all of the facts set out in the Statement of Claim are true, it is plain and obvious that no cause of action is disclosed against the Defendant Mr. Ash?

19 The starting point for this analysis is the Statement of Claim itself. Paragraphs 43 and 44 of the Statement of Claim are relevant. They read:

43. Further, the conduct of the Defendants, or one or any of them, is intentional and deliberate and is undertaken by the Defendants, or one or any of them, to exploit the economic vulnerability and necessitous circumstances of the representative Plaintiff and other Class members ...
44. The individual Defendant Ash authorized or assented or acquiesced or participated or omitted to do anything for the purposes of aiding or abetting the acts or omissions set forth above and is jointly and severally liable with the corporate Defendant PRL Corporations to the representative Plaintiff and other Class members ...

20 Counsel for Mr. Ash argues that the allegations in these pleadings, even if proven to be true, do not form a cause of action against him personally. He argues a rule which every first year law student is taught: namely, the Court should not pierce the corporate veil. Stated another way, a corporation is a separate legal identity, distinct from its directors and shareholders, with rights and liabilities of its own. As a result, a corporate veil is created whereby the acts of directors are seen as the acts of the corporation, and any liability arising from those acts attaches to the corporation, and not to the directors personally.[6]

21 Counsel for Mr. Aryton, having been a first year law student at one time, acknowledges the existence of the rule. But he adds, the rule is not absolute. So, while the rule affords protection to directors for legitimate corporate purposes, the corporate veil may be lifted and liability may attach to a director in certain circumstances.

22 Courts have commented on the circumstances in which the corporate veil will be lifted. These circumstances include: where there are findings of fraud or deceit against a director,[7] where a director's actions are tortious in and of themselves,[8] where there is evidence that the director(s) either a) formed the corporation for the purpose of doing a wrongful act, or, b) directed that the corporation do a wrongful thing after it was formed[9] and where doing so (that is to say recognizing the corporate veil) would result in a decision "too flagrantly opposed to justice".[10]

23 In two recent cases, courts have specifically considered the issue of striking pleadings from a statement of claim when the directors of corporations allegedly involved in illegal payday loan operations were personally named as defendants in the action. The two cases were Tschritter v. Rentcash Inc.,[11] and Bellows v. Quickcash Ltd..[12]

24 In Tschritter, the Plaintiff commenced an action against the corporation, The Cash Store, and its sole officer and director. The Plaintiff also named the corporate shareholder of the Cash Store, Rent Cash, as a defendant as well as the past and current directors of Rent Cash. The Plaintiff claimed that the fees charged on loans amounted to an annual interest rate of over 1000%, which is well in excess of the allowable rate of interest under the Criminal Code.

25 The defendants argued that the action should not proceed against all of them as to do so would lift the corporate veil and no facts were pled to establish personal liability against them.

26 My brother Hawco J. observed that the statement of claim contained the following allegations: the Cash Store contravened s. 347(1) of the Criminal Code; the purpose of The Cash Store was to lend money at a criminal interest rate; and that the directors of Rent Cash had authorized the company to commit the criminal act. He relied on the following statement from Rainham to confirm that these allegations disclose a cause of action against the individual directors:

> If a company is formed for the express purpose of doing a wrongful act, or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences.[13]

As a result, Justice Hawco did not strike the individual defendants from the claim and the directors' personal liability was left for the trial judge to determine.

27 In Bellows, the Plaintiff filed a claim against a payday loan corporation called Quik Cash, and its officers and directors, alleging the defendants charged and collected interest on loans at a criminal

rate of interest. The defendant officers and directors applied to strike the claim against them, saying the claim lacked sufficient facts to disclose a cause of action against them personally. They also argued there is no personal liability at law for directors and officers arising out of the actions of the corporation.

28 The Court pointed to a number of cases which held that controlling minds may be personally liable when they have directed that a wrongful thing be done, or used the corporate structure for clearly improper conduct and declined to strike the pleadings.

29 Counsel for Mr. Ash submits that Tschritter and Bellows are distinguishable from this case. He submits that the Statement of Claim in this action does not allege the corporation was incorporated for an illegal purpose, nor does it allege that Mr. Ash knew the corporations' actions were wrong, or that Mr. Ash benefited from the corporations' acts. He also submits that in the recent Supreme Court decision, Transport North American Express Inc. v. New Solutions Financial Corp.,[14] the Court held that a finding that a corporation contravened s. 347 of the Criminal Code was not evidence that the company in question had been established for a criminal purpose.

30 Counsel for Mr. Ayrton submits that the Statement of Claim in this case is strikingly similar to those in the Tschritter and Bellows actions and submits the law does not require a corporation to be established for an illegal purpose, or to have as its sole purpose an illegal act, in order to find a director personally liable; it is sufficient if, once formed, the director expressly directs a wrongful thing be done.

31 Counsel for Mr. Ayrton then submits the Statement of Claim makes just this type of allegation against Mr. Ash in paragraph 43, which alleges that "the conduct of the Defendants, or any one of them, was intentional and deliberate", meaning that Mr. Ash allegedly intended the criminal conduct. Furthermore, paragraph 44 of the claim also specifically alleges that Mr. Ash "authorized or assented or acquiesced or participated or omitted to do anything for the purposes of aiding or abetting the acts or omissions set forth above".

32 The allegations of fact in this case, assuming they are proven, are the type that might convince a court to lift the corporate veil. The issue of Mr. Ash's personal liability is an issue to be determined at trial and the pleadings against Mr. Ash will not be struck.

(2) The Application to Certify these Proceedings as a Class Proceeding

Discussion

33 There are three main policy objectives behind class proceedings: access to justice; judicial economy; and behaviour modification. A class proceeding may offer litigants better access to justice by distributing the costs of litigation across a large number of class members, making litigation more economical. Judicial economy is achieved by having cases with similar fact-finding and legal analysis done in one action rather than being duplicated in many actions. Finally, a class proceeding helps to deter actual and potential wrongdoers by making them accountable to the public.

34 In a certification application, the Court is interested in whether the action is well suited to being tried as a class proceeding. The Court is not testing the merits of the application.

35 The Class Proceedings Act (the "Act") came into force in April of 2004. While these proceedings were instituted prior to the Act coming into force, the parties have agreed that I should apply the Act in this Application.

36 In order to have these proceedings certified as a class proceeding, and to recognize the person seeking to bring the class action as a representative plaintiff, the Court must be satisfied that the requirements in s. 5 of the Act are met. Section 5 reads:

> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
>
> (a) the pleadings disclose a cause of action;
> (b) there is an identifiable class of 2 or more persons;
> (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
> (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
>
> (i) will fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:
>
> (a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;
> (b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> (d) whether other means of resolving the claims are less practical or less efficient;
> (e)

whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

(3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.

Position of the Parties

37 Mr. Ayrton submits these proceedings should be certified as they meet all the requirements of s. 5.

38 The Defendants PRL, Payroll, and David Ash oppose certification. The main thrust of their argument is that there are too many individual circumstances that the Court will have to take into consideration, and that these individual circumstances may result in different determinations of the alleged illegalities and remedies for the class members. They also argue that Mr. Ayrton was knowledgeable about the nature of the later loans that he entered into, which may situate him differently from other class members, and so he is not an appropriate representative plaintiff.

39 The Defendants Hornby, Thurlow, David Feller, Praveen Varshney, Sokhie Puar and Patrick Warren, substantially agree with the submissions of PRL, Payroll and Mr. Ash. They part ways regarding whether Mr. Ayrton is an appropriate representative plaintiff, with the Hornby and Thurlow group of Defendants approving of Mr. Ayrton as a representative plaintiff if these proceedings are certified.

40 In light of the requirements of s. 5 and the position taken by the parties, there are three main issues which must be addressed. First - Is the class definition proposed by Mr. Ayrton too broad? Second - Do the questions of fact or law common to the prospective class members predominate over questions affecting only individual prospective class members - or vice versa? Third - Is Mr. Ayrton a suitable representative plaintiff? I will consider each in turn.

Class Definition

41 The Defendants argue that the proposed class definition is too broad and includes class members who are not commonly situated so the proposed class members will be facing different legal issues, resulting in an incohesive and unworkable class.

42 The Defendants point to two types of differences between potential class members and argue that these differences will likely mean that success for one will not be success for all.

43 The first difference between the proposed class members is that some of them have likely defaulted on their loans with the Defendants. The Defendants estimate that a high percentage (69%) of their customers have defaulted on their loans on at least one occasion. When a customer defaults, the Defendant companies enter into different agreements with the customers depending on the customer's circumstances.

44 In some cases, loan extensions are given for a few days and no additional fees are levied on top of the fees already agreed to. In other cases, arrangements are made with customers whereby customers pay the loan in equal instalments of a 6 to 12 month period without additional fees being

charged. There are also cases where the Defendant companies have accepted settlements with customers for only a partial recovery of the original loan.

45 As a result of these types of differences, the Defendants argue that a different analysis will need to be done in order to answer questions about whether the brokerage fee was interest, the transaction was unconscionable, or there was an unjust enrichment. Therefore, each claim of the proposed class members will be fact-specific and depend on the individual circumstances of the customers. The Defendants argue this is especially true because the class members seek equitable remedies, and the granting of those remedies will also depend on the level of sophistication, knowledge and motivation of the individuals seeking loans.

46 The second difference that the Defendants raise is that the class members are subject to different legislation. Mr. Ayrton, as the proposed Representative Plaintiff, has requested that the Court certify as a class all individuals who borrowed money from the Defendants from January 1, 1997 to date.

47 The Defendants point out that the Limitations Act[15] bars a claimant from commencing an action once two years have passed from the time the claimant first knew or ought to have known about the existence of the claim. Therefore, a number of the proposed class members may be statutorily barred from participating in the action.

48 The Defendants also point out that Mr. Ayrton seeks to rely on remedies under the Fair Trading Act retroactive to January 1, 1997, but that the Fair Trading Act only applies to consumer transactions arising after September 1, 1999.

49 Mr. Ayrton responds that the class is commonly situated because there is one overarching issue to this case which unites them all. The overarching issue is whether the Defendants entered into agreements by which they sought to charge interest at a criminal rate. The determination of whether an agreement violates s. 347(1)(a) of the Criminal Code is based on the time the transaction is entered into - so the fact that a customer may have received an extension on repayment is irrelevant to the question of whether the brokerage fee constitutes interest at a criminal rate.

50 As for the differences in legislation, Mr. Ayrton argues that the predecessor legislation to the Fair Trading Act, the Consumer Credit Transactions Act,[16] incorporated similar provisions regarding the disclosure of interest costs, so should not be a bar to certifying the class.

51 The other legislation in issue, the Limitations Act, may not be a bar based on public policy reasons as ultimately the constitutional doctrine of paramountcy may prevent the Defendants from relying on a provincial statute to shelter them from the consequences of their misconduct in an action based on a Criminal Code violation. In any event, Mr. Ayrton argues that the determination of this matter is for the common issues judge to determine at trial.

52 In the end, the identifiable class requirement is an inquiry into whether the members of the class can be identified by objective criteria and, while the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation.[17] But ease of identification through objective criteria should not become the agent to make the class unnecessarily broad. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.[18]

53 The defined class, as proposed in the certification motion, is individuals who borrowed money as a payday loan from the Defendant companies subsequent to October 15th, 2001 (which Ayrton seeks to amend to January 1, 1997), were charged interest fees and a brokerage fee, and repaid the original loan amount, plus fees and interest on or after the due date.

54 This definition provides objective criteria for membership in the class based on the borrowing and repayment of a loan, and the class is related to the common issue of whether criminal rates of interest were charged. A person will know they are a member of the class if they obtained and repaid the original loan amount, plus fees, from the Defendant companies during the period specified. Individuals who had all or part of their original loan forgiven will be excluded by definition.

55 The issues raised by the Defendants' regarding the Limitations Act will have to be addressed, but for me to decide that issue would be delving into the merits of the case, and the authorities are clear that the certification stage is not meant for that purpose. That is an issue for the common issue judge to determine. The inclusion of individuals whose claims may ultimately be found to be statute barred is not a barrier to proper identification of the members of the class, nor does it expand the class unnecessarily.

56 The other issue raised by Defendants, regarding individual circumstances that may affect remedies, is best addressed under the next section on common issues. At this stage, the identifiable class requirement is met if there is "some rational relationship between the class and common issues".[19]

57 In my view, there is a rational relationship between the class - persons who borrowed and repaid their loans in full from the Defendants, and the common issues - whether those loan agreements were unlawful, and if so, what remedies may be available to them. Similarly, the fact that some class members may ultimately be denied a remedy due to their individual circumstances does not mean that the class is overbroad and should not be certified.

Do Common or Individual Issues Dominate?

58 In the Certification Motion, Mr. Ayrton proposes sixteen common issues between the class members and Defendants. In his brief, Mr. Ayrton organized the issues into four categories: criminal interest rate issues; restitution issues; Fair Trading Act issues; and punitive damages issues.

59 Briefly, the issues in each of these categories are as follows:

1. Criminal Interest Rate Issues

   Were the fees charged by the Defendants interest for the purposes of s. 347 (1) of the Criminal Code? If the fees are characterized as interest, then a) are the loan agreements in contravention of s. 347(1)(a) of the Criminal Code, and b) did the collection of the fees under the agreements result in the receipt of interest at a criminal rate, contrary to s. 347(1)(b) of the Criminal Code?

2. Restitution Issues

   If the Defendants received interest at a criminal rate, then have they been unjustly enriched by the retention of that criminal interest? If so, are the Defendants liable to account to the class members?

3. Fair Trading Act Issues

> Irrespective of the criminal rate issues - are the Defendants liable under the Fair Trading Act for failing to disclose the total cost of credit to the class members on the loan agreements? Did the Defendants also fail to comply with the Fair Trading Act by receiving wage assignments from the class members? If the Defendants failed to comply with the Fair Trading Act, are statutory and exemplary damages owed to the class members?

4. Punitive Damages Issues

> If the Defendants are found to have received interest at a criminal rate, or to have breached the Fair Trading Act, does this conduct justify an award of punitive damages? If so, what is the amount to be awarded?

60 The Defendants concede that there is one common issue to the class members in the first category - whether the brokerage fee constitutes interest under s. 347 the Criminal Code - but submit this issue will not materially advance the class members' claims in any meaningful way. The resolution of the interest rate issue will only be a preliminary hurdle for the class members, but the other issues in this category will need to be resolved on an individual basis because of the individual variance in many of the loan agreements.

61 The Defendants relied heavily on the Transport case for their argument. The case concerned two corporations who entered into a credit agreement for $500,000. There were a number of fees and charges in the agreement in addition to a 4% per month interest rate.

62 The various payments, when totalled, resulted in a criminal rate of interest as defined in s. 347 of the Criminal Code. When the payments became too onerous, the borrower applied to the court for a declaration that the agreement contained an illegally high rate of interest and should not be enforced.

63 The Supreme Court of Canada upheld a decision by the lower court that applied the doctrine of "notional severance" to the agreement, allowing the offending interest rate to be read down so that the contract provided for the maximum legal rate of interest. The Court directed courts to use judicial discretion when deciding on the remedies available in cases arising under s. 347 of the Criminal Code:

> There is a broad consensus that the traditional rule that contracts in violation of statutory enactments are void ab initio is not the approach courts should necessarily take in cases of statutory illegality involving s. 347 of the Code. Instead, judicial discretion should be employed in cases in which s. 347 has been violated in order to provide remedies that are tailored to the contractual contest involved. ...
>
> A spectrum of remedies is available to judges in dealing with contracts that violate s. 347 of the Code. The remedial discretion this spectrum affords is necessary to cope with the various contexts in which s. 347 illegality can arise. At one end of the spectrum are contracts so objectionable that their illegality will taint the entire contract. For example, exploitative loan-

> sharking arrangements and contracts that have a criminal object should be declared void ab initio. At the other end of the spectrum are contracts that, although they do contravene a statutory enactment, are otherwise unobjectionable. Contracts of this nature will often attract the application of the doctrine of severance. ... In each case, the determination of where along the spectrum a given case lies, and the remedial consequences flowing therefrom, will hinge on a careful consideration of the specific contractual context and the illegality involved.[20]

64 The Supreme Court of Canada ultimately held that notional severance was appropriate in the case because the agreement was a commercial transaction entered into by experienced and independently advised commercial parties. There was nothing inherently illegal about the parties intentions to enter into the contract. The Supreme Court of Canada outlined the following approach to determine if an otherwise illegal agreement should be partially enforced rather than being declared void ab initio. A court should consider the following factors:

1) whether the purpose or policy of s. 347 would be subverted by severance;
2) whether the parties entered into the agreement for an illegal purpose or with an evil intention;
3) the relative bargaining position of the parties and their conduct in reaching the agreement;
4) the potential for the debtor to enjoy an unjustified windfall.[21]

65 Based on this case, the Defendants argue that even if the criminal rate issue is resolved, the Court will still be required to engage in individual inquiries to determine, on a case by case basis, whether the doctrine of notional severance should be applied. Therefore, the Defendants submit that there is only one preliminary common issue in the first category of common issues, the resolution of which will result in negligible judicial economy, and does not provide justification for a class proceeding.

66 The Defendants also rely on the Transport case to negate the framing of the restitution issues, in category two, as common issues. They submit that in order to determine whether the parties entered into the agreement for an illegal purpose, the court will be required to look at evidence on the intention of each party to each individual loan agreement. Similarly, the Court will need to look at evidence on the bargaining position of each individual class member and their conduct in reaching the loan agreements.

67 The "common issues" under the Fair Trading Act category, are also "uncommon" issues according to the Defendants. The Defendants point to s. 13(3) of the Fair Trading Act, which requires a court to consider the following when determining whether to grant relief under the Act: "whether the consumer made a reasonable effort to minimize any damage resulting from the unfair practice and to resolve the dispute with the supplier before commencing the action in the Court". Due to this requirement, the Court will be required to inquire into the individual efforts of the class members to mitigate their damages or resolve the dispute on their own.

68 The Defendants also submit that the forth category, punitive damages, cannot be a common issue for the class members because individual inquiries will need to be made. Punitive damages are awarded when compensatory damages are inadequate to achieve the objectives of retribution, deterrence and denunciation. The determination cannot be made until after individual inquiries have been made relating to compensatory damages and notional severance.

69 The Defendants also rely on a recent decision from British Columbia, MacKinnon v. National Money Mart Company et al.,[22] that considered whether to certify a class proceeding against 20 defendants who run payday loan type companies. This decision was released after the Applications were argued and the parties made additional submissions subsequent to its release.

70 In National Money Mart, Mr. MacKinnon proposed to certify as a class all persons in the Province of British Columbia who had taken out payday loans from any of the 20 different payday loan businesses. Justice Brown called this proposed class action "industry-wide litigation".[23]

71 The Defendant companies in the case, as in the present case, opposed certification on the ground there were insufficient common issues shared by the class members. Justice Brown specifically denied certification on that ground, stating that she was not satisfied the proposed common issues were common to the class. She noted the manner in which payday loan companies operate their businesses differs widely.

72 In order to determine the criminal interest rate issues, each fee charged by each defendant would need to be reviewed, and a determination made as to the amount of interest charged and received. The fact finding and legal analysis done for one class member and defendant, such as Mr. MacKinnon and Money Mart, would have little or no application to other borrowers and lenders because the court would be required to look at each separate form of agreement and fee charged.[24]

73 Justice Brown also held that even if there was sufficient commonality in the legal analysis, a class action would still not be the preferable procedure as each defendant company would be required to attend and participate in the review of agreements and business models which have little in common with theirs. Individual plaintiffs would be required to wait for determination of their claim while unrelated fees and agreements were considered.[25]

74 She held that the remaining common issues, namely restitution, payments to franchisers, Trade Practice Act[26] issues and punitive damages, could not stand alone as common issues because they were all dependant on a determination of the criminal interest rate issue.[27] She also noted that even if a particular standard form loan agreement was found to constitute an agreement to receive interest at a criminal rate, the court would still have to look at individual circumstances such as: oral variations to the contract, repayments made by individuals, whether collection procedures were used, defences of defendants based on voluntariness or individuals being fully informed, and counterclaims for unpaid amounts.[28]

75 Justice Brown found that for any individual claimant or defendant it may take a very significant period of time, as the court works through other issues, before their individual circumstances are dealt with and that was not an efficient use of judicial resources.[29]

76 She commented that these claims could potentially be pursued more effectively in "less ambitious" class proceedings.[30]

77 The Defendants say National Money Mart is on point with this case. They acknowledge that the large number of defendants and different business models was a factor in the case, but submit that numerous other factors, that were relevant to the decision, are present in this case. In particular, the Defendants point to the following issues that were raised by Justice Brown in her reasons dismissing certification, and say that they are also issues that should result in dismissing the certification of this action:

> - variances were made to the loan agreements;
>
> -the court will have to determine on an individual basis the date of the advance of principal and the dates of repayment;
>
> - payments may have been made after collection procedures are initiated requiring the court to consider what portion of the payment is principle versus interest and costs; and
>
> - there are differences in the individual borrowers regarding their knowledge and reasons for entering into the loans that will effect the trade practice and punitive damages claims.

78 Mr. Ayrton's position is that one common issue predominates over all other issues in the case. He submits that the criminal rate issue is an overarching issue that unifies all class members. He also argues the standard form agreements used by the Defendants set out the brokerage fees upfront, therefore to determine whether the fee constitutes interest under the Criminal Code will involve the same fact finding and legal analysis for all class members. Mr. Ayrton submits that the calculation to determine if the Defendants received a criminal rate of interest under s. 347(1)(b) will involve a simple mathematical calculation based on the amount of repayment and when it is received, which is information contained in the ledgers of the corporate Defendants. Therefore, the analysis of individual circumstances is not necessary for these inquiries.

79 As for the Transport case, Mr. Ayrton submits the loan agreements at issue fall into the "exploitive loan sharking" end of the spectrum of illegal contracts referred to by the Supreme Court of Canada, and are not akin to a situation where a court would apply notional severance:

> Using notional severance to read down interest provisions to be just within the legal limit would not find application in traditional loan-sharking transactions. It would be available as a remedy where a court recognizes the commercial sophistication and professional advice received by both parties, concludes that the violation of s. 347 by the parties was unintentional, and considers it equitable to give effect to the highest legal interest obligation available.[31]

80 Mr. Ayrton also argues the Defendants have miscast the restitution issues by suggesting the Court will have to focus on borrowers' individual circumstances to determine if restitution should be awarded. In an action for unjust enrichment, after the court finds an enrichment of the defendant and corresponding deprivation of the plaintiff, the court next inquires whether there is a juristic reason for the enrichment. Mr. Ayrton submits that in a case involving s. 347 of the Criminal Code the juristic reason inquiry focusses on the lender, not on the borrower.

81 For example, in Garland v. Consumer's Gas Co.[32], the Supreme Court of Canada found a juristic reason for criminal rates of interest that a gas company had charged through its late payment penalty. The juristic reason was that the Ontario Energy Board, which regulated the gas company, had ordered the late payment penalties. However, as soon as the gas company was put on notice that there was a serious possibility the payments violated the Criminal Code, it could no longer rely on the orders as a juristic reason for the unjust enrichment.

82 Mr. Ayrton submits that it is clear from this analysis that the "individual circumstances" to be considered in this action would be the knowledge of the lenders, not the borrowers. Therefore, the restitution issue can be considered for the class as a whole.

83 While it is true some assessments of damages will need to be done on an individual basis, Mr. Ayrton argues that in most cases the Court will be able to ascertain damages based on his circumstances, since he is the Representative Plaintiff. The pretext to a class proceeding is that the representative plaintiff stands in the place of the class members because his circumstances are similar to those of the class members. Accordingly, the legal analysis proceeds based on those circumstances.

84 In determining whether the proposed issues are common issues or individual issues, it is important to look to the Act. The Act defines a common issue as "common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts".[33] The Class Proceedings Act (British Columbia) shares this definition, and as it has been in existence for some time, courts in B.C. have had a chance to interpret this definition. A common issue has been interpreted as an issue that will be applicable to all in a class or subclass and will move the litigation forward.[34]

85 In my view, the claims in this case raise similar issues of fact and law, that, once resolved, will advance the class members' claims in a meaningful way. The class members have all been advanced loans by the Defendants under a nearly identical scheme whereby they are required to pay a brokerage fee on top of interest for their loan. There is one central issue to their claims that, once resolved, will advance the class members' claims in a meaningful way.

86 That issue is whether the brokerage fee constitutes interest under s. 347 of the Criminal Code. If the answer is yes, there are other questions that follow regarding the receipt of that interest and what remedies flow from the receipt of that interest, that can be answered. It may be that at this stage the class members should be divided into sub-groups depending on whether they paid their loans on time, were granted an extension of a few days, or were granted an extension of a few months. However, the factual and legal issues for the court to determine regarding these sub-groups, such as the availability of notional severance, or a juristic reason for the Defendants' enrichment, can be determined based on the circumstances of a representative for those subgroups.

87 In addition, the Defendants' opposition to certification is largely answered by s. 8 of the Act itself. Section 8 directs the court not to refuse certification because damages will be assessed individually after the common issues are determined or because a subclass has claims that raise common issues not shared by all the prospective class members.

88 The National Money Mart case is distinguishable from this case on a number of grounds. In her decision, Justice Brown highlighted why the fact finding and legal analysis would not be shared among the class members by pointing out differences in the schemes of the payday loan companies. The companies charged various different fees such as processing fees, administration fees, documentation fees and so on. The organization of the companies also differed, with some acting as brokers for lenders, and some offering loans on their own behalf. Many of the companies also offered special terms or arrangements, that differed from other companies special arrangements, to their customers depending on the borrowers' circumstances or credit rating.

89 The fact finding and legal analysis in this case will be shared by the class members. The Defendant companies used nearly identical forms and operated under the same scheme whereby a retail store brokered a loan for a separate lender, and charged interest plus a brokerage fee. The rate of

interest charged and the brokerage fee scale appears to be the same for Payroll/PRL as it is for Hornby/Thurlow. Therefore, the question regarding whether the brokerage fee is interest, and whether it is interest at a criminal rate, will involve the same legal analysis for all corporate Defendants, and is clearly a common issue.

90 In National Money Mart, the failure of the criminal interest issue to be classified as a common issue resulted in the failure of the other proposed issues to be found in common. Justice Brown found that the restitution issues, Trade Practice Act issues, and Punitive Damages issues were all dependent on a determination that the defendants provided loans at a criminal rate of interest. Justice Brown's decision on this point highlights the interconnectedness of the issues regarding restitution, the Fair Trading Act and punitive damages, to the central issue regarding the criminal rate of interest. By resolving the criminal rate issue in this case, the class members' claims will unquestionably be advanced in a meaningful way.

91 It is true that Justice Brown also found that individual circumstances added to the reasons that the claims were not suitable for a class proceeding. She stated that it was neither fair nor efficient for a claimant or defendant to wait as the court deals with individual circumstances regarding the variance of loan agreements, defences, counterclaims, and so on.

92 I agree that in the context of the proposed class proceeding in the National Money Mart case the issues regarding individual circumstances were a further reason not to certify the proceeding. In the balancing done between "common issues" and "individual issues", the individual circumstances added even more weight to the "individual issues" side of the scale. However, that side of the scale was already fully loaded considering that Justice Brown did not find a single common issue in the proceeding.

93 That is not so in this case. This is an example where the claims may be pursued effectively in, to use the words of Justice Brown, "less ambitious" class proceedings.

94 When deciding whether a class proceeding is the preferable procedure, one should also keep in mind the policy reasons behind class proceeding legislation: access to justice; judicial economy; and behaviour modification. In my view, these three policy objectives will be met by certifying this action.

95 Access to justice will be provided to a group of people who would find it uneconomical to litigate one of these actions individually, both due to the potentially modest recovery and due to the reality that those seeking payday loans are generally not in a position to fund expensive litigation.

96 Judicial resources will be used efficiently by having similar issues of fact and law analyzed in one action.

97 Finally, if the plaintiffs are successful in their claims, the goals of accountability for wrongful actions and deterrence of future wrongful actions will likely be met.

98 I find that in the context of the entire claim, the common issues predominate over individual issues.

Appropriate Representative Plaintiff

99 The Defendants Payroll, PRL, and Mr. Ash also argued that Mr. Ayrton is not an appropriate representative plaintiff. They submit that Mr. Ayrton was knowledgeable about the nature of the loans

when he entered into the later loan agreements, and is therefore potentially situated differently from others in the class and cannot represent them adequately.

100 The Defendants Hornby, Thurlow, and the directors of those companies, agree that Mr. Ayrton may be differently situated from other class members because they allege he entered into loans with their companies in order to push forward the class action and will not be deserving of a remedy. However, these Defendants feel that having a representative plaintiff with these personal circumstances will benefit their case, so they do not oppose his role as a Representative Plaintiff.

101 The arguments of the Defendants are arguments for the common issues judge to determine as they go to the merits of the case. Mr. Ayrton took out loans with all of the corporate Defendants. He and the class members share the common issue, namely, whether the Defendants charged interest at a criminal rate on their loans, therefore he is in a position to fairly and adequately represent the interests of the class.[35] He has produced a workable plan for the proceeding to progress. There is no evidence to suggest that he is in a conflict of interest with other class members regarding the common issues.

102 I am satisfied that Mr. Ayrton meets the requirements under the Act to be a representative plaintiff.

103 The Application for certification of these proceedings is granted and Mr. Ayrton is appointed as the Representative Plaintiff.

(3) Application to consolidate Action #1 and Action #2

104 Mr. Ayrton asks for Action #1 and Action #2 to be consolidated. He argues that the parties and issues are essentially identical and should be consolidated pursuant to Rule 229 of the Alberta Rules of Court.

105 The Defendants Hornby, Thurlow, and the Defendant directors of those companies oppose consolidation. They argue that the two actions are exactly the same, and that this duplicity constitutes an abuse of process of the court. Therefore they ask that Action #2 be struck under Rule 129(d) of the Alberta Rules of Court for being an abuse of process.

106 Actions #1 and #2 share the same issues of law and fact, as the discussions in the previous sections have explained. Rule 229 allows consolidation where two or more actions have a common question of law or fact. Consolidating these two actions would partly remove the Defendants' concerns about duplicity, as they would then be heard together.

107 The Defendants Hornby, Thurlow, and their respective Directors would still be named in both so some duplicity would remain. The way to remove that duplicity is to strike them from Action #1.

108 I order that Actions #1 and #2 be consolidated and that the Defendants Hornby, Thurlow, and their respective Directors be struck from Action #1.

Costs

Counsel for Mr. Ayrton asked that this matter proceed on the basis of a no costs regime because it is a matter of public interest. As this issue was not raised in the Notice of Motion, it is inappropriate for me to consider the matter at this time. Counsel is advised to file a new Notice of Motion regarding this issue. Otherwise, costs for this application may be spoken to later by the parties.

LOVECCHIO J.

1 R.S.C. 1985, c. C-46

2 R.S.A. 2000, c. F-2

3 R.S.A. 2000, c. J-1

4 R.S.A. 2003, c. C-16.5

5 Tottrup v. Alberta (Minister of Environment) (2000), 81 Alta. L.R. (3d) 27, 2000 ABCA 121.

6 Salomon v. Salomon, [1895-99] All E.R. Rep. 33 (H.L.)

7 Montreal Trust Co. of Canada Inc. v. ScotiaMcLeod Inc. (1995), 129 D.L.R. (4th) 711 (Ont. C.A.) at 720.

8 Blacklaws v. Morrow (2000), (2001) 84 Alta. L.R. (3d) 270, 2000 ABCA 175 at 284.

9 Rainham Chemical Works, Ltd. and others v. Belvedere Fish Guano Co., Ltd., [1921] All E.R. Rep. 48 at 52.

10 Kosmopoulos v. Constitution Insurance Co. of Canada, [1987] 1 S.C.R. 2 at 10.

11 [2004] A.J. No. 900, 2004 ABQB 590.

12 [2004] N.J. No. 352, 2004 NLSCTD 191.

13 Tschritter, note 11 at para. 17.

14 [2004] 1 S.C.R. 249, 2004 SCC 7.

15 R.S.A. 2000, c. L-12

16 R.S.A. 1985, c. C-22.5.

17 Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 38.

18 Hollick v. Toronto (City), [2001] 3 S.C.R. 158, 2001 SCC 68, at para. 21.

19 Hollick, note 18, at para. 20.

20 Transport, note 14, at paras. 4 and 6.

21 Transport, note 14, at para. 43.

22 MacKinnon v. National Money Mart Company et al, [2005] B.C.J. No. 339, 2005 BCSC 271.

23 National Money Mart., note 22, at para. 2.

24 Ibid. at paras. 23 - 26.

25 Ibid. at para. 31.

26 R.S.B.C. 1996, c. 457.

27 National Money Mart, note 22, at paras. 32 - 35.

28 Ibid. at para. 39.

29 National Money Mart., note 22, at para. 40.

30 Ibid. at para. 40.

31 Transport, note 14, at para. 39.

32 [2004] 1 S.C.R. 629, 2004 SCC 25

33 Class Proceedings Act, note 4, s. 1(e)

34 Harrington v. Dow Corning Copr. (2000), 193 D.L.R. (4th) 67, 2000 BCCA 605, at para. 24; Scott v. TD Waterhouse Investor Services (Canada) Inc. (2001), 94 B.C.L.R. (3d) 320, 2001 BCSC 1299, at para. 76.

35 Fakhri v. Alfalfa's Canada Inc. (c.o.b. Capers Community Market) (2003), 26 B.C.L.R. (4th) 152, 2003 BCSC 1717, at para. 75.