COURT FILE NO.: 03-CV-254970CP
DATE: 20091026

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Stephen Markson – Plaintiff/Respondent/Moving Party by Cross-Motion – and - MBNA Canada Bank – Defendant/Moving Party/Respondent to Cross-Motion

BEFORE: Justice Cullity

COUNSEL: *Linda Rothstein* and *Odette Soriano*- - for the Respondent/Moving Party by Cross-Motion/Plaintiff

William G Horton, Jill Lawrie and *David Noseworthy* - - for the Moving Party/Respondent to Cross-Motion/Defendant

DATE HEARD: October 21, 2009

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

[1] This action was commenced on September 9, 2003. The plaintiff's claims relate to alleged breaches of section 347 of the Criminal Code by the defendant in connection with its charges on transactions made by its credit card customers.

[2] Certification was denied for reasons released on July 28. 2004 and an appeal was dismissed by a majority of the Divisional Court, on October 27, 2005. A further appeal was upheld by the Court of Appeal for reasons dated May 2, 2007 and the proceeding was certified by order of the court.

[3] Although, at first instance, I accepted that there were common issues relating to the plaintiff's claims for declaratory and injunctive relief, a resolution of these would not, in my opinion, advance the proceeding sufficiently as the additional claims for restitutionary relief and breach of contract would likely require the court to review millions of transactions of cardholders in order to identify those who paid interest at a criminal rate, the amounts of such payments, and the variables that affected the rate. I held that, on the evidence, the possibility that an appropriate electronic system can be developed, on the basis of the information in the defendant's records without separate examination of every credit card account, was at that time entirely conjectural.

[4] I also held that, as there were reasons why class members might well consider the orders for declaratory and injunctive relief as not in their best interests - and no evidence to the contrary - the plaintiff had not established that a class proceeding was the preferable procedure.

[5] In view of these findings, it was unnecessary to consider whether Mr Markson had provided a workable litigation plan as required by section 5 (1) (e) (ii) of the CPA and I did not do so. For the same reason, the requirement was not considered in the reasons of the majority of the Divisional Court. Nor was it addressed by the dissenting judge, O'Driscoll J. who would have certified the proceeding.

[6] In order to rebut the argument of defendant's counsel that the cardholders entitled to restitution could not readily be identified, plaintiff's counsel had relied on evidence that it might be possible to design a computer program that could do this. As I have indicated, I had found the evidence was insufficient for this purpose and, in delivering the reasons of the Court of Appeal, Rosenberg J.A. was not persuaded that this finding was unreasonable. In paragraph 37 of the reasons. he continued:

> Accordingly, if the millions of transactions have to be examined individually, the motion judge is undoubtedly correct that those damages are not suitable for certification; the time and cost to determine the size of the liability in relation to each member of the class would overwhelm the common issues. However, if the motion judge is correct in finding that cash transactions would have to be examined individually, the allegedly illegal conduct of the defendant will continue and its customers will receive no remedy for the previous violations.

[7] The learned judge then found that the concern referred to in the last sentence of that passage could be met by an application of sections 23 and 24 of the CPA which, he stated, had been raised for the first time in the Court of Appeal.

[8] It was also held that, in these circumstances, the requirement that a class proceeding would be preferable to individual proceedings by class members was satisfied as this would provide a method of obtaining restitution on a class-wide basis and the amounts involved were so small that none of the class members would have an interest in pursuing an individual claim.

[9] The decision of the Court of Appeal is now the leading authority on the interpretation of the aggregate assessment provisions of section 24 of the CPA and on the interplay between sections 23 and 24. What is unusual about the decision is that the court. like O'Driscoll J. in the Divisional Court. was prepared to certify the proceeding without considering whether the plaintiff had produced an acceptable litigation plan as required by section 5 (1) (e) (ii) of the CPA. The Court of Appeal stated that this question was not in issue on the appeal.

[10] In a sense, of course, it was in issue as the requirement is one of the five statutory preconditions for certification. I am informed, however, that the requirement was not mentioned on the appeal and it was not an issue between the parties in that sense. It would have been apparent to the court, and to counsel that a revised plan would be required to accommodate the court's findings and, given those findings, the court may well have been satisfied that an

acceptable plan could be devised. I do not believe the decision to certify without approving a litigation plan was intended to downplay the importance that the requirement has been given in numerous cases in which it has been held that the contents of a plan may cast significant light on the other statutory requirements for certification and, in particular, the requirement relating to the preferable procedure.

[11] Almost two and one-half years later the parties have now moved in this court for approval of competing alternative litigation plans. That proposed by the defendant is the more elaborate in that it seeks to accommodate numerous specific issues that will need to be resolved before the common issues can be decided. Several of these relate to assumptions that will need to be made before actuaries can compute the effective annual rate of interest on a variety of transactions and in different factual scenarios involving the amounts and timing of advances and repayments. As well as the general questions relating to the meaning of credit advanced under an agreement or arrangement in section 347 and to the items that are considered to be interest for the purposes of the section, the assumptions identified by defendant's counsel in their factum for these motions relate to the following, among other, questions:

> 1. Is the effective annual rate of interest to be determined with respect to all credit advanced at a particular time, or separately for different types of credit such as cash advances and purchases?
>
> 2. Should interest be calculated for each cash advance separately?
>
> 3. How should transactions that, for actuarial purposes, give rise to a negative interest rate be treated?
>
> 4. How are monetary adjustments to be dealt with?
>
> 5... What rounding methodology, if any, should be used?
>
> 6. How are pre-existing opening balances to be treated for the purpose of performing the calculation?
>
> 7. How are unpaid closing balances to be treated for the purposes of performing the calculation?
>
> 8. How should payments be allocated among multiple cash advance transactions?
>
> 9. How should instances of same-day repayment be treated?

[12] These, counsel emphasise, are novel questions of law concerning the correct approach to the calculation of a criminal rate of interest in the context of credit card advances. There are several possible answers to a number of the questions and actuarial science cannot determine

how the choice between them is to be made. In view of the bearing they may have on both the existence and quantum of liability, they are likely to be very much in dispute at the trial.

[13] In view of the number and complexity of these issues - as well as the variables of timing of advances and payments that can determine the effective annual interest rate, and the difficult threshold question of voluntariness - defendant's counsel proposed to bifurcate the trial of common issues by excluding from the first stage the computation of the amount of restitution or damages on a class-wide basis and the issue of punitive damages. All of the other common issues would be tried at the first stage.

[14] As the evidence that bears solely on the quantum of damages, or a restitution amount, on a class wide basis would not be required in determining the issues to be dealt with at the first stage - but in order to provide a factual context for the resolution of the question of liability and the possibility of an aggregate assessment - the defendant proposes that statistical sampling be used in order to obviate the necessity to produce full details of several million transactions in the period between 2004 and now. The defendant is able to make such details available electronically for that period, although not for the earlier part of the class period that commenced in 1997.

[15] In response, plaintiff's counsel moved for acceptance of a less elaborate plan that, arguably, does not reflect the limited basis on which the proceeding was certified. They do not agree that the common issues trial should be conducted in two stages and they seek immediate production of the details of the millions of transactions since 2004. They submitted that a process of sampling should be employed only in respect of transactions prior to 2005 for which the defendant has no means of electronic recovery.

[16] Plaintiff's counsel relied on authorities that indicate that the court should be reluctant to bifurcate proceedings as well as their *prima facie* right to full production of all relevant information. They conceded that sampling could be approved for the purpose of determining liability pursuant to section 12 of the CPA, but they insisted that there was a heavy onus on the plaintiff to justify what would of necessity be a second-best approach.

[17] Counsel also submitted that the original concern that millions of transactions would have to be manually dealt with has now disappeared as their experts have developed a computer program that would enable information to be extracted and analysed. The response of defendant's counsel was that, on the evidence, the program - which has not been produced - would merely permit the plaintiff's experts to replicate the defendant's accounting. Contrary to the assumption in the plaintiff's litigation plan, the program could not be used to determine the effective annual rate of interest on cardholders' transactions unless and until the court had resolved the numerous legal issues and assumptions that the program would have to accommodate. I accept this criticism and I note that, to that extent, at least, the trial would necessarily be conducted in two stages. I note, also, that the CPA itself contemplates that there may be separate determinations of common issues and individual issues. The computation of damages will often be included in the latter and discoveries may be bifurcated for the purpose of the common issues trial and the determination of damages.

[18] Certification in this case was, somewhat unusually, predicated and dependent on the possibility of an aggregate assessment of damages. The Court of Appeal accepted that, if the trial judge does not find that an aggregate assessment is possible, the proceedings may have to be decertified. Until that issue is resolved it will not be known whether evidence of the quantum of liability has any relevance. Accordingly, the defendant's proposal to draw a firm line between the two stages is at least consistent with the basis on which certification was granted.

[19] More fundamentally, the Court of Appeal's acceptance of statistical sampling for the purpose of an aggregate assessment of damages was, in my opinion, crucial to its decision to certify the proceeding:

> By resort to section 23 and 24 in this case it will be possible for the trial court to deal with the problem identified by the motion judge in para 57 of his reasons that "the cost of investigating, and analyzing, the details of each cardholder's transactions with MBNA - 8 million since 2000 - and processing the claims of those who are found to have paid interest at a criminal rate, might well be quite disproportionate in relation to the amounts recoverable". (para 52)

[20] For the purpose of section 24 (1) (c) of the CPA - the one question to which plaintiff's counsel insisted that evidence of the aggregate liability could be relevant at the defendant's first stage - it was expressly recognised in paragraph 45 of the reasons of the Court of Appeal that sampling would be acceptable and appropriate.

[21] In my opinion this is not a case like *Garland v Consumers Gas Co.*, [2004] 1 S.C.R. 629 in which both the Court of Appeal and the Supreme Court of Canada deprecated the conduct of litigation by instalments. The preliminary motions that made their way to the Supreme Court of Canada, and were responsible for the unprecedented delays in that case, were brought before certification and they did not resolve all legal issues between the parties. Here, the decisions made at the first stage would determine liability and the possibility of an order for restitution or an award of damages, or they would very likely terminate the proceeding. If the plaintiff is successful on both liability and an aggregate assessment of damages, all that will remain to be done will be to compute the damages in accordance with the principles accepted by the trial judge at the end of the first stage.

[22] In these circumstances, and in view of the number and complexity of the legal issues, I am of the opinion that defendant's counsel are correct that it will be in the interests of efficient case management for the parties to proceed to trial first on the central legal issues, on the question whether an aggregate assessment is possible, and the manner in which it will be conducted, without, at this stage, an obligation on the defendant to produce all the details of the several million transactions since 2004.

[23] I agree with defendant's counsel that to require full production in respect of transactions, that may well number in excess of 12 million, would be "unnecessary, unduly burdensome, expensive and overly invasive". As defendant's counsel submitted in paragraph 91 of their factum:

> There is both human time and computer processing time involved in accessing this information. The time involved will increase with the size of the production set. This work is not required in order to answer the Phase One Common Issues, or for the Court to provide guidance on the assumptions to be made with respect to calculations - all this can be decided (and as a practical matter. will in fact be decided) on the basis of example or sample transactions. If it is determined that there is no liability. then all of the additional activity contemplated by the Paintiff's plan will be wasted effort. Nor is this work required if the court determines that damages can be assessed on the basis of some combination of aggregate damages and statistical sampling.

[24] Whatever electronic data is extracted and produced will have to be reviewed and analysed and this is what the plaintiff proposes. In consequence, to require full production at the first stage would inevitably require an expenditure of time for no useful purpose and the second stage – when full production could, but might not, be required - may never occur.

[25] In my judgment, defendant's counsel were correct in their submission that the plaintiff has not produced an acceptable plan that "sets out a workable method of advancing the proceeding on behalf of the class" within the meaning of section 5 (1) (e) (ii) of the CPA. The proposed plan ignores the limited range of transactional evidence required for the resolution of the numerous subissues of law that must be determined before an effective annual rate of interest can be calculated. It also ignores the fact that, even if these issues and that of voluntariness are ultimately resolved in favour of the plaintiff, there will almost inevitably be a break in the trial while the decision on them is under consideration and a further adjournment while the experts make the necessary calculations - and counsel prepare their submissions – on liability, damages or restitution. By requiring an immediate production and analysis of transactions involving millions of separate transactions by cardholders, the plaintiff's plan would impede the progress of the proceeding and, if he is not successful on the issues at the defendant's first stage, it would give rise to significant wasted expense. Even if the plaintiff is successful at the first stage, full production may not be ordered. I believe this aspect of the plaintiff's proposed plan is not consistent with the basis on which the proceeding was certified.

[26] Accordingly. I accept the submission of defendant's counsel that the trial should be conducted in two stages. Sampling is to be permitted at the first stage with respect to transactions after 2004 as well for earlier transactions. The plaintiff is to be entitled to reasonable information with respect to the sampling process and to supervise its implementation. Any issues that arise with respect to the appropriate size of a sample, or otherwise in connection with the process, can be referred to me, or to my successor as the case-management judge, for resolution.

[27] In order to identify and clarify the numerous subissues that will have to be determined by the trial judge, the defendant has proposed that amended pleadings should be delivered. Whether or not that would be procedurally appropriate, I agree it is essential that the existence of the subissues and the respective positions of the parties concerning them are determined in advance of the trial and made available to the court at trial. It may be that this can be effected by an agreed statement, or that amendments to the pleadings will be required after discoveries had been

completed. I would ask counsel to consult on this question and, if necessary, seek an appointment to resolve matters on which they are unable to agree.

[28] In all other respects the litigation plan as provided by defendant's counsel is approved, subject, of course, to the possibility that it may need to be revised if additional issues arise in the course of the proceeding.

[29] My inclination is that the costs of the motion should be in the cause but counsel may make submissions on costs orally, or if they would so prefer, in writing.

CULLITY J.

DATE: October 26, 2009