

CITATION: *Mortillaro v. Unicash Franchising Inc.*, 2011 ONSC 923
COURT FILE NO.: 03-CV-257357 CP
DATE: 20110209

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **KENNETH D. MORTILLARO**, Plaintiff/Moving Party

 UNICASH FRANCHISING INC. carrying on business as
 UNICASH FINANCIAL CENTRES, Defendants/Respondents

BEFORE: G.R. Strathy J.

COUNSEL: *Susan S. Brown and Jody Brown*, for the Plaintiff/Moving Party

 Meagan J. Swan, for the Defendants/Respondents

DATE HEARD: February 7, 2011

ENDORSEMENT

[1] This is a motion, made on consent, for certification of this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "C.P.A."), for approval of a settlement between the parties, and for the approval of fees and other disbursements payable to class counsel.

[2] This is a "payday loans" case against the defendant Planinvest Consulting Limited ("Unicash"). Unicash operated primarily in the Greater Toronto Area and it had no operations outside Ontario. It offered low principal, high cost consumer loans, which were designed to provide financing between paydays. The plaintiff alleges that the fee charged by Unicash to advance each payday loan is "interest" as defined in s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46, and that the total interest charged exceeded an effective annual rate of 60%, contrary to s. 347(1) of the *Criminal Code*.

[3] In his statement of claim, the plaintiff seeks a declaration that Unicash has been unjustly enriched and that the payday loan agreements entered into by Unicash and its customers are unenforceable. He also seeks repayment of the allegedly criminal interest received by the defendants.

[4] Since the commencement of the action, Unicash has gone out of business. In February 2008, it sold its assets to National Money Mart Company, realizing a net amount of about \$1 million. During settlement negotiations, Unicash disclosed that the majority of the proceeds from

the sale of its business went to satisfy secured bank debts of about \$750,000, and that payday loans formed a very small portion of its net revenues while it was in business.

[5] Under the proposed settlement, which is subject to court approval, Unicash will forgive all unpaid payday loans owed by class members and will make a payment of \$155,000, to be distributed as follows:

- (a) first, to cover the costs of notices of the settlement approval hearing;
- (b) second, to the 10% levy owed to the Class Proceedings Fund;
- (c) third, to the fees and disbursements of class counsel, plus taxes; and
- (d) finally, to InCharge Canada Debt Solutions or a similar credit counseling charity, as a *cy près* donation in lieu of distribution to class members.

[6] It is estimated that the *cy près* distribution will be in the range of \$50,000.00.

[7] Although the settlement is a very modest one, it is driven by practical considerations – the game is simply not worth the candle because Unicash has gone out of business. This action is almost eight years old and its continued prosecution is unlikely to yield any tangible benefits to the class.

[8] It is some comfort that this action and other class actions involving consumer loans have achieved the goal of behaviour modification by bringing about changes in the regulatory landscape. The *Criminal Code* has been amended to exclude payday loans from s. 347 in defined circumstances, and a new provincial regulatory scheme has been implemented to regulate the payday loans industry.

The Action and Certification

[9] The representative plaintiff, Mr. Mortillaro, entered into several payday loan agreements with Unicash. He was unable to pay the last one due to his financial circumstances. He brings this action on his own behalf and on behalf of a class composed of all persons in Canada who entered into a payday loan with Unicash and who have paid or been charged interest on that loan. Unicash entered the payday loans business in Canada in 1992. Shortly after the commencement of this action, in 2003, it got out of the payday loans business. The evidence is that its total revenues from payday loans from 1992 to the time it ceased business were less than \$400,000.

[10] Unicash employed a standard form payday loan agreement, which was supposed to have the following terms:

- (a) Unicash would lend the borrower an agreed upon sum in the total amount of \$172.00 or less;
- (b) the principal, together with all accrued interest, was due on the borrower's next payday;

(c) at the time the payday loan was taken, the borrower was required to endorse and provide to Unicash a personal cheque dated for the due date in the total amount of the payday loan, which was made up of the principal amount of the payday loan, as well as the following amounts:

(i) a "cheque cashing fee" of 2.5% of the amount of the payday loan plus \$1.99; and

(ii) a "handling fee" in the amount of \$14.99 (collectively, the "Interest").

(d) if the loan was not repaid on the due date, a "late payment fee" in the amount of \$2.00 per day was charged;

(e) if the principal and Interest were not repaid by the due date, the borrower was deemed to have opted to repay the loan and accrued Interest charges by way of the post-dated cheque; and

(f) Unicash deposited the endorsed personal cheque to its own credit at its bank, as a holder in due course.

[11] In practice, Unicash did not charge the Interest as set out in the payday loan agreements. It charged \$20.00 for every \$100.00 of credit advanced, plus applicable late fees if a payday loan was not paid on the due date.

[12] The Interest charged by Unicash is "interest" as that term is defined in s. 347(2) of the *Criminal Code*, as it is a charge or expense paid or payable for the advancing of credit under an agreement or arrangement by or on behalf of the person to whom the credit is advanced. The Interest charged by Unicash on its payday loans grossly exceeded the criminal rate of 60%. This is confirmed by the actuarial calculations obtained by the plaintiff that show that the effective annual interest rate charged by Unicash for the last payday loan taken by Mr. Mortillaro was 11,497.6%.

[13] This action meets the test for certification set out in s. 5 of the *C.P.A.* Numerous similar actions have been certified in Ontario: *Smith v. National Money Mart Co.* (2007), 37 C.P.C. (6th) 171, [2007] O.J. No. 46(S.C.J.), leave to appeal to Div. Ct. refused, [2007] O.J. No. 2160 (Div. Ct.); *McCulcheon v. The Cash Store Inc.* (2006), 80 O.R. (3d) 644, [2006] O.J. No. 1860 (S.C.J.); *Joseph v. Quik Payday Inc.* (2006), 38 C.P.C. (6th) 106, [2006] O.J. No. 4835 (S.C.J.); *Mortillaro v. Cash Money Cheque Cashing Inc.* (2009), 73 C.P.C. (6th) 369, [2009] O.J. No. 2904 (S.C.J.); *Bruley v. Instalozans Financial Solution Centres Ltd. et al.* (5 December 2005), Ct. File No. 05-CV-294691CP (Ont. S.C.J.). There are no material differences between those actions and this one.

[14] Similar claims have been certified in British Columbia and Alberta: *MacKinnon v. National Money Mart Co.*, 2007 BCSC 348, [2007] B.C.J. No. 520; *Bartolome v. Mr. Payday*

Easy Loans Inc., 2008 BCSC 132, [2008] B.C.J. No. 167; *Bartolome v. Nationwide Payday Advance Inc.*, 2010 BCSC 1433, [2010] B.C.J. No. 1994; *Bodnar v. The Cash Store Inc.*, 2005 BCSC 1228, [2008] B.C.J. No. 1904, aff'd 2006 BCCA 260, [2006] B.C.J. No. 1171; *Bodnar v. Payroll Loans Ltd.*, 2006 BCSC 1132, [2006] B.C.J. No. 1705; *Ayrton v. PRL Financial (Alta.) Ltd.*, 2005 ABQB 311, [2005] A.J. No. 466, aff'd 2006 ABCA 88, [2006] A.J. No. 296; *Kilroy v. A OK Payday Loans Inc.*, 2006 BCSC 1213, [2006] O.J. No. 1885; *Tracy v. Instalozans Financial Solutions Centres (B.C.) Ltd.*, 2006 BCSC 1018, [2006] B.C.J. No. 1639.

[15] The statement of claim discloses a cause of action. The plaintiff alleges that the interest charged by Unicash was usurious because it exceeded an effective annual rate of 60%, contrary to s. 347 of the *Criminal Code*. It is asserted that, because Unicash charged interest at a criminal rate, its payday loan agreements were illegal and unenforceable. It is also alleged that Unicash has been unjustly enriched and must make restitution to the class of all interest it has received at a criminal rate.

[16] There is an identifiable class as described above, a common form of loan agreement and common factual underpinnings for every class member's claim. The statement of claim gives rise to common issues. The defendants acknowledge that Mr. Mortillaro is an appropriate representative plaintiff. He was the representative plaintiff in *Mortillaro v. Cash Money Cheque Cashing Inc.*, above, and has engaged in consumer advocacy relating to payday loans. He has been actively involved in the proceeding and he has retained experienced and reputable counsel to prosecute the claim. There is no question that a class proceeding is the preferable procedure for the prosecution of a claim such as this, where there are numerous claimants with very low value claims.

Settlement Approval

[17] The basic terms of the proposed settlement are set out above. All class members will have the right to opt out of the class action and the settlement.

[18] In considering the approval of this settlement, I have had regard to the principles set out by Cullity J. in *Nunes v. Air Transat A.T. Inc.* (2005), 20 C.P.C. (6th) 93, [2005] O.J. No. 2527, at para. 7 (S.C.J.), and the frequently-cited decision of Sharpe J., as he then was, in *Dabbs v. Sun Life Assurance Company of Canada*, [1998] O.J. No. 1598 at para. 13 (Gen. Div.); and (1998), 40 O.R. (3d) 429 at 439-444, [1998] O.J. No. 2811 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97, [1998] O.J. No. 3622 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372.

[19] The settlement is, obviously, very modest. By comparison, the settlement recently approved by Perell J. in *Smith Estate v. Oviat*, 2010 ONSC 1334, [2010] O.J. No. 873, was valued by class counsel at \$120 million, although Perell J. was of the view that the estimate was over-stated. The release of Unicash's claims against class members may have some value. It appears that it has followed the practice of pursuing some such claim, including an action against Mr. Mortillaro. The proposed distribution to InCharge Debt Solutions, which is a not-for-profit credit counseling agency assisting individuals with debt and credit challenges, will indirectly benefit the class and will no doubt be of some benefit in assisting that agency in its very worthwhile work.

[20] I am satisfied that this settlement, like some settlements of ordinary litigation, is driven by the obvious reality that the defendant has no money and that the costs of pursuing the claim would be grossly disproportionate to the eventual recovery, if indeed there is any recovery.

[21] I am also satisfied that the proposed settlement is the result of *bona fide*, arms-length negotiation and that it comes with the recommendation of experienced counsel who has invested substantial resources in the litigation. In accordance with my pre-hearing direction, notice of the settlement has been published on class counsel's web site and there have been no objections.

[22] As noted above, this action and others have contributed to the goal of behaviour modification because the *Criminal Code* has been amended to allow provincial regulation of payday lenders. In 2008, Ontario passed the *Payday Loans Act, 2008*, S.O. 2008, c. 9. Under the new regime, the province sets maximum interest rates. The regulations under the *Payday Loans Act* also include provisions for better disclosure to, and protection of, payday loan consumers. Similar legislation is being or has been enacted across Canada.

[23] I therefore approve the settlement.

The Fee of Class Counsel

[24] Class counsel asks that their fees be approved in the amount of \$55,000.00 plus GST and HST, and disbursements of \$23,147.56 (being the actual amount expended), plus \$500.00 for estimated ongoing disbursements (inclusive of applicable GST and HST), to be paid from the settlement fund in accordance with the terms of the settlement agreement.

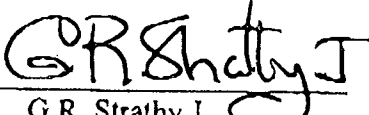
[25] Mr. Mortillaro originally entered into a contingency fee agreement with class counsel calling for a fee of 25% of the recovery, plus disbursements and taxes, subject to the approval of the court. The fee proposed is higher than the amount to which counsel would be entitled under that arrangement. Mr. Mortillaro agrees to the proposed fee. Class counsel's time spent in this matter has a face value of nearly \$250,000.

[26] In my view, the proposed fee is fair and reasonable, having regard to the factors to be considered in determining a lawyer's fee as well as the goals of the *C.P.A.* The outcome of this litigation was dictated by circumstances beyond the control of counsel. It can be regarded as a victory in principle if not in dollars. Fee awards should be designed to encourage good lawyers to take on risky and difficult class proceedings. This was such a proceeding.

[27] Mr. Mortillaro has requested an honorarium of \$1,000.00. to be paid out of class counsel's fee, to recognize his efforts in prosecuting this action on behalf of the class. A like payment was approved in *Mortillaro v. Cash Money Cheque Cashing Inc.*, above, although Lax J. echoed the reservations of Cullity J. in *McCutcheon v. Cash Store Inc.*, [2008] O.J. No. 5241 at paras. 12-14 (S.C.J.), about the "risk of engendering expectations that such payments will be approved as a matter of course." I am satisfied that Mr. Mortillaro is a real plaintiff, with a real grievance and with an active involvement in the cause. The proposed payment is not intended to be compensation or a *quantum meruit* payment but is a token recognition of his efforts.

Conclusion

[28] For the foregoing reasons, the action will be certified as a class proceeding for the purposes of settlement. The settlement is approved, as is the proposed fee of class counsel. The notice plan and form of notice, as amended at the hearing, are also approved.


G.R. Strathy J.

DATE: February 9, 2011