Court of Queen's Bench of Alberta

Citation: Ayrton v. PRL Financial (Alta.) Ltd., 2005 ABQB 311

Date: 20050422
Docket: 0301 15879
Registry: Calgary

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

Reasons for Judgment
of the
Honourable Mr. Justice Sal J. LoVecchio

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.

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

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

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

[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.

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

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]

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

[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)

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[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.

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.

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[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.

[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.

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

(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:
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> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class of 2 or more persons;
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> (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

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[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.

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

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

[19] ***Hollick****,* note 18*,* at para. 20.

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;

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[20] ***Transport***, note 14, at paras. 4 and 6.

> 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

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[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.

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

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[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.

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.

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[28] ***Ibid.*** at para. 39.

[29] ***National Money Mart.,*** note 22***,*** at para. 40.

[30] ***Ibid.*** at para. 40.

[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

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[31] ***Transport***, note 14, at para. 39.

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

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

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[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.

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*.

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[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.

[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.

Heard on the 18th day of February, 2005.
Dated at the City of Calgary, Alberta this 22nd day of April, 2005.

Sal J. LoVecchio
J.C.Q.B.A.

Appearances:

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.