CITATION: Ramanauskas v. Bank of Montreal, 2024 ONSC 782
COURT FILE NO.: CV-22-00686289-00CP
DATE: 20240206

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Robyn Ramanauskas

AND:

Bank of Montreal

BEFORE: J.T. Akbarali J.

COUNSEL: *Celeste Poltak, Adam Tanel and Elie Waitzer*, for the plaintiff

Katherine L. Kay and Danielle K. Royal, for the defendant

HEARD: In writing

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] The plaintiff moves with the consent of the defendant for an order certifying this proceeding as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*").

Brief Background

[2] In her action, the plaintiff alleges that the defendant bank has a practice of charging duplicative NSF fees on a dishonoured pre-authorized debit ("PAD"), when a payee attempts to process an already-rejected PAD for a second time.

[3] The plaintiff pleads that the defendant's standard form contract does not permit the defendant to charge duplicative NSF fees for an already-rejected PAD; rather, she states that only the first NSF charge is permitted by the contract.

[4] The plaintiff alleges that the defendant's practice of charging duplicative NSF fees violates consumer protection legislation in Ontario. The plaintiff also claims that the duplicative NSF fees constitute an unjust enrichment to the defendant, with a corresponding deprivation to the plaintiff and members of the class, without juristic reason.

[5] Moreover, the plaintiff pleads that the burden of the duplicative NSF fees falls disproportionately on low-income Canadians, who are more likely to maintain low bank account balances.

[6] The statement of claim seeks damages for breach of contract equivalent to the value of all monies paid by the plaintiff and class members resulting from the charging of duplicative NSF fees on a single rejected PAD, an order for disgorgement of the value of all monies claimed to be illegally paid by the class members, punitive damages, and an equitable rate of interest and costs.

Certification

[7] Pursuant to s. 5(1) of the *CPA*, the court shall certify a class proceeding if: (a) the pleadings or the notice of application disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (c) the claims or defences of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a representative plaintiff who would fairly and adequately represent the interests of the class, has produced a workable plan for the proceeding, and does not have an interest in conflict with the interests of other class members.

[8] Although this is a consent motion, given the court's role in class proceedings, I consider the elements of the test for certification in turn.

Section 5(1)(a): The pleadings disclose a cause of action.

[9] Certification will not be denied under s. 5(1)(a) unless it is plain and obvious that the pleadings disclose no cause of action: *Hollick v. Toronto (City)*, 2001 SCC 68, at para. 25.

[10] In this case, the defendants do not dispute, and I accept, that the pleadings disclose a cause of action in breach of contract and unjust enrichment, for which the facts are sufficiently pleaded.

Section 5(1)(b): There is an identifiable class of two or more persons that would be represented by the representative plaintiff.

[11] In determining whether there is an identifiable class, the court asks whether the plaintiff has defined the class by reference to objective criteria such that a person can be identified to be a class member without reference to the merits of the action. The class must be bounded, and not of unlimited membership, or unnecessarily broad, and have some rational relationship with the common issues: *Hollick*, at para. 17, *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 45. The class definition needs to identify all those who may have a claim, will be bound by the result of the litigation, and are entitled to notice: *Bywater Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.). Defining the class is a technical, rather than a substantive challenge: *Waldman v. Thomson Reuters Corp.*, 2012 ONSC 1138, at para. 122.

[12] The parties' consent order seeks to certify the following class:

> Every person resident in Canada who is or was a personal deposit account holder with Bank of Montreal and whose personal deposit account was charged a non-sufficient funds fee by Bank of Montreal on a re-presented pre-authorized debit transaction between August 30, 2020 and the date of this order.

[13] I am satisfied that the proposed class meets the requirements of s. 5(1)(b) of the *CPA*. The class is defined by reference to objective criteria, is bounded, and bears a rational relationship with the common issues which I discuss, below.

[14] The proposed class definition envisions a start date for the class period that is two years prior to the issuance of the Statement of Claim, which reflects the limitation period for the claims in breach of contract. The proposed end date — the date of the order — serves to crystallize the class period.

Section 5(1)(c): The claims raise common issues.

[15] When considering whether a claim raises a common issue, the court asks whether it is necessary to resolve the issue in order to resolve each class member's claim, and whether the issue is a substantial ingredient of each of the class members' claims. The issue is a substantial ingredient of each claim if its resolution will advance the case or move the litigation forward, and if it is capable of extrapolation to all class members: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 46.

[16] The plaintiff must prove that there is some basis in fact that the asserted common issues actually exist, and they are common to the entire class: *Kuiper v. Cook (Canada) Inc,* 2020 ONSC 128, at paras. 26-33.

[17] On consent, the parties seek to certify the following common issues:

Breach of Contract

1. Does the defendant's standard form contract with its individual banking customers prohibit the defendant from charging non-sufficient funds fees on re-presented pre-authorized debit transactions?

Unjust Enrichment

2. Has the defendant been enriched by their practice of charging Class members non-sufficient funds fees on re-presented pre-authorized debit transactions?

3. If the answer to question 2 is yes, have Class Members suffered a corresponding deprivation?

4. If the answer to question 3 is yes, is there a juristic reason for the enrichment?

Aggregate Damages

5. If the defendant is liable to Class Members, can an award of aggregate damages be made to Class Members?

Interest

6. If damages are awarded, should the defendant pay pre-judgment and post-judgment interest? If so, at what annual interest rate? Should the interest be simple or compound?

[18] I am satisfied that these questions are common to all class members, and the resolution of these questions at a common issues trial would advance the action for all class members, avoiding the need for each class member to prove the issues in individual trials. This criterion is satisfied by the common issues proposed.

[19] Moreover, I am satisfied that the plaintiff has adduced evidence providing some basis in fact that: (i) the defendant charges NSF fees on re-presented PADs, and (ii) that the question of whether the defendant's practice of charging duplicative NSF fees on re-presented PADs is improper can be resolved in common because, for example, all Class Members are subject to the terms of the same standard form agreement.

[20] I am also satisfied that the amount of the defendant's revenue from charging duplicative NSF fees on re-presented PADs during the proposed class period can be reasonably determined without proof by individual class members. The plaintiff has adduced evidence from Arthur Olsen, whom they propose as a data and database expert. Mr. Olson's *curriculum vitae* establishes that he has expertise in compiling, analyzing, and processing massive amounts of payments data for use in class action litigation, and has and is capable of writing code that will likely allow class members' damages to be calculated in the aggregate should they be found to have suffered compensable loss. In my view, Mr. Olson's evidence satisfies the elements of the test to admit expert evidence: *R. v. Mohan*, [1994] 2 S.C.R. 9; *White Burgess Langille Inman v. Abborr and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182. It is relevant and necessary to the question of whether damages can be determined in the aggregate, and Mr. Olsen is a qualified expert to opine on the question. I accept his evidence that aggregate damages can be reasonably determined in this case without proof from individual Class Members.

[21] Because the question of aggregate damages is a proper common issue to be certified, the common issue about interest is also appropriate: *Trillium Motor World Inc. v. General Motors of Canada Limited*, 2011 ONSC 1300, at para. 129.

[22] Moreover, I note that I certified almost identical issues in *Christopher v. Royal Bank of Canada*, 2023 ONSC 4590 on consent, in a case very similar to this one (albeit with different language in the standard form contracts).

Section 5(1)(d): Preferable Procedure

[23] This branch of the test requires that the court be satisfied that a class proceeding would be the preferable procedure for the resolution of the common issues. This inquiry is directed at two questions: first, whether the class proceeding would be a fair, efficient, and manageable way to

advance the claim, and second, whether the class proceeding would be preferable to other procedures for resolving the common issues. Section 5(1.1) of the *CPA* adds two further criteria for the court to consider: superiority and predominance. In *Banman v. Ontario*, 2023 ONSC 6187, Perell J. found that the preferable procedure analysis involves determining:

a. Whether the design of the class action is manageable as a class action;

b. Whether there are reasonable alternatives;

c. Whether the common issues predominate over the individual issues;

d. Whether the proposed class action is superior, i.e. better, to the alternatives.

[24] Preferable procedure is addressed through the lens of the three goals of class proceedings: *Hollick*, at para. 27; *Banman*, at para. 313.

[25] I am satisfied that a class proceeding is the preferable procedure to resolve the common issues. The action is manageable as a class proceeding. The proposed common issues can be determined by reference to the defendant's standard form contract and records, and are likely to wholly determine the plaintiff and class members' claims.

[26] The only available alternative procedure is individual actions, which would be inefficient and impractical. If individual actions were brought, the court's resources would be unnecessarily taxed. At the same time, individual actions are not likely to be brought because the individual losses are likely modest, rendering individual litigation impractical and uneconomic. Thus, to the extent that the defendant would be found liable, the only way this action can achieve the goals of behaviour modification, access to justice, and judicial economy is if it is certified. Put plainly, this litigation only works as a class proceeding.

[27] A class proceeding is the superior procedure in this case. Moreover, the common issues proposed in this case are predominate over individual issues, which arise only if liability is established but aggregate damages cannot be awarded.

[28] I thus conclude that this criterion is met.

Section 5(1)(e): There is an adequate representative plaintiff.

[29] To be an adequate representative plaintiff, a proposed plaintiff must be able to fairly and adequately represent the class, have developed a plan for proceeding, and not have a conflict with the class. She must be prepared and able to vigorously represent the interests of the class: *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144, at para. 73.

[30] The proposed representative plaintiff meets all the criteria set out above. Her affidavit reveals that she understands her role and obligations as representative plaintiff. There is no basis to find any conflict between the proposed representative plaintiff and the class, and none is alleged.

[31] Accordingly, I am satisfied that this criterion is met.

Conclusion

[32] I am satisfied that the criteria under s. 5(1) of the *CPA* are met to certify this action on the basis of the consent order filed by the parties. Order to go in accordance with the draft I have signed.

J.T. Akbarali J.

Date: February 6, 2024