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ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF a Claim
under the *Class Proceedings Act*, S.O. 1992, c.6

B E T W E E N:	
THOMPSON MCCUTCHEON	***David Thompson*** and ***Matthew G. Moloci*** - for the Plaintiff
Plaintiff	
- and -	
THE CASH STORE INC. AND RENTCASH INC.	***Timothy Pinos, Robin Moodie*** and ***Peter Henein*** - - for the Defendants
Defendants	
	HEARD: April 18, 2006

CULLITY J.

[1] The plaintiff entered into numerous short-term loan transactions ("payday loans") with the defendant, the Cash Store Inc. ("Cash Store"). In these proceedings commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"), he claims that, by virtue of their involvement in those transactions, the Cash Store and its parent, Rentcash Inc. ("Rentcash"), breached the provisions of section 347 (1) (a) and (b) of the *Criminal Code of Canada*, R.S. 1985, c. C-46 by entering into an agreement, or arrangement, to receive interest at a criminal rate, and by receiving such interest. He seeks a declaration to that effect and that the agreements or arrangements are harsh, unconscionable, illegal, and unenforceable at least to the extent of the illegality. He claims an accounting and reimbursement of all such "illegal amounts" on the basis of unjust enrichment. Breaches of the *Unconscionable Transactions Act*, R.S.O. 1990, c.U.2, the *Consumer Protection Act*, and similar legislation in other provinces, are also alleged and as

grounds for further claims to restitution. These claims are made pursuant to the CPA on behalf of a class of persons who entered into similar payday loan arrangements with the Cash Store.

[2] The Cash Store is a corporation incorporated under the laws of Alberta. It carries on business at locations in nine provinces - including Ontario - and two territories. It is a wholly-owned subsidiary of Rentcash which was incorporated in Ontario but has its head office in Alberta. The plaintiff has pleaded that Rentcash was the "directing mind and will" of the Cash Store.

[3] Although, in their statement of defence, the defendants deny that any of the borrowers dealt directly with Rentcash, all the allegations of fact and law in the statement of claim are made against the "Defendants".

[4] It is pleaded that the defendants held themselves out not as lenders but as brokers engaged by their customers to obtain loans from independent third parties. The plaintiff alleges that the defendants are not independent of, or at arm's length with, the alleged lenders. It is pleaded that the defendants:

> (a) represented themselves as agents of their customers when they were actually agents of the lenders;
> (b) guaranteed the repayment of all loans to the lenders, plus an annual return on their investments;
> (c) agreed with the lenders to undertake all collection and enforcement measures with respect to the loans; and
> (d) agreed to indemnify the lenders with respect to any losses.

[5] It is an essential element of the plaintiff's claims, as pleaded, that all of the payday loans were made on the same - or substantially the same - terms. These included payment of a broker's fee of 22.54 per cent (25 per cent after March 11, 2004) of the principal amount of each loan, interest of 59 per cent on the principal amount and a fee of $10.00 for the cash card required to access the funds advanced to the customer.

[6] The plaintiff moved for certification of the proceeding under the CPA. The motion was opposed by the defendants. In their counsel's submission, none of the requirements in section 5 (1) (a) through 5 (1) (e) of the CPA is satisfied.

Section 5 (1) (a): disclosure of a cause of action.

[7] As I have indicated, the plaintiff's claims for restitution are based on breaches of section 347 of the *Criminal Code*, of provisions of the *Unconscionable Transactions Act* and the *Consumer Protection Act* and of those of similar statutes in other provinces.

[8] Section 347 (1) of the *Criminal Code* reads as follows:

> 347. (1) Notwithstanding any Act of Parliament, everyone who:

> (a) enters into an agreement or arrangement to receive interest at a criminal rate, or
> (b) receives a payment or partial payment of interest at a criminal rate is guilty of
> (c) an indictable offence and is liable to imprisonment for a term not exceeding five years, or
> (d) an offence punishable on summary conviction and is liable to a fine not exceeding $25,000.00 or to imprisonment for a term not exceeding six months or to both.

[9] For the purposes of this case, "interest" - as defined in section 347 (2) - includes the aggregate of all charges and expenses paid or payable for the loans and the term "criminal rate" means:

> ... an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds 60 per cent on the credit advanced under an agreement or arrangement.

[10] Although it is pleaded that each of the three payments charged to the customers was interest within the meaning of section 347 (1), plaintiff's counsel emphasised that no claims were made against the lenders and that those against the defendants for breaches of section 347 (1) were limited to the broker's fee of 22.54 per cent (25 per cent after 11th March, 2004) of the amount of each loan. The fee is alleged to have been levied as a lump sum at the inception of the loan and at the time of any subsequent rollover. It is pleaded that, by itself, a fee of approximately 22.5 per cent resulted in an effective annual rate of interest of 1170 per cent, 585 per cent and 270 per cent on loans of seven days, 14 days and 30 days respectively, without compounding. Given this limitation, I believe plaintiff's counsel were correct in their submission that, contrary to that of counsel for the defendants, the lenders were not necessary parties to the proceedings to the extent that the claims are based on breaches of the *Criminal Code*.

[11] In my opinion, sufficient material facts have been pleaded in respect of the claims based on such breaches to satisfy the "plain and obvious test" propounded in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 that, unquestionably, is applicable for the purpose of determining whether the statement of claim discloses a cause of action against the Cash Store.

[12] The claims based on alleged breaches of the *Unconscionable Transactions Act*, and the *Consumer Protection Act* and the similar legislation in other jurisdictions received little attention at the hearing or in the factums of counsel. I am satisfied that the material facts that give rise to causes of action with respect to these claims have been pleaded. Defendants' counsel did not suggest otherwise. Their objection was that the pleading is defective for a failure to join the lenders as parties.

[13] As pleaded, these claims extend to the interest of 59 per cent and the cash card fee of $10.00, as well as the broker's fee. However, only one of the 13 common issues proposed by the

plaintiff refers to the provincial legislation and that issue is conditioned on a prior finding that the Cash Store, or Rentcash, was unjustly enriched by the payment of interest at a criminal rate. It raises the question whether the provincial legislation was breached by the provision for the payment of such interest.

[14] As, reading the pleading generously, I am prepared to accept the submission of plaintiffs counsel that the allegation of a criminal rate of interest relates only to the broker's fee, it must follow, I believe, that, despite the more extensive allegations in the pleading, certification is requested on the basis that the claims of breaches of the provincial legislation are intended to be similarly restricted. I am not aware of anything in the CPA, or of any other reason, that would prevent a plaintiff from seeking to certify proceedings on the basis of only some of the claims - or of more limited claims - than those pleaded.

[15] If, therefore, the plaintiff claims only against the defendants for restitution of amounts received in breach of the provincial legislation - and only with respect to the broker's fee that one or the other of them would retain - I do not believe that these causes of action should be considered to be materially deficient because of the failure to join the lenders as parties. In my opinion they are not persons "whose presence is necessary to enable the court to adjudicate effectively and completely on the issues" in the proceeding within the mandatory language of rule 5.03 (1) on which Mr Pinos relied. The lenders may, or may not, be helpful - or even necessary - witnesses if and to the extent, for example, that the plaintiff seeks to rely on the allegation that the lenders were undisclosed principals of the defendants, but that is not the same thing: see *Amon v. Raphael Tuck & Sons Ltd*, [1956] 2 W.L.R. 372 (Q.B.D.), at page 392, *per* Devlin J.

[16] Independently of his submission that the lenders were necessary parties to the proceedings, Mr Pinos submitted that the material facts that would constitute, or give rise to, a cause of action against Rentcash have not been pleaded.

[17] It is fundamental to this submission that - as the defendants have pleaded in their statement of defence - Rentcash did not deal directly with the customers and could only be liable on the causes of action pleaded if, as a parent corporation, it was to be identified with its subsidiary. This would, in effect, require the corporate veil to be pierced - an exercise that is permitted only in exceptional cases. As Cumming J. stated in *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.), at para 22:

> The autonomous and independent existence of the corporate entity as a juristic person separate and apart from its shareholders is a cornerstone of Canadian law. A stringent test must be satisfied before one may pierce the corporate veil of a subsidiary corporation and impose liability upon a parent corporation on the basis of an asserted agency relationship ...

[18] In response to this submission, plaintiff's counsel pointed to the allegation in the statement of claim that Rentcash was "the directing mind and will" of the Cash Store and to the

fact that all of the allegations and claims pleaded by the plaintiff were made against the defendants jointly. For the purposes of section 5 (1) (a), it is to be assumed that the factual allegations in the statement of claim will be proven at trial.

[19] There is ample authority that, exceptionally, the corporate veil may be pierced if it is proven that a parent corporation has exercised complete domination and control over the affairs and activities of a subsidiary. The authorities include *Aluminum Co. of Canada Ltd. v. City of Toronto*, [1944] S.C.R. 267, at page 271, *per* Rand J.; *Dominion Bridge Co. Ltd v. The Queen* (1975), C.T.C. 263 (F.C.T.D.), aff'd. (1977), C.T.C. 554 (F.C.A.); *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (C.A.); *Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3d) 577 (C.A.); and *Smith v. National Money Mart Company et al.* (Court of Appeal, Reasons May 5, 2006).

[20] In *Haskett,* at paragraphs 61 - 63, Feldman J. A. stated:

> In order to found liability by a parent corporation for the actions of a subsidiary, there typically must be both complete control so that the subsidiary does not function independently and the subsidiary must have been incorporated for a fraudulent or improper purpose or be used by the parent as a shield for improper activity:...
>
> The pleading falls short of suggesting that the relationship of the respective related respondent corporations is that of a conduit to avoid liability, nor is there an allegation that the parent company controls the subsidiary for an improper purpose.
>
> For the above reasons, the claims against the companies as pleaded must be struck out as disclosing no reasonable cause of action.

[21] In Mr Pinos' submission, the pleading here is similarly deficient. Although it is alleged that Rentcash was "the directing mind and will" of the Cash Store - an allegation that reflects the language that appears in a number of the decisions - it was neither pleaded nor suggested that the Cash Store was incorporated for a fraudulent or improper purpose, or that it was to be used, or was used, by Rentcash as a shield for improper activity. It followed, said Mr Pinos, that in accordance with *Haskett* and rule 25.06 (8), the material facts required to disclose the existence of cause of action against Rentcash have not been pleaded and the claims against it could not properly be included in any order certifying the proceedings.

[22] I am satisfied that, to the extent that the plaintiff seeks to rely on the control exercised by Rentcash over its subsidiary, the plea that it was the directing mind and will of the Cash Store is, on the authority of *Haskett*, insufficient. For the purpose of piercing the corporate veil between a parent corporation and its subsidiary, it is, apparently, not enough to establish that the latter was a mere puppet of the former. Some fraudulent or other "improper" motive for the former's existence must be pleaded, and proven.

[23] It follows that the plea with respect to the directing mind and will of Rentcash does not, by itself, provide the material facts required to disclose a cause of action against it for the purpose of the motion to certify the proceedings.

[24] It is possible that the claims against Rentcash could be saved if - reading the pleading generously - the factual allegations made against the defendants jointly are viewed separately and independently from those relating to the control exercised by Rentcash. On that reading of the statement of claim, it could be implied that the plaintiff and the other members of the putative class dealt directly with Rentcash. As the question that arises under section 5 (1) (a) must be decided solely on the pleadings, Mr Pinos' attempt to rely on the cross-examination of the plaintiff to demonstrate that he had no direct dealings with Rentcash cannot be accepted. (By the same token, the suggested inadequacy of the affidavit evidence filed on behalf of the plaintiff to prove that Rentcash exercised complete dominion and control over the activities and operations of the Cash Store could have no bearing on the issues under section 5 (1) (a)).

[25] However, as I understand the plaintiff's position to be that the claims against Rentcash are based solely on its relationship with the Cash Store - and that he does not intend to assert and rely on any direct contact or dealings between Rentcash and the customers - I do not believe that the rule that the pleading should be construed generously would justify a different interpretation.

[26] In consequence, the claims against Rentcash will not be included in any order certifying the proceedings. Plaintiff's counsel indicated that, if only the claims against the Cash Store are accepted for certification, the plaintiff might subsequently move for leave to amend the statement of claim to rectify the deficiency in the pleading of claims against Rentcash. Counsel also advised that, if leave to amend was granted, the plaintiff might also move to include the claims in any certification order that may be made on this occasion. It would obviously be inappropriate for me to comment on the likely outcome of any such hypothetical motions, and I refrain from doing so.

Section 5 (1) (b): an identifiable class

[27] At the hearing, plaintiff's counsel proposed the following class definition which had been revised to meet a number of objections raised by defendants' counsel in their factum:

> Any person in Canada, resident outside the Province of British Columbia, who borrowed money as a 'payday loan' from a Cash Store location, and who repaid the loan and the standard broker fee charged by the Cash Store (22.54 % of the loan amount to March 11, 2004; 25 per cent of the loan amount after March 11, 2004) on or after the due date of the loan.

[28] The definition excludes persons resident in British Columbia in deference to the similar proceeding against the present defendants that was certified in *Bodnar v. The Cash Store Inc. et al,* [2005] B.C.J. No. 1904 (B.C.S.C.) where the class was confined to residents of British Columbia.

[29] Subject to the defendants' objections to the inclusion of persons resident outside Ontario, the definition is in my opinion acceptable. The criteria are objective, rather than subjective, and the class is not over-inclusive in the sense explained by McLachlin C.J. in *Hollick v. City of Toronto* (2001), 205 D.L.R. (4th) 19 (S.C.C.), at para 21. There is also the necessary rational connection between the members of the class and the common issues to which I will refer.

[30] Defendants' counsel raised two objections to the inclusion of persons not resident in the province. The first - and the more fundamental - is that the court has no jurisdiction to bind persons who obtained loans from the Cash Store in the other provinces or territories in which they were resident. The second - alternative - objection is that, even if such jurisdiction exists, the court should not exercise it in the circumstances of this case.

[31] The challenge to the court's jurisdiction raises issues that have yet to be decided definitively by an appellate court in Ontario, or by the Supreme Court of Canada. They have been debated at length in numerous learned articles and in papers presented at legal conferences. They have also been discussed in a number of decisions at first instance in this court - some of which have been upheld on appeal without any specific analysis of the jurisdictional questions. In two decisions released earlier this year, judges in Quebec and Saskatchewan expressed reservations about the width of the jurisdiction that this court had been asked to exercise.

[32] At the most general level, the problems raised by so-called "national classes" relate to the manner in which the real and substantial connection test endorsed by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077, *Hunt v. T&N plc,* [1993] 4 S.C.R. 289 and *Beals v. Saldanha,* [2003] 3 S.C.R. 416 - and applied by the Court of Appeal in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.) and *Currie v. McDonald's Restaurants Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.) - is to be adapted to the special features of class proceedings and, in particular, to those that exist in Ontario and Alberta - and in some foreign jurisdictions - where legislation enables the court to bind class members who do not opt out of the proceedings. The issues are whether a real and substantial connection must exist between each member of the class and the forum and, if so, what connecting factors will be relevant and acceptable for this purpose.

[33] Although the traditional roles in *Emanuel v. Symon,* [1908] 1 K.B. 302 (C.A.) have now been replaced by the more flexible principles in *Morguard*, the emphasis in proceedings other than class actions is still, for the most part, placed on the contacts between the defendant and the forum. Of these the defendant's activities within the forum that are material facts, or otherwise closely connected with the cause of action, are particularly important. When extending the real and substantial connection test to non-resident class members in opt-out jurisdictions, there is clearly an analogy between the position of such members and that of defendants in individual actions in that the issue is whether the court has power to bind them. There are, however, differences. One is that the class members are also in the position of plaintiffs - albeit passive plaintiffs. The purpose of the litigation is, or should be, to confer benefits upon them and even where - as is most commonly the case - the proceedings end with a settlement, this purpose is

reflected in the requirement that the court must approve it as being in the class members' interests.

[34] The potential detriment to class members is the reverse of that confronting defendants contesting jurisdiction in individual proceedings. The members face the risk of being bound by a decision in favour of the defendants, or one that will provide them with less compensation than they believe is their entitlement. Depending on the significance to be attributed to the right to opt out, these consequences effect a loss of autonomy and, even independently of them, such a loss will result from the members' compelled involvement with proceedings in which they may not desire to participate. I note that this result can occur in any proceeding in the limited circumstances in which rule 5.03 (5) is applicable.

[35] The significance to be placed on the existence of the right to opt out is, of course, an important consideration. If the failure to do so could be regarded as analogous to an implied submission to the jurisdiction by a defendant, the arguments against acceptance of national classes would be much weaker.

[36] On the present state of the authorities that I must, or should, follow, it is settled that the inclusion of non-residents within a class for the purposes of the CPA will not *per se* amount to an excess of jurisdiction: *Western Canadian Shopping Centres Ltd. v. Dutton,* [2001] 2 S.C.R. 534 (a class of "foreign investors"); *Currie* (customers of McDonald's restaurants in Canada included in a class certified in Illinois). In other cases, involving claims in tort, a sufficiently substantial connection between Ontario and non-resident class members has been found to exist if the locus of the tort was in Ontario, or aspects of the alleged tortious conduct of the defendants *vis a vis* each of the class members occurred here: *Nantais v. Teletronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (G.D.); *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441 (G.D.). The decision of the Court of Appeal in *Currie* - a case of recognition of a foreign judgment - is consistent with the findings in such cases.

[37] The more difficult cases - of which this is one - are those in which the claims of the non- resident class members are based entirely on material facts that occurred outside Ontario. In such a case, the only connecting factor between Ontario, on the one hand, and such members and their claims, on the other, may be that they have claims against the same defendants and that these raise the same common issues as the claims of class members resident in Ontario over whom - and whose claims against the defendants - the court has jurisdiction.

[38] In some of the cases, the existence of such a connection has been found to be sufficient. In *Wilson*, for example, at paras 65 and 66 Cumming J. stated

> As already discussed, there is a real and substantial connection between the alleged cause of action in tort by Ontario residents against the defendants. In my view, this court's jurisdiction is well-founded in respect of the claims of Ontario residents....

> The CPA is merely a procedural statute. It affords the latitude to a court to establish a "national class" in a class proceeding. In my view, the CPA is not unconstitutional on the basis that the Ontario legislature is legislating extraterritorially. The CPA allows this court to include non-residents as parties in an action in which Ontario has unquestioned jurisdiction with respect to Ontario residents.

[39] Essentially the same approach was, I believe, followed by the learned judge in *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.*, [2005] O.J. No. 1118 (S.C.J.), referring back to his earlier decision in the same case: [2002] O.J. No. 298 (S.C.J.), paras 100-101.

[40] Similarly, in *Harrington v. Dow Corning* (1997), 29 B.C.L.R (3d) 88 (B.C.S.C.), Mackenzie J. noted that resident and non-residents shared the same common issue and stated:

> It is that common issue which establishes the real and substantial connection necessary for jurisdiction.

[41] Again, in *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.J.), in accepting and national class, Brockenshire J. stated:

> Here, I regard the common interest of the class members, the commercial realities of the situation, and the broad objectives of the Ontario Act, as outweighing any concerns expressed over extra territorial involvement of the Ontario court.

[42] I believe it is fair to say that the learned judges in the decisions at first instance in Ontario and British Columbia were influenced by the utility of having all claims decided in one court in the same proceeding and, also, in the earlier cases, by the fact that class proceedings statutes were then in force in only three provinces.

[43] The reasoning in the last three cases I have mentioned does not fit happily with that of the courts of Quebec and Saskatchewan in *HSBC Bank Canada Ltd. v. Hocking*, [2006] J.Q. No. 507 (S.C.) and *Englund v. Pfizer Canada Inc.*, [2006] S.J. No. 9 (Q.B.), respectively.

[44] *Hocking* involved claims against the defendant bank for an alleged overcharging of penalties when mortgages, or hypothecs in Quebec, on residential properties were prepaid. The bank operated through its offices in different Canadian jurisdictions including Ontario and Quebec and its customers presumably dealt with an office in the jurisdiction where they were resident and the property was located. This court certified an action brought against the bank in Ontario on behalf of a national class and approved a settlement of the proceeding. The settlement was to be binding only if an order recognising and giving effect to that of this court was made by the Superior Court of Quebec. Roy J. subsequently refused to grant such an order on a number of grounds. In her judgment, this court had no jurisdiction to make an order in a proceeding in Ontario that would bind residents of Quebec; if it had possessed such jurisdiction, it should have

declined to exercise it on the ground of the doctrine of *forum non conveniens*; there been a lack of procedural fairness at the certification hearing in this court in which the objections of a Quebec resident had not been accepted; and the notice given to the Quebec members of the class was inadequate.

[45] On the first ground, I understand the finding of the learned judge to have been based, strictly, on the provisions of Article 3168 of the *Civil Code of Quebec* which stipulates that, in personal actions of a patrimonial nature, the jurisdiction of a foreign court will be recognised only in specified circumstances that did not include those of *Hocking*. Roy J. did, however, refer to the decisions in Ontario in the context of her consideration of the following submission of counsel for the objector in this court:

> [The objector] submits that a court which is not competent to hear the case of a class member cannot gain such jurisdiction through the assertion of collective rights. The class members who are residents of Quebec did business with HSBC in Quebec, and as such the contractual obligations had to be enforced in Quebec; the fault alleged took place in, and the injury was suffered in Quebec. The action of class members resident in Quebec thus had no connection with Ontario. (para 43)

[46] The learned judge then noted that the decisions cited by counsel did not directly address the issue that counsel had raised. She then commented:

> A careful study of the authorities submitted by the parties demonstrates that, in the majority of cases where the court found a real and substantial connection in the context of class actions involving class members resident in several provinces, the connection was between the forum, the action and each individual member of the class. (para 45)

[47] Roy J. then referred to *Carom*, *Nantais* and *Currie* as cases where a real and substantial connection was found to have existed between each class member, Ontario and the proceedings in this court.

[48] A similar lack of enthusiasm for national classes was indicated by Klebuc J. in *Englund*. The case concerned allegedly harmful effects of drugs marketed throughout Canada by a subsidiary of a German corporation. The subsidiary had its business office in Ontario but sales representatives in Saskatchewan as well as in Ontario and other provinces. An application for a stay of proceedings of a class action in Saskatchewan was sought on the ground that a similar proceeding was pending in Ontario. Each of the actions was brought on behalf of a national class. Although the action for a stay was based on the principle of *forum non conveniens*, the court's reasons for denying a stay were more widely framed. Klebuc J. stated (at para 44):

> I reject [the defendant's] submission that the Ontario CPA allows for the creation of a "national class" that binds non-Ontario

> residents unless they opt out of a class action certified in Ontario because the laws of Saskatchewan do not recognize legislation enabled by other jurisdictions that intentionally encroaches on the right of its residents to seek judicial recourse for losses they suffered as a consequence of a tort or other breach of law committed within the Province. (para 44)

[49] Neither in *Hocking* nor in *Englund* was any reference made to the reasoning in the decisions in Ontario, and in British Columbia, that have accepted a more expansive approach to jurisdiction. While the courts in Quebec and Saskatchewan may limit the jurisdiction of the court to cases where one or more of the material facts that constitute each class member's cause of action against the defendants occurred in Ontario, the more expansive approach accepts as a sufficiently real and substantial connection a commonality of interest between non-resident class members and those who are resident in the forum and whose causes of action have sufficiently real and substantial connections to it to ground jurisdiction over their claims against the defendants.

[50] Until further guidance is provided by an appellate court, I intend to follow the decisions of this court that apply the wider approach to jurisdiction. I do not believe that to do so would be inconsistent with the decision in *Currie* - the one decision of the Court of Appeal in which jurisdictional issues created by the inclusion of non-residents in a class have been considered. In *Currie,* the issue related to the recognition of a foreign judgment and not to the jurisdiction of this court. As, however, the Court of Appeal found that the decision of the foreign court was made without jurisdiction and, as, in the modern law, jurisdiction for the purpose of recognition and for the purpose of an assumption of jurisdiction by a court of the forum can require an application of the real and substantial connection test, as well as principles of order and fairness, the reasoning of the court has some bearing on the jurisdictional question that arises in this case.

[51] Sharpe J.A. commenced his analysis by recognising that the application of the real and substantial connection test and of principles of order and fairness, to unnamed non-resident plaintiffs in a class action raised a novel point. He referred to the differences between the position of a class member and that of a typical defendant in a traditional two-party lawsuit and was of the opinion that rules for recognition and enforcement should reflect these differences. While recognising the duty of the court to ensure that the interests of class members are adequately represented and protected, he insisted that it would be wrong to approach the issue by asking simply whether the court in Illinois would have had jurisdiction over the defendants at the suit of a Canadian plaintiff:

> The court must have regard to the rights and interests of unnamed plaintiffs who did not participate in the [Illinois] proceedings. The question of jurisdiction should be viewed from the perspective of the Ontario client of a McDonald's Canada restaurant, participating in a promotional prize giveaway presented by McDonald's Canada, who has done nothing to invoke or submit to the jurisdiction of the Illinois court. (para 21)

[52] On the basis of his analysis and assessment of the competing considerations - in which he emphasised the importance of procedural fairness to the class members - the learned judge concluded:

> In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. (para 30)

[53] While the reasons, and the decision, in *Currie* make it clear that the special position of class members may have a serious impact on issues of jurisdiction, I do not think they provide unequivocal guidance for a case like this where all the material facts that give rise to a non-resident class member's cause of action would have occurred outside Ontario and their only other connection to Ontario consisted of a commonality of interest with the proposed representative plaintiff and the resident class members over whose claims against the defendants this court has jurisdiction.

[54] In *Currie* the court in Illinois was found to lack jurisdiction for the purpose of recognition and enforcement because of inadequacies in the notice given to the Canadian residents. In consequence the third of the preconditions to jurisdiction identified by Sharpe J.A. was not satisfied. The first - "a real and substantial connection linking the cause of action to the foreign jurisdiction" - was found to have been satisfied in the following passage (at para 22):

> The principal connecting factors linking the cause of action asserted in Currie's proposed class action to the state of Illinois are that the alleged wrong occurred in the United States and Illinois is the site of McDonald's head office. The alleged wrongful conduct, manipulating the "random" selection of winners of "high-value" prizes to ensure that no such prizes would be awarded to contestants in Canada, occurred in the United States. This factor is a "real and substantial connection" in favour of Illinois jurisdiction.

[55] As I read that passage, and the reasons as a whole, the court was not required to, and did not, consider whether the position would have been different if all material facts constituting the causes of action of the non-resident and resident class members had occurred outside, and inside the forum, respectively. Before one could apply the first of the learned judge's preconditions to jurisdiction to such a case, it would be necessary to answer the question: "Whose cause of action?" It is with respect to that situation that the views of the courts in

Quebec and Saskatchewan may be at variance from those expressed in this court and it is the situation that arises in this case.

[56] By incorporating fairness considerations into the rules for jurisdiction, the reasoning in *Currie* abandons some of the traditional distinctions between jurisdiction and recognition. As between the provinces and territories of Canada, the latter must still, however, accommodate the requirements of full faith and credit referred to in *Hunt*. It is possible that what I have described as the expansive approach to jurisdiction adopted in some of the previous decisions in this court can co-exist with rules of recognition that give weight to such requirements, as well as with an application of the principle of *forum non conveniens* - modified if necessary - where proceedings have been commenced in more than one jurisdiction. Whether or not this would be an appropriate method of dealing with the problems of national classes in the absence of uniform legislation, I believe I should follow the previous decisions of this court in deciding the jurisdictional question posed by the facts of this case.

[57] For these reasons, I am not prepared to accept the defendants' submissions that there is no real and substantial connection between Ontario and the claims of residents of other Canadian provinces and territories, and that this is sufficient to deprive the court of jurisdiction to bind them in these proceedings.

[58] There remains, of course, the question whether the other two preconditions to jurisdiction identified in *Currie* have been, or will be, satisfied. They relate to the requirements of order and fairness that the Court of Appeal insisted were pre-requisites to a finding of jurisdiction, and not separate defences to an action to enforce a foreign judgment.

[59] The issues relating to adequate representation and notice are likewise not considered to bear only on the circumstances in which a court might properly decline to exercise a jurisdiction that has been found to exist. Although, perhaps inevitably, the submissions of counsel tended to blur the distinction between matters that go to jurisdiction and those relate to the appropriateness of its exercise, both adequate representation and notice are required by the provisions of the CPA. The adequacy of representation arises under section 5 (1) (e) and will be dealt with in that context. The appropriate notice to be given to class members is usually considered if and when the requirements for certification have been found to be satisfied. Defendants' counsel did, however, submit that order and fairness would not be served if I included persons resident outside Ontario within the class. This, said Mr Pinos, would be unfair to both the defendants and such persons because of the lack of any specific connections between the latter and Ontario, and because the claims of each such class member arise under a separate contract governed by the laws of the province or territory in which it was effected.

[60] I do not find these submissions to be compelling in the circumstances of this case. The claims based on section 347 (1) of the *Criminal Code* will not be affected by variations in the governing laws, the same general principles of contract law will apply in all jurisdictions other than Quebec and the submission of plaintiff's counsel that the specific provincial statutes that have been pleaded are similar in their language and effect was not disputed. In these respects, the case is materially different to that in *McNaughton Automotive Ltd. v. Co-operators General*

Insurance Co. (2003), 66 O.R. (3d) 112 (S.C.J.), where Haines J. declined to exercise jurisdiction over non-resident members of a putative class. In my judgment, considerations of order and fairness militate in favour of extending the class to include persons outside Ontario so as to make it unnecessary for a separate action to be commenced on behalf of claimants in each of the other Canadian jurisdictions. It is, I believe, in the interest of class members to keep the number of law suits to a minimum and I see no unfairness to defendants in permitting this to be done by accepting a class that includes persons not resident in Ontario. The possibility that, if the class was restricted to residents of the Province, separate lawsuits in each other province and territory might not be commenced and that, in consequence, the defendants' exposure to liability would be more limited would not, in my opinion, give rise to unfairness in any relevant sense.

[61] Mr Pinos submitted that, even if non-residents are to be included within the class, residents of Nunavut and Quebec should be excluded because the Cash Store did not operate in those jurisdictions. Although this must significantly reduce the likelihood that class members will be resident in those jurisdictions, it does not eliminate the possibility that persons now resident in those provinces had previously obtained payday loans from a Cash Store located elsewhere in Canada. Just as former residents of British Columbia could be included in the class, I do not think I would be justified in accepting the proposed limitation.

[62] I was also asked by defendants' counsel to exclude residents of Alberta on the ground that similar litigation against the defendants is pending there. Although counsel understood that the litigation is "in abeyance", they did not appear to be certain about its exact status. I have, in previous cases, indicated that, for reasons of comity, I would ordinarily defer to the jurisdiction of other Canadian courts - in which substantially identical or overlapping proceedings are pending - by excluding persons resident within their respective provinces or territories from a class to be accepted for the purpose of the CPA. I would follow the same practice in this case subject to the possibility that an order certifying the proceedings in this case might subsequently be amended to expand the class in the event that the proceedings in Alberta are permanently stayed, or discontinued, without a settlement on the merits. (Since these reasons were prepared, I have been informed by plaintiff's counsel that he now recalls having advised the Court in Alberta that he would not be seeking to have residents of that province included in the class in this proceeding).

Section 5 (1) (c): common issues

[63] The common issues proposed on behalf for the plaintiff relate solely to the broker's fees charged, and to be retained, by the Cash Store. In general terms, the issues have been framed to determine:

> (a) whether the agreements with the Cash Store, or its receipt of the brokerage fees, breached the provisions of section 347 (1) (a) or (b) of the *Criminal Code*;
> (b) if the infringement of section 347 (1) (b) occurred, whether the Cash Store was unjustly enriched and to that extent is a trustee, or is liable to account, to the class members; and

> (c) whether transactions by the Cash Store that infringed the provisions of section 347 (1) (a) or (b) constituted harsh and unconscionable practices in contravention of applicable provincial legislation.

[64] Similar issues are proposed with respect to Rentcash but, in view of my finding that no cause of action has been adequately pleaded against it, they cannot be accepted. For essentially the same reason, an issue relating to the liability of the defendants for punitive damages - an issue that, it seems, is premised on a finding that Rentcash was unjustly enriched - must be rejected.

[65] The defendants did not dispute that the question whether the transactions between the Cash Store and its customers breached sections 347 (1) (a) would be a common element of the claims of each member of the class. It was not disputed that the terms on which the loans were advanced - including the payment of the broker's fee - were standard terms at all Cash Store locations across Canada.

[66] Defendants' counsel submitted that a resolution of each of the other proposed common issues would require an examination of the facts relating to each loan and, in consequence, could not be effected at a trial of common issues. In Mr Pinos' submission, the question whether breaches of section 347 (1) (b) had occurred could not be a common issue because it is established that there is no such breach if the payment of interest at a criminal rate arises from a voluntary act of the debtor: *Garland v. Consumers Gas Co.*, [1998], 3 S.C.R. 112, at para 58; *Degelder Construction Co. v. Dancorp Developments Ltd.*, [1998] S.C.R. 90 at para 34. Whether a payment was voluntary was, he submitted, essentially a question that could only be answered after an examination of the facts relating to each individual loan. I do not accept that submission.

[67] In *Degelder*, Major J defined the concept of a voluntary act as "an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement". Here the payment of the brokerage fee was required by the agreement and there is no suggestion that there could be any subsequent events that would provide the borrowers with any option, or ability, to determine whether or not it would be charged. I do not consider that the decision of the Divisional Court in *Markson v. MBNA Canada Bank*, [2005] O.J. No. 4625 - or my decision at first instance in the same case - provides any support for the defendants' position on this point. In *Markson*, I accepted a common issue relating to a breach of section 347 - without distinguishing between paragraphs (a) and (b) of section 347 (1) - but held that the plaintiff had not discharged the burden of demonstrating that a resolution of certain common issues relating to each class member's claim for restitution would constitute a sufficiently significant step in the attempts by the class members to enforce their claims. On the appeal, the majority of the Divisional Court agreed with that conclusion (at para 49). The facts of *Markson* differed from those of this case in that there were several variables that could affect whether the interest charged exceeded a criminal rate and a number of these were within the control of the debtors. While, in view of these variables, an examination of the individual facts of each transaction would be required to determine whether interest at a criminal rate had been received and the extent, if any, of the defendants' unjust enrichment, the threshold

question whether, and in what circumstances, the payments at such a rate were voluntary depended, as here, on the terms of the agreements between the parties and could therefore be accepted as a common issue.

[68] In my judgment, the existence of the variables that, in *Markson*, would affect the question whether interest at a criminal rate was received on any particular loan - and the amount of such interest - distinguishes the facts on which the decision was based from those of this case. The broker's fee was charged upfront, and the question whether it is to be considered to be interest at a criminal rate can be determined as a common issue without an inquiry into the subsequent acts of the borrower and the other circumstances of the transactions. I do not accept the submission of defendants' counsel that "only a minimal number of circumstances surrounding the contract can be determined at a class-wide level" if the word "minimal" is intended to suggest that material facts relating to the common issue could not be decided on this basis.

[69] To a large extent, the defendants' objections to the commonality of the issue relating to the unjust enrichment of the Cash Store were based on what I have found to be an incorrect assumption that the plaintiff's claims extend to the 59 % interest and the $10 cash card fee, and were not confined to the broker's fee. In addition, it is pleaded in the statement of defence that the terms of the contract provide a juristic reason for any enrichment that may have occurred. While the existence of a contract has often been referred to as an adequate juristic reason, I do not believe that this can be so when the enrichment is alleged to have resulted from a contract that breached the provisions of section 347 and is alleged to have been unjust for that reason. Just as in *Garland v. Consumers Gas Co .(No. 2)* (2004), 237 D.L.R. 4th) 385 (S.C.C.), compliance with orders of the Ontario Energy Board that conflicted with section 347 of the *Criminal Code* was held not to provide a juristic reason, a finding that interest received in contravention of the section was pursuant to a contract will not provide a defence to a claim for unjust enrichment. An illegal reason surely cannot be an acceptable juristic reason. On that basis, the contract in this case would not fall into one of the "established categories" of juristic reasons referred to in *Garland No. 2.*

[70] In *Garland No. 2* it was held that, if a plaintiff can satisfy the court that the established categories are not applicable, the defendant may still establish the existence of a juristic reason by reference to public policy considerations and the reasonable expectations of the parties. In that case, the relevant public policy consideration was found to be that "a criminal should not be permitted to keep the proceeds of their crime" and the same must be the case here. Mr Pinos, however, submitted that the court must consider the reasonable expectations of the parties and that this will require it to look at all the circumstances surrounding each loan. However, in the absence of any evidence that might suggest that either of the parties had, or might reasonably have had, expectations of sufficient relevance to constitute a juristic reason for the enrichment of the defendants - and evidence that such expectations with respect to the loan would have varied from case to case - I would not reject the proposed common issues relating to the unjust enrichment of the Cash Store. Nor would I do so on the basis that the plaintiff is seeking an equitable remedy and that all such remedies are said to be discretionary. Judicial discretions are exercisable in accordance with settled principles and not at the whim of the court. In the absence of any minimum evidential basis for a finding of facts that might attract an application of such

principles, a bald assertion that a remedy lies within the discretion of the court will not detract from any commonality it would otherwise possess.

[71] I understand the proposed common issue that refers to the provincial legislation to be confined to the question whether loan transactions entered into in breach of section 347 (1) (a) of the *Criminal Code* are to be considered as, *per se*, "harsh and unconscionable" and, as such, also in contravention of the statutes in force in some of the provinces. Construed in that manner, it would not give rise to individual issues relating to the circumstances of the parties and of the negotiations for each loan, as suggested by counsel for the defendants.

[72] In the result, I am satisfied that the proposed common issues relating to a breach of section 347 (1) (a), and the potential liability of the Cash Store for unjust enrichment in respect of the alleged breach of section 347 (1) (b), and of the unconscionable transactions legislation of Ontario, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island and Saskatchewan, would be shared by all class members. These issues do not extend beyond the agreement to receive, and the receipt of, the broker's fees. Although breaches of provincial consumer protection law were pleaded, no common issues in respect of such breaches, as such, were proposed or addressed at the hearing.

[73] I note that very similar common issues with respect to breaches of section 347, and a consequential unjust enrichment of the Cash Store, were accepted in *Bodnar* for the purpose of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. However, the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 that was referred to in that case has not been pleaded in these proceedings. I do not know whether this was an oversight. The statute would be relevant only with respect to any customers who obtained payday loans in British Columbia and are now resident elsewhere in Canada.

[74] I am also satisfied that the resolution of the common issues in favour of the plaintiff is likely to advance the proceedings substantially. For the reasons I have given, I do not accept the defendant's identification of a myriad of individual issues that, it was submitted, would remain to be determined and would outweigh any benefits to be obtained from the common issues trial. If, at the trial, the plaintiff is successful in proving a breach of section 347 (1) (b), and a consequential unjust enrichment, this would appear to be a case where the court could, and probably would, make an aggregate assessment of restitutionary damages pursuant to the powers conferred by section 24 (1) of the CPA.

[75] The parties have not been able to provide a precise estimate of the size of the class but it appears that there may be several hundred thousand members though, possibly, significantly less than 1 million. The evidence of the president and secretary of the Cash Store - who was also the president and chief executive officer of Rentcash - was that, from the beginning of 2003 to the third quarter of 2005, the Cash Store brokered 1,135,463 loan transactions and that the average amount of the loans was $367. There was no evidence of the number of individuals who were involved in more than one such transaction although counsel considered that this would probably have occurred.

[76] The defendants have not denied the likelihood that, if breaches of section 347 (1) are proven, it will be possible for the defendant to estimate from its records the aggregate amount of interest charged, and received, at a criminal rate. It is essential to the plaintiff's case for certifying the proceedings that the transactions between the Cash Store and its customers at each of its locations followed a standard pattern and that the terms on which the loans were arranged and the broker's fees were charged did not vary significantly. The only significant variations are likely to relate to the term of each loan – which, on the evidence, would not have exceeded 18 days – and the amounts advanced to the class members. In consequence, a resolution of the proposed common issues should substantially resolve the claims of the class members one way or the other. If the issues are decided in favour of the class, the only steps remaining should be to make an aggregate assessment of damages, to determine the manner in which these are to be applied for the benefit of the class members and – subsequent to the trial - to identify them and the loan, or loans, each received, if this is found to be necessary. In this connection, I note that the provisions of section 26 of the CPA authorize the trial judge to make *cy pres* distributions whether or not all of the class members can be identified, or the exact share of each can be determined, and notwithstanding the fact that persons other than class members may incidentally benefit.

Section 5 (1) (d) - a class action as the preferable procedure.

[77] In view of the common issues I have accepted, the plaintiff has, in my judgment, established a strong case for a finding that certification would accord with the three objectives of the CPA: access to justice, judicial economy and behavioural modification. For the purposes of the statute, access to justice does not require that each claimant will receive a distribution of part of the amount for which a defendant has been found liable. Section 26 (4) of the CPA recognizes that members may benefit otherwise than from a direct distribution to each of them. Justice is, moreover, accessed by proceedings that will recognise and affirm that the rights of class members have been infringed.

[78] The amounts that each of the class members may claim to have been unjustly deprived of are likely to be so small that I would be reluctant to certify the proceedings if I had accepted the submission of defendants' counsel with respect to the issues that would have to be decided on a case by case basis through a series of mini-trials. A costs benefit analysis would then suggest - as I believed to be the case in *Markson* - that any benefit to the class to be obtained by certification as a class proceeding would be non-existent. I do not believe that certification should be denied in a case like this - where a trial of the common issues may well determine the question of liability - just because the amounts each class member could legitimately claim are likely to be so small - so small, in fact, that even the enforcement of individual claims in the small claims court would very likely be prohibitively expensive.

[79] In his dissenting judgment on the appeal to the Divisional Court in *Markson*, O'Driscoll J. accepted, and endorsed, the submission of the appellant's counsel that a "classic case for certification as a class proceeding" was presented when:

1. The defendant has received interest at a criminal rate;

2. The damages each class member has suffered are small;

3. Absent a class proceeding, the class members will be denied access to justice;

4. Absent a class proceeding, the defendant may continue to flout its legal obligations;

5. Absent a class proceeding there will be no remedy reasonably available to the class; and

6. Absent a class proceeding, the defendant will be permitted to keep the proceeds of its crime.

[80] Although I had not regarded such considerations as determinative on the particular facts and the issues in *Markson*, I believe they are compelling on the facts of this case given the extent to which the common issues would dispose of the question of the Cash Store's liability and, probably, the computation of the total amount of any unjust enrichment to be attributed to it. In consequence, the conclusion of O'Driscoll J. that "this case fits perfectly into the mould of design for class proceedings" is one that I would respectfully echo in disposing of this motion.

Section 5 (1) (e) - A suitable representative plaintiff with a litigation plan

[81] The defendants challenged the ability of the plaintiff to represent the class on the ground that his answers in cross-examination reveal that he is unable to recollect facts relating to his numerous transactions with the Cash Store. I am not able to attribute any significant weight to this objection. Mr McCutcheon's personal recollections of the number, the amounts and the terms of the loans made to him are likely to be of far less importance than the evidence in the documents obtained from the defendants at discovery. It is on the basis of these that his claims and those of the other class members will likely stand or fall. He has retained experienced counsel and - notwithstanding the need to prove and rely upon the laws of other Canadian jurisdictions to a limited extent – I see no reason to doubt that his interests and those of the class will be adequately represented. The other facts that he could not remember include matters such as the layout of the Cash Store he attended, the names of the employees he dealt with and the details of the conversations he had with them. I do not believe that these facts should be material at a trial of the common issues I have accepted.

[82] There is nothing to suggest that Mr McCutcheon has any potential conflicts of interest with the other class members, or that his transactions with the Cash Store were in any way atypical. Contrary to the submission of defendants' counsel I do not accept that "his individual circumstances may differ greatly from those of a large number of other class members" in any respect that could materially affect a determination of the common issues. As was the case with counsel's submissions on the preferable procedure, the objections to Mr McCutcheon as a

representative plaintiff were premised largely on the existence of numerous individual issues that I do not consider should arise.

[83] For the same reason, I believe that most of the defendants' objections to the proposed litigation plan miss the mark. Given the small size of the maximum amounts recoverable if the broker's fees are held to include interest at a criminal rate, and the likelihood that an aggregate assessment of damages could be made, plaintiff's counsel submitted that it was neither necessary nor appropriate for him to provide a detailed litigation plan that would deal with the distribution of any amount recovered. In his submission, this question would best be left to the discretion of the judge at the trial of the common issues after the facts relating to the size of the class and the amounts recoverable have been determined and the question of an aggregate assessment has been dealt with. Counsel submitted that, if the common issues were decided in favour of the plaintiff and the members of the class, the powers conferred in section 24 and 26 of the CPA - including the power to order a *cy pres* distribution pursuant to section 26 (4) - would provide the trial judge with ample authority to fashion an appropriate distribution procedure. I am in agreement with these submissions.

[84] I do, however, agree that further attention is required to the form of notice to be given to class members and the manner in which this will be done. Subject to a satisfactory resolution of that matter - which can be dealt with at a case conference - there will be an order certifying the proceedings against the Cash Store in accordance with these reasons.

[85] Counsel should seek an appointment to deal with the question of costs or, if they would prefer to make their submissions in writing, those of the plaintiff should be made within 14 days of the release of these reasons and any responding submissions of the defendants should be made within a further 10 days.

CULLITY J.

Released: May , 2006

COURT FILE NO.: 04 - 12118 CP
DATE: 20060510

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THOMPSON MCCUTCHEON - - Plaintiff

Plaintiff

- and -

THE CASH STORE INC AND RENTCASH INC.

Defendants

REASONS FOR DECISION

CULLITY J.

Released: May 10, 2006