COURT FILE NO.: 06-CV-319400CP00
DATE: 20081217

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Thompson McCutcheon – Moving Party/ Plaintiff - and - The Cash Store Inc. and Rentcash Inc-- Respondents/Defendants

BEFORE: Justice Cullity

COUNSEL: ***David Thompson*** and ***Michael Stanton*** – for the Moving Party/Plaintiff

Timothy Pinos – for the Respondents/Defendants

DATE HEARD: June 4, 2008

Proceeding Under the *Class Proceedings Act, 1992*

ENDORSEMENT

[1] For reasons released on May 10, 2006, this action was certified against the Cash Store Inc. as a class proceeding pursuant to the CPA. The Cash Store Inc. is a wholly-owned subsidiary of the other defendant, Rentcash Inc. (now "The Cash Store Financial Services Inc."). The claims against Rentcash Inc. were dismissed for a failure to plead a cause of action.

[2] The claims pleaded relate to certain charges allegedly made by the defendants in connection with numerous pay-day loans made to the plaintiff. These charges and, specifically, certain brokerage fees are said to have infringed the prohibition against charging interest at a criminal rate in section 347 (1) of the *Criminal Code of Canada.* Breaches of the *Unconscionable Transactions Act,* R.S.O. 1990, c. U 2, the *Consumer Protection Act*, R.S.O. 1990, c C-31 and similar legislation in other provinces are also alleged. Claims for declarations for restitution of the alleged illegal and unenforceable payments are made.

[3] In the order certifying the of proceeding, the class that the plaintiff would represent was defined as comprising:

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

[4] The exclusion of persons resident in British Columbia and Alberta was made in deference to similar proceedings in the courts of those provinces. I note also that none of the payday loans was made in Quebec and there is no similar proceeding against the defendants there.

[5] The certification order contemplated that further submissions would be made on the form, content and manner of dissemination of the notice of certification to be provided to class members.

[6] While appeals from the decision were pending - and before the issues relating to notice were resolved - the parties entered into settlement negotiations and, ultimately, agreement was reached and minutes of settlement dated November 7, 2007 were executed. These provide for a settlement fund of at least $1.5 million - with a cap of $3 million - to be provided by the defendants for the purpose of making payments to class members - one half in cash and the other half in fully transferable vouchers with no expiration date. The amount each class member would receive would reflect his or her proportionate share of the total brokerage fees paid but the existence of the cap of $3 million would result in a substantial disparity between the brokerage fees received by The Cash Store Inc. and the amounts that would be payable under the settlement

[7] This disparity was said to be justified, in part, by the limited financial resources of The Cash Store Inc. and the fact that the charges against its parent had been dismissed. Plaintiff's counsel informed me that the amount of the settlement fund had been the subject of lengthy consideration by them with the assistance of their financial advisers and had been arrived at after arm's length negotiations with counsel for the defendants.

[8] After a fairness hearing was held on June 4, 2008, a series of case conferences followed in which I requested and obtained further evidence of the financial resources of The Cash Store Inc. in support of class counsel's recommendation that the settlement was fair and reasonable and that its acceptance would be in the best interests of the class members.

[9] Ultimately, on the basis of the evidence and the submissions of counsel, I advised counsel that approval would be granted. I placed considerable weight on the recommendation of experienced class counsel and the degree of risk to the plaintiff and the class that would be attendant on litigating this action to a conclusion. From its inception, defendants' counsel argued strongly that the brokerage fees that, in their submission, were paid for obtaining loans from arm's length lenders – who were not parties to the proceeding - could not, in the circumstances of this case, be considered to be illegal interest payments or otherwise unconscionable or unfair. In the light of the case law, and the findings of fact that might be made, the plaintiff's success at a trial of the common issues was by no means a foregone conclusion. Plaintiff's counsel were also concerned about the possibility of a successful appeal from the decision to certify the proceeding on behalf of a multi-jurisdictional class, and the delay and expense that would be involved in appeals, whether successful or unsuccessful. There was also the effect that the dismissal of the claims against Rentcash Inc. might have on any an attempt to enforce a judgment for an amount significantly in excess of the settlement amount.

[10] The minutes of settlement are comparatively brief. They do, however, provide a relatively simple procedure for dealing with claims by class members, and the rights of class

members to opt out of the proceeding - rights that would normally have been dealt with in a prior notice of certification - are preserved, and to be provided for, in the notice of settlement approval. The cost of administering the settlement is to be borne by the defendants - including the expense of a unusually extensive notice program. The releases contemplated by the minutes of settlement are not in my judgment unreasonable.

[11] The defendants have agreed to pay the fees of class counsel in an amount of $500,000 (inclusive of disbursements and GST) in addition to the settlement amount. No further fees will be payable to counsel in connection with their responsibilities in supervising the administration of the settlement. The proposed fee is, in my opinion fair and reasonable given the work done by counsel and the results achieved even if the latter is to be viewed only in the light of a gross recovery consisting of the minimum settlement amount of $1.5 million plus the costs of administration and the fee.

[12] More problematic is an agreement by the defendants to pay $10,000 to the representative plaintiff as quantum meruit compensation for his work and efforts in the prosecution of the action. Such payments are always to be examined closely to the extent that, as is here the case, they will result in the plaintiff's recovery of an amount that is likely to be significantly in excess of that obtained by any other member of the class he has been appointed to represent.

[13] In *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.), I referred to authorities in this jurisdiction that have considered the propriety of such payments and was prepared to approve compensation of $25,000 in a case where the representative plaintiff's well-documented contribution was far in excess of the norm. An appeal from that decision was dismissed on the basis of a settlement under which a much greater amount was to be paid to the plaintiff, and the Court of Appeal evidently saw nothing objectionable in that result.

[14] Although I am not oblivious to the risk of engendering expectations that such payments will be approved as a matter of course, the request in this case is strongly supported by class counsel who have sworn to the significant amount of time expended by Mr McCutcheon in advancing the interests of the class. His efforts were not confined to meetings with class counsel but extended to communicating with other class members, monitoring developments in the pay-day loan industry and providing input and assistance to class counsel in the settlement negotiations. Counsel have testified to his active part in all stages of the litigation and his time and energy spent in liaising between them and class members. They have sworn that he accepted the personal exposure to an adverse costs award and, to the benefit of the class, that he did not choose to seek assistance from the Class Proceedings Fund. They have stated that the request for compensation was made entirely at their suggestion. While I consider the amount requested to be on the high side, I am satisfied that, independently of this payment and the payment of counsel fees, the settlement merits approval and that the total amount of class counsel fees and the representative plaintiff's compensation could be justified if, as in *Garland*, it consisted of counsel fees from which the representative plaintiff's compensation was to be paid. On the basis of the strong support provided by class counsel, I will approve the amount of $10,000. I will, however, reiterate what I have said in other cases that, as a general rule, all benefits and payments to be made by defendants should be treated as a single package when considering the fairness and reasonableness of a settlement from the viewpoint of a class. This, I believe, should

be accepted whether or not there are expressed to be separate agreements for fees to be paid directly by defendants rather than out of a settlement amount otherwise earmarked for the benefit of the class. As in other parts of the law, substance must prevail over form.

[15] Finally, I note that the parties agreed to waive a provision of the settlement that provides that it would be null and void if counsel fees were not approved. As in *Garland*, I would have declined to approve the settlement if this had not been done.

CULLITY J.

DATE: December 17, 2008