

CITATION: Vistoli v. Haventree Bank, 2024 ONSC 1887
COURT FILE NO.: CV-20-00651976-00CP
DATE: 20240402

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Karen Vistoli

AND:

Haventree Bank, also known as Banque Haventree

BEFORE: J.T. Akbarali J.

COUNSEL: *Vadim Kats, Nicole Taylor, Emily Assini and Chelsea Smith*, for the plaintiff

Lara Jackson and Stephanie Voudouris, for the defendant

HEARD: April 2, 2024

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] The plaintiff brings this consent motion to certify a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”) for settlement purposes only.

Background

[2] Together with her former spouse, the plaintiff refinanced her home in Toronto on May 7, 2015. By May 2019, the mortgage came up for renewal. At that time, it was in good standing, and had applicable rate of interest of 5.37%.

[3] The plaintiff received a renewal letter from the defendant which included options to renew the mortgage on various terms. The plaintiff did not select any of the voluntary renewal options. The defendant, relying on an automatic renewal agreement in the renewal letter, automatically renewed the plaintiff’s mortgage, at an interest rate of 9.99%.

[4] The plaintiff was unable to make mortgage payments at this higher rate, and the mortgage went into default. Ultimately, the plaintiff sold the property. The plaintiff alleges that as a result of the automatic renewal of the mortgage, she incurred additional interest, fees, and costs.

[5] This proceeding was commenced on November 25, 2020. In it, the plaintiff alleges that the defendant breached certain legislation and the terms of its contract with the plaintiff and class

members in connection with the automatic and/or involuntary renewal of mortgages, resulting in additional interest, costs and fees to the class.

[6] The parties have reached a settlement of the issues in the action, as a result of which the plaintiff seeks a consent certification order for purposes of settlement, as well as an order approving the notice plan and short and long form notices, and the approval of the appointment of Epiq Class Action Services Canada Inc. as Claims Administrator.

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] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met, although compliance with the certification criteria is not as strictly required: *Waheed v. Pfizer Canada Inc.*, 2011 ONSC 5057, at para. 36; *Nutech Brands Inc. v. Air Canada*, 2008 CanLII 11643, at para. 9. The representative plaintiff must provide a certain minimum evidentiary basis for certification order: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 24.

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*, at para. 25.

[10] For the purposes of the settlement approval, the defendant does not dispute, and I accept, that the pleadings disclose a cause of action in breach of contract for which 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.

[12] For purposes of settlement, the plaintiff seeks to certify the following class:

All persons situated in Canada (including their heirs, estates, executors, trustees or personal representatives) whose mortgages held by the defendant were

involuntarily and/or automatically renewed, and who paid any amount of interest, costs and fees as a result.

[13] I am satisfied that the class is defined by reference to objective criteria, is bounded and bears a rational relationship with the common issue which I discuss below.

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

[14] The plaintiff proposes to certify the following common issue:

Did the defendant breach the terms of its contracts with the Settlement Class Members, including the duty of good faith and honest contractual performance, in connection with the involuntary and/or automatic renewal of mortgages and/or were these terms enforceable?

[15] I agree that this issue is common to all class members and arises from the cause of action asserted in the statement of claim. The contractual terms at issue are common to all class members. Determining this issue in a class proceeding would avoid the need for each class member to prove it in individual trials. This criterion is satisfied.

Section 5(1)(d): Preferable Procedure

[16] In order to determine whether a class proceeding is the preferable procedure for the resolution of the common issues, the court must consider the importance of the common issues in relation to the claims as a whole: *Hollick*, at para. 30.

[17] In *Bennett v. Lenovo (Canada) Inc.*, 2017 ONSC 5853, at para. 84, Perell J. summarized the criteria relevant to a preferable procedure analysis, including:

- a. whether a class proceeding would be better than other methods, such as joinder, test cases, or other means of resolving the dispute;
- b. whether a class proceeding represents a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims;
- c. whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy, and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.

[18] The recent amendments to the *CPA* have added to the preferability analysis. Section 5(1.1) of the *CPA* states that a class proceeding is only preferable if:

- a. it is superior to all reasonably available means of determining the entitlement of the class members to relief; and
- b. the questions of fact or law common to class members predominate over any questions affecting individual class members.

[19] The import of these criteria was considered by Perell J. in *Banman v. Ontario*, 2023 ONSC 6187, at paras. 317-322. He concluded that the addition of s. 5(1.1) to the *CPA* imposes a stricter test for preferability than the test that governed since 1994 when the *CPA* came into force. The preferable procedure analysis is now more rigorous and involve determining, through the lens of judicial economy, behaviour modification, and access to justice:

- 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 (better) to the alternatives.

[20] In the context of the settlement, courts have recognized that a class proceeding is a fair, efficient, and manageable method for advancing the class members' claims and is preferable to other procedures. As Perell J. held in *Waheed*, at para. 27, where there is a cause of action, an identifiable class, common issues, and a settlement, there is a strong basis to conclude that a class proceeding is the preferable procedure because certification would serve the primary purposes of the *CPA*: access to justice, behaviour modification, and judicial economy.

[21] I agree that, in the context of this settlement, a class proceeding is superior to all reasonably available means, both to determine the entitlement of the class members to release and to address the impugned conduct of the defendant.

[22] Moreover, in the context of this settlement, there are no questions affecting only individual class members. The proposed common issue is thus predominant.

[23] I conclude that a class proceeding is the preferable procedure in this case.

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

[24] The evidence before me indicates that the proposed representative plaintiff, Ms. Vistoli, understands her duties as a representative plaintiff and is capable of fulfilling them. She has played an active role in the action and will continue to do so. She has no known conflict of interest with other class members. She has proposed a reasonable notice program, using both direct and indirect notice, and has proposed a workable plan to move towards the approval of the settlement agreement.

Notice Plan and Notices

[25] The notice plan proposed includes providing direct and indirect notice to class members. I am satisfied that the plan is robust and will result in the proposed settlement and settlement approval hearing coming to the attention of at least most class members.

[26] I provided the parties with comments on the draft notices, which they have incorporated. I approve the draft notices subject to one addition to the short form notice which I have added to the draft and circled in red.

Administrator

[27] The parties have proposed Epiq Class Action Services Canada Inc. as Claims Administrator, and Epiq has agreed to serve. I am satisfied that Epiq is an appropriate choice and is able to discharge the duties of Claims Administrator.

Conclusion

[28] For the reasons set out above, I grant the plaintiff's motion and certify this action as a class proceeding pursuant to the *CPA* for settlement approval purposes only.

[29] I approve the notice plan and draft notices, as amended.

[30] I approve the appointment of Epiq as Claims Administrator.

[31] Order to go in accordance with the draft I have signed.

J.T. Akbarali J.

Date: April 2, 2024