SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-001222-237

DATE: May 8, 2024

PRESIDED BY: **THE HONOURABLE SILVANA CONTE, J.S.C.**

GILBERT CREMISI
Applicant
v.
B2B BANQUE
Defendant

JUDGMENT

OVERVIEW

[1] Applicant seeks permission to institute a class action on behalf of the following class, namely:

> All persons in Canada who have or had a B2B Bank investment loan and whose monthly payment was unilaterally increased by B2B Bank to more than the "monthly payment due" stipulated in the loan agreement;

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[2] At authorization Applicant agreed to limit the class to all persons in the province of Quebec who adhered to a B2B Bank investment loan on or after February 17, 2020.

[3] B2B Bank (B2B) is a chartered bank owned by the Laurentian Bank of Canada which operates in Canada[1].

[4] On November 28, 2016, Applicant and his wife signed the B2B application form and loan agreement[2].

[5] In December 2016, Applicant and his wife applied for and received a $200,000 loan from B2B to be invested in B2B's Distribution Alliance Programs which offers, amongst others, mutual fund investments approved by B2B[3].

[6] On December 22, 2016, the $200,000 loaned to Applicant and his wife was invested in a Fidelity mutual fund. This mutual fund generated monthly distributions of capital that are then applied to the monthly interest owing on the loan[4].

[7] The loan is payable on demand and is subject to a variable rate of interest calculated at the Prime Rate plus .75% per annum [5].

[8] Clause 9 of the loan, which is in issue, states in part:

> 9. Repayment options
>
> Upon advancement of the Loan proceeds, although the Loan is repayable on demand, I/We shall, in the manner set out herein, subject to any revised payment schedule and until such time as the Loan is repaid or a demand for repayment is made by the Bank, make monthly payments (the "Instalments") of the **lesser of (i) the monthly payment due, and (ii) any and all amounts outstanding pursuant to this Agreement (the "Indebtedness").**
>
> The monthly payment due is:
>
> ☐ Interest Only Payments
>
> OR
>
> X Principal and Interest Payments: $1,154.79
>
> Note: The interest will accrue monthly on the date of the loan. This interest payment is the amount as of the date of the Loan.
>
> Each instalment is due on the 5th day of each calendar month starting on 01/05/2017 (the monthly "Payment Date") Each instalment shall be applied first to the monthly payment of interest due on the Loan as of that Payment Date (the "Interest Payment") and the balance, if any, shall be applied against the Principal.

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1 Exhibit P-2.
2 Exhibit P-1.
3 Exhibit P-3.
4 Exhibit P-4.
5 Exhibit P-1 Clause 8.

> If the Prime Rate increases after the date hereof and the amount of each instalment to be paid hereunder is insufficient to satisfy the Interest Payment due as of such Payment Date, **the shortfall shall be added to the outstanding Principal and such additional amounts shall bear interest at the Variable Interest Rate and shall form part of the Indebtedness**.
>
> In the case of Principal and Interest Payment Loans: at this rate of payment, it is expected that the Indebtedness will be repaid in approximately _____years in approximately equal monthly instalments.
>
> [...]
>
> [Applicant's emphasis]

[9] As at the date of the loan, the monthly instalment payment amounted to $1,154.79.

[10] In November 2022, B2B increased the monthly payment from $1,154.79 to $1,427.37[6].

[11] Upon learning of the first payment increase, Applicant immediately contacted his mutual fund sales representative to contest the increase as he understood that clause 9 of the loan fixed his monthly payments at $1,154.79 with any shortfall to be added to the principal outstanding.

[12] B2B informed Applicant that it was entitled to unilaterally increase the monthly payments under the terms of the loan agreement and thereafter Applicant paid the interest under protest.

[13] In January 2023, B2B further unilaterally increased the monthly payments to $1,528.59[7].

[14] On February 17, 2023, Applicant filed this Application for authorization to institute a class action which was then amended on September 12, 2023, to deny receipt of the letter and welcome package filed by Defendant with the Court's authorization[8].

[15] The proposed class action seeks the following conclusions:

15.1. an injunctive order that B2B cease increasing the monthly payment under the loan agreement;

15.2. reimbursement of the increase in monthly instalments paid since November 2022; and

15.3. punitive damages.

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6 Exhibit P-6.

7 Exhibit P-6.

8 Exhibits B2B-1 and B2B-2.

ANALYSIS

[16] The Court authorizes a class action and appoints the class member it designates as representative plaintiff if it is of the opinion that the application meets all of the criteria set out in article 575 of the *Code of Civil Procedure* (CCP) as follows:

1) the claims of the members of the class raise identical, similar or related issues of law or fact;

2) the facts alleged appear to justify the conclusions sought;

3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and

4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

[17] The role of the Court, at this preliminary stage, is simply to filter out frivolous or "untenable claims, sparing unnecessary procedures for the group, the representative, the defendant and the judicial system"[9].

[18] Applicant's burden at authorization is relatively low. Applicant must demonstrate that he has an "arguable case" in light of the facts and the applicable law[10]. The facts alleged in the Application are deemed to be true for the purpose of that demonstration, however, opinion and argument are not[11]. Moreover, bare or vague assertions that are not supported by some evidence, albeit limited, are insufficient to form an arguable case[12].

ARTICLE 575 (2) CCP

[19] Applicant argues that the increase in the monthly instalment payment is a breach of the loan agreement and a violation of section 16 of the *Consumer Protection Act* (CPA). Moreover, he argues that the breach of contract constitutes bad faith conduct contrary to articles 6, 7 and 1375 the *Civil Code of Quebec* (CCQ) giving rise to punitive damages under section 272 CPA.

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9 *Infineon Technologies AG* v. *Option consommateurs,* [2013] 3 S.C.R. 600 *at* para 11.

10 *Infineon, supra* at para 134.

11 *Option Consommateurs* v. *Bell Mobilité*, 2008 QCCA 2201; *Fortier* v. *Meubles Léon Ltée*, 2014 QCCA 195.

12 *Infineon, supra* note 9 at paras 127 and 134; see also *Charles* v. *Boiron Canada Inc.*, 2016 QCCA 1716 (CanLII) at para 43.

(i) Interpretation of the loan agreement

[20] While the Court normally does not engage in a review of the merits of the case at authorization[13], the Court may interpret a pure question of law or the terms of an agreement where there is no need for further evidence[14].

[21] As noted by the Supreme Court of Canada, in standard form contracts, the surrounding circumstances generally play less of a role in the interpretation process[15]. Applicant confirmed at the hearing that he does invoke or rely on the representations of his financial advisor regarding his understanding of the terms of Clause 9 of the standard loan agreement.

[22] In *Desjardins Financial Services Firm Inc. v. Asselin*,[16] the Supreme Court of Canada held as follows[17]:

> [269] The defences available to a defendant are generally considered at the trial on the merits (Oratoire, at para. 41). As I explained, however, a court may decide a pure question of law at the authorization stage if the outcome of the proposed class action depends on its doing so. This principle, which applies to the interpretation of legislation, also extends to the interpretation of a release included in the Sanction Order made by the Ontario Superior Court of Justice, which has "full force and effect" in Quebec under s. 16 of the CCAA. The question is whether, if the facts are assumed to be true, the conclusions sought by the respondent are tenable in light of that release.
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> [...]
>
> [271] Where evidence is necessary to determine the applicability of a release found in a sanction order, this question should be decided at the trial on the merits. Conversely, where such evidence is not necessary, it would be neither logical nor desirable, from the standpoint of judicial economy and of proportionality of proceedings, to defer making a decision on this question of law when the court has an opportunity to decide it at the authorization stage. Therefore, the fact that a question of interpretation presents some difficulty at the authorization stage does not make it an improper question if it does not require evidence to be adduced (see, for example, TELUS Communications Inc. v.

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13 *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, 2019 SCC 35 (CanLII), [2019] 2 SCR 831 at para 7.

14 *Centre de santé dentaire Gendron Delisle inc. v. La Personnelle, assurances générales inc.*, 2021 QCCA 1758 (CanLII) at para 7; *Louisméus v. Compagnie d'assurance-vie Manufacturers (Financière Manuvie)*, 2017 QCCS 3614 (CanLII) at para 58.

15 *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 (CanLII), [2016] 2 SCR 23 at para 32.

16 *Desjardins Financial Services Firm Inc. v. Asselin*, 2020 SCC 30 (CanLII), [2020] 3 SCR 298.

17 *Desjardins Financial Services Firm, supra* at paras 269,271; see also *Benjamin v. Crédit VW Canada inc.*, 2022 QCCA 1383 (CanLII) at para 29.

> Wellman, 2019 SCC 19, [2019] 2 S.C.R. 144, at paras. 86-87). In law as in life, it is preferable not to put off until tomorrow that which should be done today. [...]

[23] Applicant's theory of the case is as follows[18]:

23.1. Clause 9 clearly stipulates that the "monthly payment due" is $1,154.79 and that his payment will always be "the lesser" of this amount and the Indebtedness;

23.2. The contract also stipulates that if the Prime Rate increases, the amount of the shortfall will be added to the outstanding balance;

23.3. The effect of the previous two paragraphs can only mean that the "monthly payment due" will always remain $1,154.79 and that if the Prime Rate increases, the excess interest will be added to the balance of his loan, meaning that the term of the loan will increase, but not the monthly payments;

23.4. Applicant can pay back the loan using the monthly distributions and is not out of pocket. That said, Applicant was aware that should the monthly distributions decrease, he would still be responsible for the shortfall up to the agreed upon "monthly payment" of $1,154.79 - and not more;

23.5. In short, the loan with B2B was of interest to him because the monthly payments were never supposed to change (i.e. always remain at $1,154.79), only the term of the loan could increase.

[24] Defendant argues that the terms of the loan agreement are clear and that there is no ambiguity. The loan was subject to a variable interest rate and as such the monthly instalment was not fixed. Moreover, Defendant argues that the disclosure statement mailed to all borrowers clearly sets out this fact and underlines that the loan is amortized over 240 months or twenty years.

[25] In reply, Applicant denies that he or his wife received the disclosure statement and welcome package.

[26] The Court finds that Applicant's interpretation of the loan agreement is simply not tenable.

[27] The terms of the loan are clear and unambiguous. Applicant's interpretation of the loan as fixing the monthly instalment due in the amount of $1,154.79 thereby extending the term of the loan indefinitely, contradicts the terms contained therein which clearly provides that: 1) the loan is payable monthly at a variable rate of interest (Prime

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18 Paragraphs 15 to 20 of the Amended Application.

Rate plus .75% per annum); and 2) the loan is amortized over twenty years and is subject to a fixed term of twenty (20) years.

1) Variable rate of interest

[28] Applicant acknowledges that the cost of borrowing may vary based on the changes to the Prime Rate in Clause 8 of the loan agreement as follows [19]:

> The Prime Rate in effect from time to time (the "Variable Interest Rate") such interest to be calculated daily and payable monthly from the date the Loan proceeds are advanced.[...] Prime Rate means the annual interest rate announced by the Bank from time to time[...] **I/We agree that the applicable Variable Interest Rate may, for interest computation purposes, change without notice upon each change in the Prime Rate** and **I/We acknowledge that the cost of borrowing for the Loan may vary based on changes to that Prime Rate**.[...]

[29] Applicant also acknowledges in Clause 10 (pre-authorized debit authorization) of the loan agreement that the monthly instalments owing may vary from month to month:

> [...]I/We authorize the Bank to debit on each Payment Date all amounts that may be owing to the Bank pursuant to this Agreement, **which may vary from month to month**, including, without limitation, the Instalments and fees payable pursuant to this Agreement, and to apply these amounts to my/our Indebtedness. [...]

[30] In addition, Clause 9 of the loan agreement which references the repayment options provides:

> I/We shall, in the manner set out herein, **subject to any revised payment schedule**[...]make monthly payments (Instalments)[...]

[31] Moreover, Clause 9 which calculates the monthly instalment payment at $1,154.79 adds a note to the reader that "This interest payment is the amount **as of the date of the Loan**, as clearly the interest payment is subject to change.

[32] Finally, Clause 9 states that an increase in the Prime Rate may result in a shortfall which is also a clear indication that the monthly interest rate is not fixed and may exceed the monthly distribution from the mutual fund investment.

[33] If there is a shortfall, Clause 9 simply provides that that amount is added to the Principal and is then subject to the Variable Rate of Interest.

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[19] Exhibit P-1, Clauses 8, 9 and 10.

2) Term of the loan agreement

[34] The Disclosure Statement[20] which is incorporated by reference in Clause 12 of the loan agreement (paragraphs 23 and 31), fixes the term of the loan and amortization period at 240 months or twenty (20) years.

[35] The Disclosure Statement is enclosed the Welcome Package which Defendant claims is generated automatically and sent to the address indicated on the loan document, the whole in accordance with Clause 14 of the loan agreement[21].

[36] While Applicant denies having received a Welcome Package and Disclosure Statement, the loan agreement clearly sets out in Clause 2 that the repayment of the Principal and Interest is amortized over a term of 240 months.

[37] In addition, Clause 9 of the loan agreement states that principal and interest loans are subject to monthly payments at the Variable Interest Rate and on an amortization period of twenty (20) years and a term of twenty (20) years.

[38] Finally, despite Applicant's claim that he understood that he would never have to be out of pocket, as the monthly mutual fund distribution would cover the monthly instalments of the loan, the disclosures in Clause 11 of the loan agreement are clear. These disclosures caution the borrower as to the risks of leveraging for the purpose of investment. In particular, the fact that the loan obligations remain notwithstanding a decrease in the value of the securities. A borrower is advised to ensure he has adequate financial resources to repay the interest and the loan failing which he may be required to sell his funds at a loss.

(ii) Punitive damages

[39] The Supreme Court of Canada held in *Richard v. Time*[22] that violations that are intentional, malicious or vexatious, or conduct that displays ignorance, carelessness or serious negligence with respect to merchant's obligations and consumers' rights under the CPA may result in awards of punitive damages under section 272 CPA.

[40] As the Court finds there is no breach of contract, there is clearly no recourse to punitive damages. However, even if there was an arguable case, the facts do not demonstrate malicious or careless conduct giving rise to a claim for punitive damages. Defendant simply does not agree with Applicant's interpretation of the loan agreement.

[41] The Court will now examine the other criteria for the sake of completing its analysis.

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20 Exhibit B2B-2; Clause 13 of Exhibit P-1.

21 Examination of Ms. Ann Du on September 21, 2023.

22 *Richard v. Time Inc.*, 2012 SCC 8 (CanLII), [2012] 1 SCR 265 at para 180.

ARTICLE 575 (1) CCP

[42] The following are the questions of fact and law that Applicant seeks to have the Court determine on the merits:

42.1. Does Clause 9 of the agreement prohibit BNB from increasing the amount of the monthly payment due by Class members indicated in that clause?

42.2. Did B2B violate section 16 CPA?

42.3. If either of these questions are answered in the affirmative, are Class members entitled to compensatory or punitive damages and in what amounts?

42.4. Should an injunctive remedy be ordered to prohibit B2B from increasing the monthly payment due and to only collect the amount provided for in clause 9 of the B2B agreement?

[43] A single identical, similar or related question of law would be sufficient to meet this condition provided that it is significant enough to affect the outcome of the class action[23].

[44] As the Court has found that there is no color of right or tenable case to be authorized, this condition cannot be met. However, assuming that there was an arguable case, the questions as drafted would be common to the proposed class.

ARTICLE 575(3) CCP

[45] The composition of the proposed group must be such that it would be impractical to proceed by mandate or joinder of the parties when examining the number of potential members and their geographic location[24].

[46] As the facts are deemed true, there are at least 5,000 potential class members in Quebec alone who have signed the standard form agreement with countless other members across Canada. On that basis, the Court finds that this criterion has been satisfied.

ARTICLE 575 (4) CCP

[47] The Supreme Court of Canada held in *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*[25] that "the applicant must show (a) an interest in the suit, (b) competence and (c) an absence of conflict with the class [...] These three criteria are to be interpreted

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[23] *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, *supra*, note 13 at para 18.

[24] *Rozon v. Les Courageuses*, 2020 QCCA 5 (CanLII) at para 23; Yves LAUZON, *Le recours collectif*, Cowansville, Édition Yvon Blais, 2001, p. 38.

[25] *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, *supra,* note 13, at para 32.

"liberally", which means that "[n]o proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly".

[48] Applicant has met these three criteria and is an adequate representative.

FOR THESE REASONS, THE COURT:

[49] **DISMISSES** the Amended Application for authorization to institute a class action.

[50] **THE WHOLE** with costs.

Silvana Conte

SILVANA CONTE, J.S.C.

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Date of Hearing: April 25, 2024