

CITATION: Bernstein v. Peoples Trust Company, 2019 ONSC 6076
COURT FILE NO.: CV-13-493837-00CP
DATE: 2019/10/21

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
JOYCE BERNSTEIN) *Charles Sinclair* for the Plaintiff
)
Plaintiff)
)
– and –)
)
PEOPLES TRUST COMPANY and) *Lawrence Thacker, and Jonathan Chen* for
PEOPLES CARD SERVICES LLP) the Defendants
)
Defendants)
)
)
Proceeding under the *Class Proceedings Act, 1992*) **HEARD:** In writing
)

PERELL, J.

REASONS FOR DECISION - COSTS

[1] Pursuant to the *Class Proceedings Act, 1992*,¹ the Representative Plaintiff, Joyce Bernstein, brought a class action against the Defendants, Peoples Trust Company and Peoples Card Services LLP (collectively “Peoples Trust”).

[2] The action was brought on behalf of all consumers in Ontario within the meaning of the *Consumer Protection Act, 2002*,² who purchased or acquired a prepaid payment card sold or issued by Peoples Trust between November 29, 2011 and April 30, 2014. In her action, Ms. Bernstein alleged that Peoples Trust breached the Gift Card Regulations in *O. Reg. 17/05 (General)*, a regulation enacted pursuant to the *Consumer Protection Act, 2002*.

[3] Ms. Bernstein moved for a summary judgment. Peoples Trust brought a cross-motion for a summary judgment dismissing her action.

[4] In her summary judgment motion, Ms. Bernstein claimed damages of \$36,842,000 plus prejudgement and postjudgment interest plus punitive damages plus costs. On May 13, 2019,³ I granted Ms. Bernstein a summary judgment for: (a) \$6,186,000 to any Class Member who had a

¹ S.O. 1992, c. 6.

² S.O. 2002, c. 30, Sched. A.

³ *Bernstein v. Peoples Trust Company*, 2019 ONSC 2867.

Single Load Prepaid Card (“SLP card”); this award is compensation for the unused balances on the card after the VALID THRU DATE; (b) \$9,144,000; this award is the sum charged purchasers of SLP cards contrary to *O. Reg. 17/05* or in breach of contract; and (c) \$1.5 million for punitive damages.

[5] I awarded prejudgment interest of \$1,233,753.⁴ With the award for prejudgment interest, the Class was awarded \$18,063,753.

[6] I dismissed Ms. Bernstein’s approximately \$21.5 million claim with respect to Peoples Trusts’ General-Purpose Reloadable Cards (“GPRs”).

[7] Ms. Bernstein now seeks her partial indemnity costs calculated at 60% of her actual fees. She claims \$685,220.85 for counsel fee plus \$296,876.17 in disbursements for a total claim of **\$982,097.02**, all inclusive of GST. The bulk of the disbursement relate to the work of Ms. Bernstein’s expert, Cohen Hamilton Steger.

[8] Ms. Bernstein’s Costs Outline breaks down the costs incurred by Class Counsel into categories, including: (a) pleadings; (b) case conferences; (c) Class Proceedings Fund application and communications; (d) experts and reviewing the expert reports prepared by both parties’ experts; (d) application to intervene in *Jiang v. PTC* (includes the drafting of the application, preparation for and attendance at the hearing Vancouver); (e) motion for a discovery plan; (f) documentary discovery and production of documents; (f) mediation (in Vancouver); (g) summary judgment motion and cross-motion; and (h) review of the Reasons for Decision and the preparation of the Supplementary Submissions on Prejudgment and Postjudgment Interest and Distribution.

[9] In addition, she seeks payment from the Defendants, Peoples Trust of \$10,000 (plus postjudgment interest) in costs that I ordered payable to the Plaintiff “in the cause” following the certification hearing.

[10] Peoples Trust submits that because of the divided success, the parties should bear their own costs.

[11] In the alternative, it submits that Ms. Bernstein should be awarded **\$107,160.13**, which is 25% of her legal fees after reduction for excessive, unnecessary, or improper partial indemnity costs.

[12] In this last regard, Peoples Trust submits that the following fees totalling \$180,404.50 should be deducted from Ms. Bernstein’s partial indemnity counsel fee:

- a. \$16,561.50 should be deducted on account of the cost submissions on certification because this should have been dealt with when the costs were determined and awarded.
- b. \$10,395 should be deducted on account of the dealing with the Class Proceedings Fund, which Peoples Trust submits is a costs it should not be expected to bear.
- c. \$41,055 should be deducted for the Application to Intervene in *Jiang*, which Peoples Trust submits is a costs it should not be expected to bear.

⁴ *Bernstein v. Peoples Trust Company*, 2019 ONSC 4675.

- d. \$50,000 should be deducted from the mediation counsel fee because the 113.2 hours expended by Mr. Sokolov included time spend on the GPR Cards, which was a claim that Ms. Bernstein ought to have dropped as demonstrated by the outcome of the summary judgment motion.
- e. \$53,393 should be deducted from the counsel fee for the motion for summary judgement as excessive. While Class Counsel and Peoples Trust’s counsel spent roughly the same amount of time, Peoples Trusts lawyers spent significant time requesting, reviewing and analysing vast amounts of customer data, including amounts for each specific fee charged to each individual cardholder over the time period encompassed by the Class Period, but Class Counsel did not have a similar task.
- f. \$9,000 should be deducted from the fee for reviewing the Reasons for Decision.

[13] In my view, the appropriate award in the immediate case for the summary judgment motions is \$905,244.02, all inclusive [\$982,097.02 minus \$68,011.50 minus \$8,841.50 (0.13 [GST] x 68,011.50)].

[14] I disagree with Peoples Trust’s submission that given the divided success, each party should bear their own costs. Practically speaking, Peoples’ Trust cross-motion was redundant. The result of the summary judgment motion was totally dispositive of Ms. Bernstein’s action and she was the successful party in that action although not as successful as her aspirations. Peoples Trust was found liable and damages were assessed; Ms. Bernstein was the successful party and costs follow the event.

[15] I do agree, in part, with Peoples Trust’s submission that there should be item-by-item reductions in Ms. Bernstein’s break down of Class Counsel’s fees. I agree that items a, b, and c, which total \$68,011.50, and the associated GST of \$8,841.495 should be deducted because they are not appropriate charges for a party and party assessment of costs.

[16] Accordingly, I award Ms. Bernstein \$905,244.02, all inclusive, for the summary judgment motions.

[17] In addition, although no new award is necessary, Ms. Bernstein is entitled to the of \$10,000.00 (plus postjudgment interest) in costs that I ordered payable to the Plaintiff “in the cause” following the certification hearing.

Perell, J.

October 21, 2019

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SUPERIOR COURT OF JUSTICE**

BETWEEN:

JOYCE BERNSTEIN

Plaintiff

– and –

PEOPLES TRUST COMPANY and PEOPLES CARD
SERVICES LLP

Defendants

REASONS FOR DECISION - COSTS

PERELL J.

Released: October 21, 2019