

CITATION: Bernstein v. Peoples Trust Company, 2019 ONSC 4675
COURT FILE NO.: CV-13-493837-00CP
DATE: 2019/08/07

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
JOYCE BERNSTEIN)	<i>Louis Sokolov, Jonathan Schachter, Nadine</i>
)	<i>Blum and Charles Sinclair for the Plaintiff</i>
Plaintiff)	
)	
– and –)	
)	
PEOPLES TRUST COMPANY and)	<i>Lawrence Thacker, and Jonathan Chen for</i>
PEOPLES CARD SERVICES LLP)	<i>the Defendants</i>
Defendants)	
)	
)	
Proceeding under the <i>Class Proceedings Act, 1992</i>)	HEARD: In writing
)	

PERELL, J.

REASONS FOR DECISION

[1] In this certified action under the *Class Proceedings Act, 1992*,¹ the Representative Plaintiff, Joyce Bernstein, brought a class action against Peoples Trust. 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*.

[2] Ms. Bernstein moved for a summary judgment. She claimed damages of \$36,842,000 plus prejudgement and postjudgment interest plus punitive damages plus costs.

[3] On May 13, 2019,³ I granted Ms. Bernstein a summary judgment for:

- a. \$6,186,000 to any Class Member who had a Single Load Prepaid Card (“SLP card”); this award is compensation for the unused balances on the card after the VALID THRU DATE.

¹ S.O. 1992, c. 6.

² S.O. 2002, c. 30, Sched. A.

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

- 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.
- c. \$1.5 million for punitive damages.

[4] I dismissed Ms. Bernstein's approximately \$21,5 claim with respect to People Trust's General Purpose Reloadable Cards ("GPRs").

[5] I required further submissions about: (a) the appropriate method or procedure for distributing the awards to Class Members; and (b) prejudgment and postjudgment interest.

[6] On June 12, 2019, Peoples Trust served a Notice of Appeal. It appeals the findings with respect to the SLPs and the award of punitive damages made in the Decision.

[7] On June 19, 2019, the Plaintiff filed a Notice of Cross-Appeal. The Plaintiff appeals the findings with respect to the GPRs.

[8] Turning to the matter of the determination of the distribution protocol, Peoples Trust submitted that the determination should be deferred pending the resolution of the appeal and the cross-appeal. I agree and, therefore, I shall say no more about the parties' respective submissions with respect to the distribution protocol.

[9] Turning to the matter of prejudgment and postjudgment interest, the parties agree that pre-judgment interest on punitive damages is prohibited pursuant to s. 128(4)(a) of the *Courts of Justice Act*.⁴

[10] Peoples Trust did not dispute, the Class Members' entitlement to prejudgment or postjudgment interest.

[11] Assuming that this Court accepts that pre-judgment interest is calculated from the start of the Class Period, Peoples Trust does not dispute the quantum calculation of prejudgment interest by Cohen, Hamilton Steger & Co. Inc., which provided expert evidence for the summary judgment motion for Ms. Bernstein.

[12] Cohen, Hamilton Steger & Co. Inc. did not include the punitive damages in its calculation of pre-judgment interest. It calculated simple interest (*i.e.*, no compounding). It used a fixed interest rate of 1.3% being the applicable prejudgment interest rate in the quarter before the action was commenced (November 29, 2013). It assumed that the excess fees, excess activation fees and unused/seized balances in respect of the SLP cards at issue were incurred evenly throughout the class period, being November 29, 2011 to April 30, 2014. Then, Cohen, Hamilton Steger & Co. Inc. assumed that each year's excess fees, excess activation fees, and unused/seized balances were incurred evenly during that year. It then calculated interest on 50% of each year's amount and 100% of cumulative amounts at the beginning of the year. Using this methodology, the total amount of prejudgment interest totals \$1,233,753.

[13] The methodology employed by Cohen, Hamilton Steger & Co. Inc. is consistent with s. 128(3) of the *Courts of Justice Act* which provides that "if the order includes an amount for past pecuniary loss, the interest calculated under subsection (1) shall be calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order."

⁴ R.S.O. 1990, c. 43.

[14] In *Celanese Canada Inc. v. Canadian National Railway Co.*,⁵ the Court of Appeal noted that "[t]he purpose of s. 128(3) is to achieve fairness in the payment of the prejudgment interest on pecuniary damages by ensuring that a plaintiff will not recover a windfall that would otherwise result were s. 128(1) to be applied". By calculating interest on a half year's interest on incremental damages and then again on the full year of interest at the beginning of that year, Cohen, Hamilton Steger & Co. Inc.'s methodology conforms with s. 128(3).

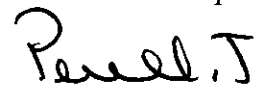
[15] I, therefore, award the Class Members prejudgment interest of \$1,233,753.00.

[16] Pursuant to s. 129(1) of the *Courts of Justice Act*, money owing pursuant to an order, including costs fixed by the court, "bears interest at the postjudgment interest rate, calculated from the date of the order." Unlike s. 128 of CJA, there is no prohibition on ordering costs on punitive damages.

[17] The prevailing rate as at May 13, 2019 for postjudgment interest was 3.0% *per annum*.

[18] The Class Members requests an award of postjudgment interest at this rate commencing from May 13, 2019 on all amounts awarded against the defendants in this matter inclusive of punitive damages and prejudgment interest.⁶ With the above award for prejudgment interest, to date, the Class has been awarded \$18,063,753.

[19] I award the Class Members postjudgment interest on \$18,063,753 at the rate of 3.0% *per annum* from May 13, 2019.



Perell, J.

Released: August 7, 2019

⁵ [2005] O.J. No. 1122 (C.A.).

⁶ Costs are yet to be determined.

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BETWEEN:

JOYCE BERNSTEIN

Plaintiff

- and -

PEOPLES TRUST COMPANY and PEOPLES CARD
SERVICES LLP

Defendants

REASONS FOR DECISION

PERELL J.

Released: August 7, 2019