IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sherry v. CIBC Mortgage Inc.*,
2015 BCSC 490

Date: 20150331
Docket: S116769
Registry: Vancouver

Between:

Erin Sherry

Plaintiff

And:

CIBC Mortgage Inc.
and in French, Hypothèques CIBC Inc.

Defendant

Before: The Honourable Madam Justice Watchuk

Supplementary Reasons for Judgment

Counsel for the Plaintiff:	K.A.G. Bridge B.M. Samuels
Counsel for the Defendant:	H. Van Ommen, Q.C. A. Cocks
Place and Dates of Hearing:	Vancouver, B.C. January 5, 2015
Place and Date of Judgment:	Vancouver, B.C. March 31, 2015

I. INTRODUCTION

[1] In Reasons for Judgment dated June 30, 2014 (the "June Reasons") this action was conditionally certified as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*CPA*"). The June Reasons are indexed at 2014 BCSC 1199. These reasons deal with two outstanding issues from those reasons: the definition of the class and the addition of a common issue of punitive damages.

[2] This case relates to financial charges (commonly referred to as "Prepayment Penalties") which the defendant, CIBC Mortgages Inc. ("CIBC") levied on the plaintiff and other class members. The plaintiff's claims involve standard mortgage terms incorporated into CIBC's mortgage contracts with the plaintiff and other class members commencing in 2005, and a standardized method or formula used CIBC from 2005 onward to quantify the Prepayment Penalties charged to the plaintiff and other class members.

[3] With regard to the definition of the class, in the June Reasons the matter was referred back to counsel for further submissions:

> [116] The class is capable of clear and finite definition, and otherwise this matter is suitable for certification. Although in some circumstances the court may amend the class definition, in this case the class definition is referred to counsel to make further submissions on an amended definition to be proposed by plaintiff's counsel. The action will be conditionally certified pending the court being satisfied that the class has been properly narrowed and defined.

[4] With regard to the inclusion of a common issue on punitive damages, this issue was not fully resolved. The June Reasons addressed this on the basis that the plaintiff would bring a further application:

> [117] In addition, the plaintiff submits the following as a possible description of a common issue on punitive damages:
>
> Did the Defendant, or its agent as alleged in the Notice of Civil Claim:
>
> (a) breach the Plaintiff Language Promise as defined in the Notice of Civil Claim;
>
> (b) breach the *Trust and Loan Companies Act*, S.C. 1991, c. 45, and the *Cost of Borrowing (Trust and Loan Companies) Regulations*, SOR/2001-104, as alleged in the Notice of Civil Claim;

(c) breach the *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313, s. 9.1 and *Mortgage Brokers Act Regulations*, B.C. Reg. 100/73, as amended, as alleged in the Notice of Civil Claim;

(d) breach the *Business Practices and Consumer Protection Act*, ss. 67(1) and 84(m), as alleged in the Notice of Civil Claim;

(e) breach fiduciary duties as alleged in the Notice of Civil Claim; or

(f) commit the Miscalculations as alleged in the Notice of Civil Claim;

and, if so, do such breaches, acts or omissions justify an award of class-wide punitive and/or exemplary damages?"

[118] This proposed common issue on punitive damages encompasses the issues of alleged breaches of statutory and regulatory provisions, as well as an issue of fiduciary duties owed by the defendant.

[119] As was discussed at the hearing, counsel for the plaintiff is to file an application to deal with this matter at a further hearing.

[5] The parties have made further submissions on both issues.

II. COMMON ISSUE - PUNITIVE DAMAGES

A. Application

[6] The plaintiff seeks an order certifying the following issues as common issues:

1. Do the acts and omissions of the defendant warrant an award of punitive damages?
2. If the answer to issue 1 is yes, should an award of punitive damages be made against the defendant and, if so, in what amount?

(collectively, the "Punitive Damages Common Issues").

[7] The order sought is an order directing that the Punitive Damages Common Issues be bifurcated. This would mean that the first issue will be heard and decided at the trial of the other common issues in the case. The second issue would be heard and decided later, following determination of the issues including the quantum of compensatory damages payable to the class members.

B. Background

[8] This action was commenced on October 7, 2011. The plaintiff is a resident of British Columbia who was a mortgagor under a Double Discretion Mortgage Contract issued by CIBC as mortgagee.

[9] The common issues that were identified by the plaintiff and were the subject of determination in the June Reasons were:

> 1. Are the provisions in the Defendant's Mortgage Contracts (as defined in the Notice of Civil Claim) that purport to allow the Defendant to charge penalties upon the prepayment of part or all of the principal debt enforceable?
> 2. If the answer to common issue 1 is "yes", is the maximum penalty that may be charged under the Defendant's Mortgage Contracts limited to three months' interest on the principal amount that is prepaid?
> 3. If the answer to common issue 1 is "yes" and the answer to common issue 2 is "no", when the Defendant calculated and charged prepayment penalties based on interest rate differentials ("IRDs") did the Defendant miscalculate and overcharge those prepayment penalties?
> 4. If the answer to common issue 3 is "no", are the provisions of the Defendant's Mortgage Contracts that purport to permit such calculation and charging of prepayment penalties:
>
> (a) unconscionable, void or voidable, and/or unenforceable at common law or in equity; or
>
> (b) contrary to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, s. 8, and if so, should those provisions be set aside pursuant to the *Business Practices and Consumer Protection Act* ss. 10 and 105 or otherwise?

In the course of this hearing, it came to my attention that para. 120 of the June Reasons, due to an error, omitted the first three common issues, and restated only the fourth. The intention was to include the four common issues in that paragraph and to certify the four common issues which were identified by the plaintiff and which are set out here. The order arising from these certification proceedings should so state.

[10] The Notice of Civil Claim pleads the following facts relevant to the punitive damages claim:

> 17. At all relevant times, CIBC and the Bank, both in their own names and under the name of President's Choice, have advertised and promoted, and continue to advertise and promote, their commitment and promise to use "plain language mortgage documents", specifically including plain language regarding the cost of Prepayments (the "Plain Language Promise").
>
> ...
>
> 76. Due to the intentional and wrongful conduct of CIBC, including but not limited to CIBC's creation and use of Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts which constitute breaches of CIBC's Plain Language Promise [referred to in paragraphs 17 and 19 to 23 of the Notice of Civil Claim] and of its statutory obligations under the *Trust and Loan Companies Act*, S.C. 1991, c. 45, the *Cost of Borrowing (Trust and Loan Companies) Regulations*, SOR/2001-104 [referred to in paragraph 24 of the Notice of Civil Claim], and the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, [referred to in paragraphs 25 and 26 of the Notice of Civil Claim] as set out above, CIBC's committing of the Miscalculations [referred to in paragraphs 38 to 45 of the Notice of Civil Claim] and CIBC's breaches of fiduciary duty [referred to in paragraph 46 of the Notice of Civil Claim], the Plaintiff seeks class-wide punitive and exemplary damages.
>
> ...
>
> 89. CIBC's intentional and wrongful conduct as described herein justifies an award of punitive and exemplary damages.

There is no present claim that exemplary damages be included as a common issue.

[11] The factual issues and evidence that pertain to the common issues already certified are also relevant to the issue of whether punitive damages are appropriate.

C. Law Regarding Punitive Damages as a Common Issue and the Bifurcated Approach

[12] Punitive damages are awarded where the defendant's conduct "has been egregious, deliberate and intentional and so extreme in nature as to be deserving of condemnation and punishment and where compensatory damages alone would be inadequate to punish the defendant for this conduct": *Andersen v. St. Jude Medical, Inc.*, 2010 ONSC 77 at para. 31.

[13] The Court of Appeal has confirmed that punitive damages are available in class actions brought under British Columbia's *CPA*: *Fakhri v. Wild Oats Markets Canada, Inc.*, 2004 BCCA 549, at paras. 23-26. However, punitive damages should only be awarded if

they would serve a rational purpose considering the objects of a punitive damage award (at para. 21).

[14] The purpose of a punitive damage award was discussed at length by the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18. Punitive damage awards are the exception rather than the rule and they are imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that represents a marked departure from the standards of decent behaviour (at para. 94). These awards are intended to punish the defendant rather than compensate the plaintiff (at para. 36). Accordingly, a punitive damage award should only be awarded if, in the context of the particular case, it advances one of the objectives for which punitive damages are awarded: retribution, deterrence and denunciation (at paras. 68 and 71).

[15] Significantly, Binnie J. in *Whiten* stated that punitive damage awards must be considered in relation to the other damages and punishments faced by the defendant. Punitive damages should be awarded "if, but only if" all other penalties, including compensatory damages, "have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence and denunciation" (at para. 123).

[16] The relevant facts to consider when determining the appropriateness of a punitive damage award were summarized by Justice Perrell in *Robinson v. Medtronic Inc.* (2009), 80 C.P.C. (6th) 87 at para. 170 (Ont. S.C.J.), aff'd 2010 ONSC 3777 (Div. Ct.):

> It follows from Justice Binnie's remarks that an assessment of punitive damages requires an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives or retribution, deterrence, and denunciation. These factors must be known to ensure that punitive damages are rational and to ensure that the amount of punitive damages is not greater than necessary to accomplish their purposes.

[17] A punitive damage award may be an available in relation to CIBC's alleged breaches of its statutory obligations. This is because even where a statute does not provide a civil remedy for its breach, the common law may supply a remedy. This was recently discussed by the Supreme Court of Canada in *Bank of Montreal v. Marcotte*, 2014 SCC 55, at paras. 79 to 84. The plaintiff banks asserted that when banks breach their statutory obligations under the *Bank Act*, S.C. 1991, c. 46, the legislature intended those banks to be subject to criminal

sanctions under the act instead of civil awards of punitive damages. The Court rejected this argument, and noted that there are many provincial laws that provide a variety of civil causes of action that can potentially be raised against banks. As long as these remedies are not inconsistent with a statute, those civil actions are still valid and available. Accordingly, as noted by the Court of Appeal in *Fakhri,* punitive damage awards are available in class actions brought under the *CPA*.

[18] Section 4(1)(c) of the *CPA* requires the plaintiff to establish some basis in fact for the statutory requirement that the issues as framed are common to members of the proposed class: *Hollick v. Toronto (City),* 2001 SCC 68 at para. 25; and *Watson v. Bank of America Corp.*, 2014 BCSC 532 at para. 61. The underlying question when analyzing commonality is whether allowing the issues to proceed will avoid duplication of fact-finding or legal analysis. The court must consider whether each issue to be addressed at trial can be managed fairly on a common basis: *Watson* at paras. 66–69.

[19] The court must be careful to ensure that an issue is genuinely a common issue and not simply made to appear common by the manner in which it is posed. As noted by Madam Justice Fisher in *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050, it is important that a common issue is different from a common cause of action, as a common cause of action does not in itself give rise to a common issue (at para. 140). Justice Fisher went on to note that even though class members may have a common cause of action and a commonly phrased theory of liability, a common issue will nonetheless fail to be established where the actual determination of liability for each class member can only be made upon an examination of the relevant, unique circumstances of each class member (at para. 141).

[20] As stated by the Supreme Court of Canada, the commonality question should be approached purposively. The underlying question is whether certification of the Punitive Damages Common Issues would avoid duplication of fact-finding or legal analysis. Therefore, the core question at this stage is whether determining whether the defendant's acts or omissions make punitive damages *prima facie* appropriate together with the other common issues will avoid duplication of fact-finding and legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39 [*Dutton*].

[21] Punitive damage claims may be certified as a common issue in appropriate cases. In circumstances where class members' damages must be determined on an individual basis after the conclusion of the common issues trial, some courts have bifurcated the issue of punitive damages. In such a case, *prima facie* entitlement to punitive damages is certified as a common issue, and the entitlement of individual class members and the quantification of their punitive damages are determined following the assessment of their compensatory damages at the individual trials. Again, if the compensatory award to an individual class member or the class as a whole is sufficient to punish the defendant, then no punitive damages should be awarded: *Whiten* at para. 94.

[22] In *L.R. v. British Columbia*, 1999 BCCA 689; aff'd in *Rumley v. British Columbia*, 2001 SCC 69, Mackenzie J.A., speaking for the Court of Appeal, stated:

> 48. ... The plaintiffs' pleading alleges conduct that if substantiated could be characterized as morally culpable. Any award for punitive damages should reflect the overall culpability of the defendant. It does not have to be linked to the harm caused to any particular claimant and does not require individualized assessment. A global award can be assessed for the successful class members as a group, and allocated among them as the trial judge considers appropriate. The plaintiffs would be required to succeed on a common issue related to sexual abuse as well as proving moral culpability to establish a foundation for punitive damages.
>
> 49. As compensatory damages also punish the defendant indirectly, any award for punitive damages should take into account the quantum of compensatory damages awarded. In the context of a class proceeding, that suggests that the assessment of any award for punitive damages should be deferred until the total amount of compensatory damages has been assessed.

[23] In *L.R.*, the Court of Appeal utilized the bifurcated approach. It certified common issues regarding whether the defendant was negligent or in breach of fiduciary duty, as well as punitive damages claims as follows:

> 1. If the defendant was negligent or breached a fiduciary duty, "was the defendant guilty of conduct that justifies an award of punitive damages?"
>
> 2. If so, "what amount of punitive damages is awarded?"

[24] On appeal to the Supreme Court of Canada, Chief Justice McLachlin for the Court agreed with Mackenzie J.A.'s reasoning on the certification of punitive damages. Since the defendant's liability was limited to systemic negligence against the group rather than specific

class members, the fact-finding that was necessary for the shared punitive damages issues would be more appropriately dealt with as a common issue: *Rumley* at para. 34.

[25] The Court of Appeal again adopted this bifurcated approach to punitive damages in *Chalmers v. AMO Canada Company*, 2010 BCCA 560. After quoting, at para. 30, from Mackenzie J.A.'s judgment in *L.R.* at para. 49 (as set out above), Tysoe J.A., speaking for the Court, stated:

> 31. Although the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, it does not follow, in my opinion, that no aspect of the claim of punitive damages should be certified as a common issue. It is my view that the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the trial in this proceeding where the other common issues will be determined. The focus will be on the defendants' conduct, and there is nothing in this case that will require consideration of the individual circumstances of the class members in order to determine whether the defendants' conduct is deserving of punishment. The ultimate decision of whether punitive damages should be awarded, and the quantification of them, can be tried as a common issue following the completion of the individual trials.
>
> [Emphasis added.]

[26] The above-quoted passage from *Chalmers* was quoted and applied by this Court in:

> *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057 at paras. 58-60, aff'd 2012 BCCA 260;
>
> *Jones v. Zimmer GMBH*, 2011 BCSC 1198, at paras. 73-74; aff'd 2013 BCCA 21;
>
> *Dominguez v. Northland Properties Corporation*, 2012 BCSC 328 at paras. 190-192; and
>
> *Miller v. Merck Frosst Canada Ltd.*, 2013 BCSC 544, at para. 188-193.

[27] The bifurcated approach to determination of punitive damages claims has been widely applied in class actions, including in:

> *Andersen* at paras. 32-33 and 37-38;
>
> *Robinson v. Rochester Financial Ltd.*, 2010 ONSC 463 at paras. 57-61; and
>
> *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 at paras. 369-378.

[28] The Court of Appeal in *Chalmers* confirmed that the focus at this stage is the defendant's conduct. The certification judge should not certify punitive damages as a common issue if the reprehensibility of the defendant's conduct cannot be assessed without considering the plaintiff's individual circumstances: *Chalmers* at para. 31. However, if the assessment of the defendant's conduct will be focused on systemic wrongdoing against the group, rather than wrongdoing towards individual class members, then certification may be appropriate: *Rumley* at para. 34.

D. The Submissions of the Parties

[29] The parties do not seriously disagree on the interpretation of the law outlined above. The major disagreement relates to the appropriateness of certifying the punitive damages claim in this case because of the potential significance that the individual issues will have on the punitive damages claim.

[30] The plaintiff submits that certification of the Punitive Damages Common Issues is appropriate in this case. Relying on the Court of Appeal's analysis in *Chalmers*, the plaintiff asserts that the certification judge must focus on the degree to which the propriety of the defendant's conduct can be determined without considering the plaintiff's individual circumstances (at para. 31). Since the defendant's conduct can be assessed separately from the circumstances of individual class members, it is appropriate to bifurcate the punitive damage claims and proceed with the first stage as a common issue.

[31] The defendant opposes certification of punitive damages as a common issue. The defendant's major objection is that it would be unfair to decide even *prima facie* entitlement to punitive damages as common issue without consideration of the individual issues.

[32] The defendant will raise common law, statutory, or equitable defences to the class members' claims. It says that issues that are relevant to its defences must be considered when assessing the reasonableness or high-handedness of the defendant's conduct. Accordingly, the defendant argues that the court cannot determine fairly whether its alleged conduct is deserving of punishment without these inquiries. Assessing the defendant's conduct in isolation from the facts that are relevant to the available defences would not convey a fair and accurate picture of the defendant's overall conduct.

[33] With reference to the plaintiff's particular circumstances, it says that the plaintiff had the benefit of advice from both a lawyer and a mortgage broker. Further, following her interactions with a representative of the defendant, she received a reduction on her prepayment charge. This, therefore, is not one of the rare, exceptional cases of conduct so reprehensible and deserving of punishment that punitive damages ought to be awarded.

[34] Thus, the defendant submits, both proposed common issues of *prima facie* entitlement and quantum of punitive damages necessarily require an examination of individual circumstances.

[35] In the alternative, the defendant submits that the plaintiff's second proposed common issue regarding quantum is inappropriate at this stage of the proceeding. It should be deferred. It should not be included as a common issue at this time, even on a bifurcated basis. After the first common issue is decided, more will be known including whether there are sub-classes of class members.

E. Discussion

[36] The plaintiff seeks to certify two additional common issues regarding punitive damages. The first issue asks this Court to analyse whether the defendant's conduct warrants an award of punitive damages. The second issue relates to class members' entitlement to and quantum of punitive damages.

[37] The parties dispute whether the requirements of s. 4(1)(c) of the *CPA* are satisfied by the proposed common issues. Specifically, the defendant submits that punitive damages are not a common issue in this case because to determine whether the defendant's conduct merits punitive damages cannot be fairly assessed without considering facts that will only be relevant to the defences to the individual claims.

[38] As indicated above, punitive damages will only be awarded in exceptional cases for egregious misconduct if and only if all other penalties are inadequate to accomplish the objectives of retribution, deterrence, and denunciation: *Whiten* at paras. 36 and 94. Punitive damages cannot be determined "at large" and can only be decided once all other sanctions have been visited upon the defendant (at paras. 76, 94, and 98).

[39] The defendant says that this case is distinguishable from other cases where punitive damages issues have been certified. In those cases, primarily product liability cases, the claims focused on the negligent marketing, testing, manufacturing, and promotion of certain products. Accordingly, the conduct in those cases that was the basis for the punitive damages question could be examined without considering interactions with individual class members, because the wrongful conduct was to the class as a whole, *i.e.*, people who would use the defendants' products. In such cases, determining the wrongfulness of the defendants' conduct did not require an examination of individual class members' circumstances or of any interaction with individual class members to conduct a fair assessment of the defendant's conduct at issue. See for example *Stanway*; *Bartram v. Glaxosmithkline*, 2012 BCSC 1804, aff'd 2013 BCCA 462; and *Miller*.

[40] The defendant says that this case is akin to *Koubi v. Mazda Canada Inc.*, 2010 BCSC 650, varied in 2012 BCCA 310 but not on the issue of punitive damages. In that case, Madam Justice Dardi refused to certify the assessment of the defendant's behaviour as a common issue because the question required a consideration of certain of each class member's factual circumstances (at paras. 154-157). She did so despite the fact that she had certified other common issues.

[41] However, the decision in *Koubi* was specific to the facts of that case. The claims in that case involved defects to vehicle door-lock mechanisms. This meant the damages related to allegedly faulty locks needed to be assessed in light of external factors, particularly the frequency of break-ins on vehicles in the vicinities of the individual class members. Madam Justice Dardi described this as follows in the section on punitive damages:

> [154] This is a case in which, given its very particular nature, the defendants' conduct cannot be considered in isolation from the individual circumstances of particular claimants. The relative incidence of theft from auto is variable across different communities. While individuals in one community may face a high incidence of such crime, others do not. There is no basis in the evidence to suggest any uniformity in the extent to which individuals in various localities may have been affected. The assessment of the reasonableness of the defendants' conduct and whether it can be characterized as "harsh, vindictive, reprehensible, or malicious" cannot fairly be separated from this consideration.

[42] This case differs from *Koubi* because it involves standardized documentation and a standard formula. There is substantial uniformity in the defendant's conduct, which is the

focus of the first stage of the punitive damages inquiry. Again, the first of the Punitive Damages Common Issues is focused on the reprehensibility of the defendant's conduct. It is this conduct which will be examined as a common issue. The entitlement and quantum of the punitive damages will be determined in the second stage.

[43] In this case the matters complained of are more analogous with the misconduct in *Rumley* and *Chalmers*. The defendant's conduct was systemic in nature: the publicly-disseminated Plain Language Promise; the standard form mortgage documentation filed under the *Land Title Act*, R.S.B.C. 1996, c. 250; and a broadly-applied formula used from 2005 onward to calculate prepayment penalties. The first of the Punitive Damages Common Issues can accordingly be determined on a class-wide basis by examining the defendant's conduct as it affected a broad group without considering the circumstances of individual class members.

[44] The Notice of Civil Claim discloses a reasonable and arguable claim for punitive damages, based on the matters referred to in paragraph 76 of the Notice of Civil Claim as quoted above.

[45] I find that certification of the Punitive Damages Common Issues satisfies the requirements for certification set out in s.4 of the *CPA*, and that certification of those issues as common issues is the preferable means for their hearing and determination.

[46] I also find that the bifurcated approach will address the requirements for determining common issues, and many of the objections of the defendant. There is no authority for deferring the second Punitive Damages Common Issue as submitted in the defendant's alternative position.

[47] The individual circumstances of each class member can be considered in addressing the second proposed question after the first question is determined and the question of compensatory damages is addressed. At the second stage in the proceeding, after the first punitive damages common issue is decided, the court will be in a position to consider the second question and determine if an award of punitive damages should be made against the defendant.

[48] In the result, both Punitive Damages Common Issues are certified. The first of the two issues relates solely to the defendant's conduct. The second Punitive Damages Common Issue is also certified, but will be determined following the resolution of the other common issues and the quantification of compensatory damages. At that stage, it can be determined whether an actual award of punitive damages will "serve a rational purpose" in light of the objectives of such an award.

[49] The following common issue is therefore added as a common issue in these proceedings:

> 1. Do the following alleged acts and omissions of the Defendant warrant an award of punitive damages?
>
> (a) a breach of the Plain Language Promise as defined in the Notice of Civil Claim;
>
> (b) a breach of the *Trust and Loan Companies Act*, S.C. 1991, c. 45, and the *Cost of Borrowing (Trust and Loan Companies) Regulations*, SOR/2001-104, as alleged in the Notice of Civil Claim;
>
> (c) a breach of the *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313, s. 9.1 and *Mortgage Brokers Act Regulations*, B.C. Reg. 100/73, as amended, as alleged in the Notice of Civil Claim;
>
> (d) a breach of the *Business Practices and Consumer Protection Act*, ss. 67(1) and 84(m), as alleged in the Notice of Civil Claim;
>
> (e) a breach of fiduciary duties as alleged in the Notice of Civil Claim; or
>
> (f) the commission of the Miscalculations as alleged in the Notice of Civil Claim;
>
> 2. If the answer to issue 1 is yes, should an award of punitive damages be made against the Defendant and, if so, in what amount?

III. CLASS DEFINITION

A. Submissions of the Parties

[50] Following the issuance of the June Reasons which addressed the definition of the class in paras. 97 to 116, counsel have discussed the appropriate definition of the class. The parties are now agreed on certain aspects of the definition but disagree on two points: inclusion of persons who were charged three months' interest; and inclusion of persons who

entered into mortgages without the discretionary language, referred to as the "other" mortgages.

[51] The plaintiff proposes the following definition:

> Persons resident in British Columbia who were or are mortgagors under mortgages issued by the Defendant as mortgagee, who prepaid part or all of the principal amounts secured by those mortgages from 2005 onward, and who:
>
> (a) had a mortgage containing either a Discretion as to Calculation Clause or a Discretion as to Comparison Rate Clause, or both, and paid any Prepayment Penalty; or
>
> (b) had any mortgage issued by the Defendant and paid a Prepayment Penalty based on an IRD.

[52] "Prepayment Penalties" and "IRD" are defined in paragraph 18 of the Notice of Civil Claim:

> 18. At all relevant times, CIBC has used in its standard form Mortgage Contracts provisions regarding Prepayments which purport to provide that where the mortgagor or mortgagors exercise the right to make a Partial Prepayment or a Complete Prepayment, charges ("Prepayment Penalties") apply (the "Penalty Provisions"). The Penalty Provisions provide, in general terms, that where Prepayment Penalties are applicable they will equal the greater of:
>
> (i) three months' interest on the principal amount that is subject to a Prepayment Penalty; and
>
> (ii) an amount referred to as an interest rate differential ("IRD" or "IRD amount") based on the principal amount that is subject to a Prepayment Penalty, quantified by reference to:
>
> (a) a Rate specified or described in the Mortgage Contract (the "Contract Rate"), and
>
> (b) another Rate (the "Comparison Rate").

[53] The defendant opposes that class definition, and proposes this definition instead:

> Persons resident in British Columbia who were or are mortgagors under mortgages issued by the Defendant as mortgagee from 2005 onward who prepaid part or all of the principal amounts secured by those mortgages, and who had a mortgage containing either a Discretion as to Calculation Clause or a Discretion as to Comparison Rate Clause, or both, and paid a prepayment charge calculated with an IRD amount for making such prepayments.

[54] The defendant submits that this Court held in the June Reasons that the plaintiff's proposed class definition and her proposed amended class definition were overbroad and failed to satisfy s. 4(1)(b) of the *CPA*.

[55] The defendant argues that the plaintiff now proposes a class definition which is not rationally connected to the claim or the common issues. Further, it says that the plaintiff has failed to establish some basis in fact for the existence of two or more persons within this newly defined class. As a result, this new definition also fails to satisfy s. 4(1)(b) of the *CPA* and it must be rejected on that basis

[56] The defendant also takes the position on the pending appeal that there is no discretion that could be applied to calculating the "three months' interest" amounts that are one of the subjects of the plaintiff's claim. As such, the defendant argues that if it is successful on appeal, the inclusion of those payments in the plaintiff's claim and the definition of the class is unnecessarily over-inclusive.

B. Legal Principles Regarding the Definition of a Class

[57] The Supreme Court of Canada summarized the goal of the class definition requirement in class proceedings in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, at para. 57, with Rothstein J. speaking for the majority of the Court:

> I agree with the courts that have found that the purpose of the class definition is to (i) identify those persons who have a potential claim for relief against the defendants; (ii) define the parameters of the lawsuit so as to identify those persons who are bound by its result; (iii) describe who is entitled to notice of the action (*Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.), at paras. 26 and 30; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. J. (Gen. Div.)), at para. 10; Eizenga et al., at § 3.31). *Dutton* states that "[i]t is necessary . . . that any particular person's claim to membership in the class be determinable by stated, objective criteria" (para. 38). According to Eizenga et al., "[t]he general principle is that the class must simply be defined in a way that will allow for a later determination of class membership" (§ 3.33).

[58] A class definition is critical in class proceedings because it identifies the individuals entitled to notice, entitled to relief (if any is awarded), and bound by any judgment. For this reason it is essential that "the class be defined clearly at the outset of the litigation": *Dutton* at para. 38.

[59] As indicated in both *Sun-Rype Products Ltd.* and *Dutton*, one purpose of the class definition is to identify those persons who have a potential claim for relief. In other words, the definition of the class should be based on the matters alleged in the Notice of Civil Claim

that are certified as common issues. Whether those claims will succeed at trial is not a proper consideration at this stage.

[60] In order to satisfy the requirements set out in s. 4(1)(b) of the *CPA*, the plaintiff must use admissible evidence to establish an adequate class definition and the existence of two or more class members within this class: *Dutton* at para. 37. This class definition should state objective criteria that can identify the members of the class and those criteria should usually be related to the common issues asserted by the class members. This was summarized by the Supreme Court of Canada in *Dutton* at para. 38:

> … The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch, *supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.

[61] This passage emphasizes that the class definition "should not depend on the outcome of the litigation". In other words, the class is defined in relation to the common issues indicated in the notice of claim, but in most circumstances the class should not be restricted by the court's assessment of the merits of those claims.

[62] However, the class must be defined with as much precision as possible in order to focus the process on those with identifiable claims and avoid those with no potential claims. This is particularly important where the class is large: *Gardner v. General Motors of Canada Limited* (2007), 163 A.C.W.S. (3d) 905 (Ont. S.C.J.).

[63] As recently noted by the British Columbia Court of Appeal, an identifiable class that complies with the requirements laid out in *Dutton* is particularly important in jurisdictions like British Columbia, "where class proceedings legislation provides for opt-outs": *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193 at para. 80. Again, the class must be defined as precisely as possible.

[64] The plaintiff must also show, on admissible evidence, that there are two or more persons within the defined class: *Ladas v. Apple Inc.*, 2014 BCSC 1821, at paras. 150-167.

C. Discussion

1. Relevant Time Period

[65] The relevant time period that should be used to determine the class definition was discussed in the June Reasons. The impugned formula or method that the defendant used to calculate IRDs (the alleged "Miscalculations") is alleged in the Notice of Civil Claim at paragraph 38 to have been used "at all relevant times". The June Reasons state in para. 99 that "CIBC began making the Miscalculations no later than 2005" (emphasis added). The evidence provides a factual basis indicating that the alleged Miscalculations began in 2005, as indicated in para. 84 of the June Reasons.

[66] The plaintiff now agrees that the definition of the class should reflect 2005 as the year the alleged Miscalculations began. The parties are in agreement that the impugned discretionary clauses came into use in 2005.

2. Persons Who Were Charged Three Months' Interest

[67] The parties do not agree on whether persons who paid Prepayment Penalties based on three months' interest are included in the class. The plaintiff's position is that such persons are the focus of the primary issue identified in the Notice of Civil Claim and their numbers would be most of the class. The June Reasons also identify this at para. 5 as a major allegation. However, the defendant opposes including those persons in the class.

[68] In para. 67 of the June Reasons a chart outlined in summary form the various claims advanced in these proceedings. This overview sets out Argument 1 which is that the prepayment penalty provisions are void in the impugned mortgages that contained a 'discretion as to calculation' clause, or a 'discretion as to comparison rate' clause, or both. Consequently, Argument 1 seeks relief for all prepayment penalties under any mortgages with discretionary clauses. This is pleaded in the Notice of Civil Claim at paragraphs 27 to 36.

[69] For ease of reference, the chart of causes of action set out at para. 67 of the June Reasons is reproduced below:

	DOUBLE DISCRETION MORTGAGES	**SINGLE DISCRETION MORTGAGES WITH A DISCRETION AS TO COMPARISON RATE CLAUSE**	**SINGLE DISCRETION MORTGAGES WITH A DISCRETION AS TO CALCULATION CLAUSE**	**OTHER MORTGAGES**
Argument 1	Prepayment penalty clause is void and unenforceable	Prepayment penalty clause is void and unenforceable	Prepayment penalty clause is void and unenforceable	N/A
Argument 2	Maximum penalty is three months' interest	Maximum penalty is three months' interest	N/A	N/A
Argument 3	Interest Rate Differential ("IRD") was miscalculated and overcharged	IRD was miscalculated and overcharged	IRD was miscalculated and overcharged	IRD was miscalculated and overcharged

The common issues determined in the June Reasons encompass these causes of action.

[70] An 'alternative' argument is that the maximum permissible penalty under some mortgages is three months' interest. This is pleaded in the Notice of Civil Claim at paragraph 37. This is also identified as a major allegation in para. 5 of the June Reasons, and is referred to as "Argument 2" in the outline of claims at para. 67 of the June Reasons.

[71] The plaintiff's proposed class definition in sub-paragraph (a) refers to persons who, from 2005 onward, "paid any Prepayment Penalty". This corresponds to the issues alleged in the Notice of Civil Claim and includes persons who paid a prepayment penalty of three months' interest, not only persons whose penalty was based on an IRD.

[72] In contrast, the defendant's proposed definition is limited to persons who paid penalties based on an IRD. This definition would not reflect the primary issue as pleaded and as identified in the June Reasons, which is the allegation that the impugned Prepayment Penalty clauses are void and unenforceable, regardless of whether that penalty was for three months' interest or based on an IRD.

3. Alleged Miscalculations of IRDs

[73] The parties do not agree on including in the class those persons who entered into mortgages without discretionary clauses and who were allegedly overcharged prepayment penalties based on an IRD because of the pleaded Miscalculations. These are referred to as the "other" mortgages.

[74] The Miscalculations are pleaded to have affected the calculations of IRDs under all of the defendant's mortgages, not only those that contained one or both of the impugned discretionary clauses. This is set out in the Outline of Claims above and in the Notice of Civil Claim at paragraphs 38 to 40. The pleadings on this point are also summarized in the June Reasons at para. 5, item (c).

[75] The plaintiff has provided evidence of the existence of the "other mortgage contracts" and of individuals who entered into such contracts and who paid a prepayment charge calculated with an IRD amount. The April 2, 2013 affidavit of Barry Golum, an officer of the defendant, sets out the number of individuals potentially affected. The plaintiff submits that 803 individuals had other mortgages. With that evidence, I am satisfied that two or more persons fit within the plaintiff's proposed class definition as required by s. 4(1) of the *CPA*.

D. Conclusion

[76] The definition of the class proposed by the plaintiff is consistent with both the principles and purposes of the class definition set out in the relevant case law, and the issues and claims identified in the Notice of Civil Claim and the June Reasons.

[77] This definition is rationally connected to both the pleadings and to the common issues. As outlined above, the plaintiff's proposed definition corresponds to the persons involved in all of the transactions that underlie the causes of action in the Notice of Claim.

[78] The Class Definition is therefore:

> Persons resident in British Columbia who were or are mortgagors under mortgages issued by the Defendant as mortgagee, who prepaid part or all of the principal amounts secured by those mortgages from 2005 onward, and who:
>
> (a) had a mortgage containing either a Discretion as to Calculation Clause or a Discretion as to Comparison Rate Clause, or both, and paid any Prepayment Penalty; or

(b) had any mortgage issued by the Defendant and paid a Prepayment Penalty based on an IRD.

[79] This action which was conditionally certified in the June Reasons pending determination of the Class Definition is now certified as a class proceeding pursuant to Part 2 of the *CPA*.

"The Honourable Madam Justice Watchuk"