lavery
Lawyers

Failure to comply with the provisions of the Regulation respecting the application of the Consumer Protection Act dealing with notices of forfeiture of the benefit of the term

July 1, 2013

Although non-compliance with the *Consumer Protection Act* (the "**CPA**") is generally sanctioned by the nullity of the CPA non-compliant clauses, or of the contract in its entirety, in cases involving written notices of forfeiture of the benefit of the term, the courts have sometimes decided to maintain the validity of the non-compliant notices if they were not prejudicial to the consumer's rights. The following two judgment support this view.

CAISSE POPULAIRE DESJARDINS DU PORTAGE JUDGMENT
In a recent Court of Québec judgment, *Caisse Populaire Desjardins du Portage* v. *Létourneau*[1], the Court dismissed the defendant's plea which sought to annul the notice of forfeiture of the benefit of the term because the statements of account attached to the said notice did not detail all of the information prescribed by the *Regulation respecting the application of the CPA* (the "**Regulation**"). Contrary to the requirements of subsections 67(e) and 67(f) of the Regulation, the statements of account in question did not clearly indicate the balance of net capital remaining after each sum of money paid into the defendant's account, nor the portion thereof used to pay the net capital and the portion used to pay credit charges.

Having sent two notices of forfeiture of the benefit of the term and waited the requisite thirty (30) days for the forfeiture to occur, the Caisse sued the defendant for the reimbursement of two personal loans on which the defendant failed to make monthly instalments.

At trial, the defendant admitted owing payments on the loans, however she submitted that the notices were invalid because the statements of account did not include all of the information required by the Regulation. Therefore, she argued that the forfeiture of the benefit of the term had not occurred and she was only liable to pay the plaintiff the lapsed instalments, rather than the balance of the loans.

The Caisse admitted that the statements of account did not respect the form prescribed by the Regulation, but argued that the information omitted was not material and should not invalidate the notices.

The Court noted that the purpose of the statement of account attached to the notice of forfeiture of the benefit of the term is to inform the consumer of the amount owing so that he may, within thirty

(30) days of the receipt of such notice, remedy the default by paying the stated amount to the merchant. In this case, the Court sided with the Caisse, agreeing that the notices and the attached statements of account contained the information required for the defendant to ascertain and remedy its default. Citing another Court of Québec judgment in the case of *Banque de Montréal* v. *Bujold*[2], rendered in 2009, the Court reminded us that the CPA was adopted in order to protect consumers from illegal practices of merchants, but it should not enable consumers to plead trivial and immaterial non-compliance with the law in order to avoid their obligations.

BUJOLD JUDGMENT

In the *Bujold* case, the plaintiff bank sued the defendant for the balance due under the instalment sales contract signed for the purchase of a used vehicle. Similarly to the judgment summarized above, the defendant submitted to the court that the notice of forfeiture of the benefit of the term did not respect subsections 67(e) and 67(f) of the Regulation and should therefore be annulled. The defendant, however, also submitted that the credit contract itself should be annulled due to the bank's failure to adequately investigate his financial situation, and the fact that it was obvious that the defendant had no use for the purchased vehicle. In its judgment, the Court noted that the CPA is meant to protect vulnerable consumers, but should not be abused by them to obtain the nullity of clauses or contracts that are otherwise valid. The Court admitted that it could annul the notice of forfeiture of the benefit of the term based on the defendant's submissions, but such a decision would be contrary to the best interests of justice because it would inevitably result in a new notice being issued by the plaintiff, causing additional delays and possibly further contestation by the defendant.

On the issue of the nullity of the consumer contract itself, the Court questioned the good faith of the defendant, Bujold, because he made multiple flagrantly incorrect statements on the bank's credit application form, including a false declaration of employment and revenue and false details regarding hypothecary loan payments, and blatantly neglected to declare several outstanding personal loans. Yet, the defendant did not hesitate to sign at the bottom of the credit application form, certifying that all the information provided to the bank was true and correct.

In light of these circumstances, the Court found that the bank was not negligent in its duty to investigate the plaintiff's financial background prior to granting the credit. According to the Court, the real reasons which explained why the defendant obtained a loan to purchase a vehicle he did not need were the defendant's own misrepresentations and his general lack of business acumen. Moreover, the Court criticized the defendant's reprehensible conduct, holding that this conduct estopped the defendant from arguing the deficiencies in the notices before the Court. For these reasons, the Court upheld the validity of both the credit contract as well as the notice of forfeiture of the benefit of the term and ordered the defendant to pay the outstanding debt to the plaintiff.

COMMENTS

Merchants should not view the courts in these cases as being generally lenient toward non-compliance with consumer protection legislation. However, these cases are a reminder that a merchant's rights should not be undermined on the basis of technicalities or trivial and immaterial non-compliance that does not prejudice the consumer.

While it is difficult to generalize from these cases, the courts have at least given some flexibility to merchants in cases in which their notices of forfeiture of the benefit of the term are deficient where the accompanying statements of account fail to clearly indicate the balance of net capital remaining and the portion thereof used to pay the credit charges. The real criterion seems to be whether the defendant was able to ascertain and remedy its default.

The *Bujold* judgment also provides some guidance on the extent of the merchants' duty to investigate the degree of the consumer's consent in accordance with the criteria under section 9 of the CPA (namely, the condition of the parties, the circumstances in which the contract was entered

into and the benefits arising from the contract for the consumer). According to case law, the consumer's personal circumstances should be considered and verified by the merchant prior to entering into a binding contract with the consumer. In carrying out such verifications, a merchant may rely on the (apparently true) representations made by the consumer.

---

1. *Caisse Populaire Desjardins du Portage* v. *Létourneau*, 250-22-002775-125 (C.Q.).

2. *Banque de Montréal* v. *Bujold*, 2009 QCCQ 5530.