CITATION: Trillium Motor World Ltd. v. General Motors of Canada Limited, 2016 ONSC 666
COURT FILE NO.: CV-10-397096CP
DATE: 20160322

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Trillium Motor World Ltd. Plaintiff	Alan D.J. Dick, Andy Seretis, Bryan Finlay, Q.C., Marie-Andrée Vermette, for the Plaintiffs, Defendants to the Counterclaim
– and –	
General Motors of Canada Limited and Cassels Brock & Blackwell LLP Defendants	David S. Morritt, Kent E. Thomson, Sean Campbell, Sarah Weingarten, for the Defendant/Plaintiff by Counterclaim, General Motors of Canada
AND BETWEEN:	
General Motors of Canada Limited Defendant, Plaintiff by Counterclaim	Peter H. Griffin, Rebecca Jones, for the Defendant Cassels Brock & Blackwell LLP
– and –	
Trillium Motor World Ltd. and Thomas L. Hurdman Plaintiff, Defendants to the Counterclaim	**HEARD:** January 13, 25, 2016

T. MCEWEN J.

REASONS ON THE MOTION TO SETTLE THE TERMS OF THE JUDGMENT

[1] Trillium and Cassels have not been able to agree on the form of the Judgment that affects those two parties. There is no dispute between Trillium and GMCL.

[2] As a result of the dispute, both parties filed written submissions and attended before me on January 13, 2016. Further written materials were filed and the parties appeared again on January 25, 2016. Afterwards, once again, further written submissions were filed.

[3] Trillium and Cassels' disagreement stems from three disputes.

[4] The first dispute between the parties concerns the $45 million Judgment in favour of Trillium. In its initial written submissions concerning the settlement of the Judgment, Cassels submitted that the Judgment should allow for a further calculation that could result in a reduction of the $45 million damages award. Trillium disagreed.

[5] For the reasons that follow, I agree that the Judgment should contain a mechanism that *may* allow for the reduction sought by Cassels.

[6] It became apparent to me when reviewing the parties' written submissions to settle the Judgment that this dispute resulted from an unstated conclusion in my Reasons for Judgment. Simply put, when I prepared my Reasons for Judgment, I believed that the 181 Class Members had all retained Cassels, and did not include any of the call dealers who simply participated in the May 24, 2009 telephone conference with Cassels and the Canadian Automobile Dealers Association ("CADA"). This conclusion is referenced specifically at paragraph 536 (and the accompanying footnote 7), wherein I state that Cassels breached its duties to the 181 Class Members but "not the call dealers".

[7] The parties' written submissions, however, disclosed that some unknown number of the 181 Class Members almost assuredly included call dealers, although the parties still do not know the number of call dealers contained in the 181 Class Members.

[8] Based on my belief, as can be seen in paragraph 611 of the Reasons for Judgment, I calculated damages on the basis that the Class Members included the 181 dealers, all of whom I understood to have retained Cassels. In performing my calculations, I found that all 202 dealers sustained damages for loss of chance in the amount of $50 million, but that damages should only be awarded proportionally to the 181 Class Members which reduced the award to $45 million. Had I been of the opinion that call dealers were included in the 181 Class Members, I would have referenced this consideration when assessing damages.

[9] By way of explanation, and without casting any aspersions on counsel, I came to the aforementioned conclusion that the 181 Class Members did not include call dealers for a number of reasons.

[10] First, the distinction between the dealers who allegedly retained Cassels and the call dealers was not specifically articulated in the Statement of Claim. Also, neither Trillium nor Cassels referenced the issue of call dealers in their opening oral or written submissions. Considerable time, however, was spent by both parties concerning the issue as to whether Cassels had been retained by any dealers.

[11] During the course of the trial, the three former dealers who testified – Thomas Hurdman, Fern Turpin Jr. and Brian Condie – all sent in a Participation Form and money as requested by the National General Motors Dealer Steering Committee in order to retain Cassels. All three also participated in the May 24, 2009 conference call. No evidence was led, however, concerning any distinction between them having retained Cassels, as opposed to simply participating in the conference call. Further, during the trial, I was provided with the lists of the identities of both the GMCL Dealers and the Saturn Dealers who received WDAs. No evidence was led at trial which specifically identified that an action was being advanced on behalf of the call dealers. This suggested to me that the 181 Class Members had all retained Cassels.

[12] As illustrated in paragraphs 365 and 370 of the Reasons for Judgment, the specific issue as to whether the Class Members included call dealers was first raised in closing argument. At that time, I indicated to counsel that I was surprised by this submission.

[13] During my exchange with Trillium's counsel, I also raised the issue as to how the call dealers could be identified. Counsel for Trillium submitted that statutory declarations could be obtained from individuals who claimed to be on the May 24, 2009 conference call, following which such individuals could be subject to cross-examination. A determination could then be made by me as to whether they were, in fact, call dealers.

[14] During closing argument, Cassels took the position that Trillium was attempting to create "a new 'call dealer' category of Class Members": see paragraph 367 of the Reasons for Judgment. Cassels also submitted there was no representative plaintiff produced on behalf of the call dealers and that the call dealers claim was not pleaded in the Statement of Claim. Cassels therefore submitted that the call dealers' claim had not been certified and was incapable of certification.

[15] As a result of the foregoing, I concluded that the 181 Class Members had retained Cassels and did not include call dealers. Further, upon the completion of trial, I was left with the impression that, if I found that Cassels owed a duty of care to the call dealers, statutory declarations will be provided to those who claimed to be call dealers and the size of the Class will be expanded, not contracted.

[16] After hearing my explanation on January 13, 2016, Trillium was nevertheless of the view that it was entitled to damages in the amount of $45 million and that no mechanism should be built into the Judgment whereby the $45 million figure could be reduced. Trillium submitted that to do so would be inconsistent with the reasons; that it undermined the proper application of the principles of aggregate damages; and that quantum was the subject of an appeal and cross-appeal.

[17] Upon counsel's return on January 25, 2016, Trillium therefore submitted that the Judgment should contain the following paragraphs touching upon the issue of damages:

> 2. **THIS COURT ORDERS AND ADJUDGES** that judgment as against the defendant Cassels Brock & Blackwell LLP ("Cassels") be and is hereby granted to the Class, as defined below, and that Cassels pay damages in the amount of forty-five million dollars ($45,000,000.00) to be distributed in accordance with the process described in paragraph 11 herein.
>
> ...
>
> 11. **THIS COURT ORDERS AND ADJUDGES** that the issue of notice to the Class Members and the criteria and process for distribution of the judgment granted in paragraph 2 above shall be determined on further motion to this court, if necessary, following the final disposition of any appeal.

[18] Cassels, on the other hand, submitted that Trillium has ignored the clarification to my reasoning and Trillium's position offends fundamental principles of fairness and is contrary to law. Cassels submitted that it would not be just to allow the dealers that retained Cassels to reap the benefits of an aggregate damages award calculated on the basis of 181 Class Members, as some of those members are very likely call dealers to which no duty of care was owed. Cassels therefore argued that some mechanism should be built into the Judgment to allow for a reduction of the $45 million damage award.

[19] Cassels submitted that either of the following two forms of Judgment should be considered by me:

> 6. **THIS COURT ORDERS AND ADJUDGES** that Cassels pay damages in the amount equal to the number of Saturn Dealers and Participation Form Dealers, divided by one-hundred and eighty one (181), multiplied by forty-five million dollars ($45,000,000.00).
>
> 7. **THIS COURT ORDERS AND ADJUDGES** that the process for determining the number and identity of the Participation Form Dealers, and for calculating the damages awarded in paragraph 6 above, shall be determined on further motion to this court prior to the perfection of any appeals.
>
> 8. **THIS COURT ORDERS AND ADJUDGES** that the issue of notice to the Class Members and the criteria and process for the distribution of the damages granted in paragraph 6 above and calculated in accordance with paragraph 7 above shall be determined on further motion to this court, if necessary, following the final disposition of any appeal.

Or, alternatively,

> 6. **THIS COURT ORDERS AND ADJUDGES** that Cassels pay damages in the amount of forty-five million dollars ($45,000,000.00), which amount may

be reduced in accordance with the process set out in paragraph 7 below.

7. **THIS COURT ORDERS AND ADJUDGES** that the process for determining the number and identity of the Participation Form Dealers, and for calculating the damages awarded in paragraph 6 above, shall be determined on further motion to this court, if necessary, following the final disposition of any appeal.

8. **THIS COURT ORDERS AND ADJUDGES** that the issue of notice to the Class Members and the criteria and process for distribution of the damages awarded in paragraph 6 above and calculated in accordance with paragraph 7 above shall be determined on further motion to this court, if necessary, following the final disposition of any appeal.

[20] I agree with Cassels that the Judgment must reflect the fact that the $45 million award *may* be reduced following the disposition of the appeal; otherwise, Cassels *may* be ordered to pay damages calculated upon the number of Class Members (181) rather than the number of Class Members to whom Cassels was actually found to have owed a duty of care.

[21] In my view, the alternative proposal of Cassels is the most sensible one since it maintains the damages amount at $45 million subject to a calculation, and *possible* reduction, following the disposition of the appeal. This process maintains the amount of the Judgment as urged upon me by Trillium, but at the same time meaningfully deals with my unstated conclusion concerning the composition of the Class and provides for a possible subsequent calculation on further motion, following the appeal.

[22] Cassels urged me, however, to carry on at this stage and conduct a hearing, pending the appeal, to determine how many of the Class Members included call dealers. Cassels submitted that I should "complete the work I started" so that a proper record was before the Court of Appeal. Trillium opposed this suggestion.

[23] In my view, it would be inappropriate for me to carry on and hear further evidence on this issue, as this matter is under appeal. The alternative proposal of Cassels which I have accepted allows the judgment to be settled, my participation to come to an end (subject to any further decision of the Court of Appeal) and the matter to proceed to appeal with these Reasons setting out the clarification.

[24] The second dispute between the parties surrounds the issue as to whether, in order to create a retainer, a dealer had to return both the aforementioned Participation Form and money to CADA as requested by the Steering Committee.

[25] Cassels submits that, in order to qualify as a Class Member, a dealer must not have only returned the Participation Form but must have *also* forwarded money as requested in the form. Cassels therefore submits that the Judgment should refer to "Contributing Dealers". Trillium submits that in order to retain Cassels it was sufficient to return the Participation Form without

making payment and that the return of the form and/or the forwarding of money would suffice. Trillium therefore submits the judgment ought to refer to "Participation Form Dealers".

[26] I agree with Trillium.

[27] This issue arose as a result of wording in the Judgment where I referred to dealers who sent money to CADA to retain Cassels, as opposed to the call dealers who were only present during the teleconference on May 24, 2009. Examples of this wording can be found in paragraphs 366, 378, 448 and 539. Cassels therefore submits that, in order to create a retainer, not only must the Participation Form have been sent, but funding was also required.

[28] I do not agree. The intent of the Judgment was not to limit the Class only to those who forwarded the participation forms and funds towards the retainer. Either would suffice.

[29] This is consistent with both Trillium's submissions at trial, as can be seen in paragraph 442 of the Reasons for Judgment, and from my discussion in paragraph 403 and the reasoning beginning at paragraph 411. In the Reasons for Judgment, I did not distinguish between those dealers who only sent in the Participation Form as opposed to those who also sent in funding.

[30] Furthermore, Cassels did not take the position in its written or oral arguments that funding was required in order to qualify as a Class Member. Of note is the fact that in closing argument, counsel for Trillium and Cassels, and also myself on occasion, slipped into the habit of referring to those dealers who participated in the retainer of Cassels as those who "sent in the form" or those who "sent in money". At one point during closing argument, counsel for Cassels submitted that all of the dealers who retained the Participation Form also sent money to CADA. As noted, however, no distinction was drawn by Trillium or Cassels in this regard.

[31] This type of language found its way into some of the paragraphs of the Reasons for Judgment. Based on the above, however, it was not done to draw a distinction between those dealers who sent in the Participation Form as opposed to those dealers who sent in the Participation Form and/or funding. The intent of the Judgment is to create a retainer for those who sent in a Participation Form and/or funding. This conclusion is supported by the overall analysis.

[32] Based on the foregoing I accept Trillium's submission that the Judgment should refer to "Participation Form Dealers".[1]

[33] After the attendance on January 25, 2016, the parties identified a third dispute between them with respect to the form of the Judgment. As a result, they provided me with further written submissions.

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[1] Having heard my explanation during the January 13, 2016 attendance, Cassels incorporated the Form "Participation Dealers" into its draft wording concerning the first issue discussed above.

[34] Cassels submits that the Class only includes those members who returned the Participation Form and/or funds to CADA prior to executing a WDA.

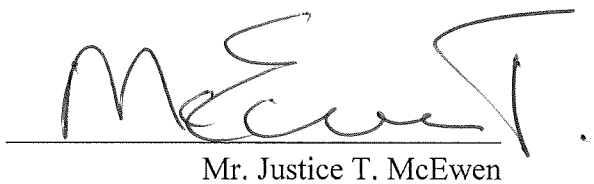
[35] Trillium submits that the Class includes those members who returned the Participation Form and/or funds prior to GMCL's waiver of the Acceptance Threshold Condition in the WDA, which occurred later on May 30, 2009.

[36] I agree with Trillium. Its submission is consistent with my Reasons for Judgment and, in particular, but not restricted to, reasons set out in paragraphs 433, 456, 480, 531, 532, 555 and 561. The reasons do not suggest the restrictive analysis urged upon me by Cassels. No further analysis is required here.

[37] Based on my agreement with Trillium's submissions concerning the definition of "Participation Form Dealers" and the fact that they include those dealers who returned the Participation Form and/or the funds prior to GMCL's waiver of the Acceptance Threshold Condition in the WDA, I accept Trillium's proposed paragraph as follows:

> 3. **THIS COURT ORDERS AND ADJUDGES** that judgment as against the defendant Cassels be and is hereby granted to those members of the Class who did not opt out of the proceeding and who:
>
> a. are Saturn Dealers; or
>
> b. are dealers who, prior to GMCL's waiver of the Acceptance Threshold Condition in the WDAs, marked "yes" and returned to the Canadian Automobile Dealers Association ("the "CADA") the "General Motors Dealer Group Participation Form" attached to the May 4, 2009 and/or May 13, 2009 memoranda and/or sent funds to CADA in accordance with those memoranda (the "Participation Form Dealers").

[38] I invite the parties, including GMCL, to provide me with an agreed upon draft Judgment incorporating my findings above. I have not undergone this exercise since, in the several drafts that were provided to me, the parties have not agreed on the preamble, and so I leave it to the parties to complete the drafting process.



Mr. Justice T. McEwen

Released: March 22, 2016

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Trillium Motor World Ltd.

Plaintiff

– and –

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Defendants

AND BETWEEN:

General Motors of Canada Limited

Defendant, Plaintiff by Counterclaim

– and –

Trillium Motor World Ltd.
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Plaintiff, Defendants to the Counterclaim

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