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CITATION: Trillium Motor World Ltd. v. General Motors of Canada Limited, 2011 ONSC 3939
DIVISIONAL COURT FILE NO.: 135/11
DATE: 20110622

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
TRILLIUM MOTOR WORLD LTD. Plaintiff (Respondent)	*David L. Sterns* and *Allan D. J. Dick*, for the Plaintiff/Appellants
– and –	
GENERAL MOTORS OF CANADA LIMITED and CASSELS BROCK & BLACKWELL LLP Defendants (Appellants)	*David Morritt* and *Evan Thomas*, for the Applicant/Defendant General Motors of Canada Limited *Peter H. Griffin, Rebecca Jones* and *Stephanie F. Couzin*, for the Applicant/Defendant Cassels Brock & Blackwell LLP
	HEARD: May 19, 2011

LOW J.

[1] The defendants move for leave to appeal in respect of some, but not all, of the questions certified as common issues in the class action proceeding brought by the plaintiff.

[2] Following the global financial crisis of 2008 and in extreme financial difficulty, General Motors of Canada Limited (GMCL) and its parent, General Motors (GM), sought assistance from their respective governments. A condition of assistance to GMCL was a downsizing of its constellation of over 700 dealerships.

[3] GMCL informed 240 of its dealers (hereinafter referred to as "offerees") that their dealer agreements would not be renewed upon expiry on October 21, 2010. GMCL offered those dealers a wind-down agreement. The same agreement was offered to all of the offerees. The offer was made on May 20, 2009 with a deadline for acceptance of 6 p.m. EST on May 26, 2009.

It was a term of the offer that it be accepted by all of the offerees by the deadline, with the condition being waivable by GMCL.

[4] A total of 207 (85%) of the offeree dealers who received the wind-down offer accepted it on or before the deadline. Several accepted after the deadline had passed. Some did not accept the offer. GMCL waived the condition and the accepted offers became operative agreements.

[5] General Motors sought insolvency protection in the U.S. GMCL obtained government financial assistance and survived.

[6] The plaintiff has brought action against GMCL and against the law firm Cassels Brock & Blackwell LLP and has sought certification under the *Class Proceedings Act*, 2002, S.O. 2002, c.6. The motion was heard by Strathy J. who granted certification by order dated March 1, 2011.

[7] Thirteen questions were certified as common issues.

[8] In this motion, the defendants seek leave to appeal only with respect to the following among the issues listed in paragraph 5 of the order:

> (c) If GMCL owed a duty of fair dealing to the Class Members, did GMCL breach this duty by:
>
> (i) delivering the Wind-Down Agreements to the Class Members on or after May 20, 2009 and requiring acceptance of the Wind-Down Agreements by 6 p.m. EST on May 26, 2009;
>
> (ii) not disclosing to the Class Members the identities of dealers offered a Wind-Down Agreement;
>
> (iii) stating in the Notice of Non-Renewal and Wind-Down Agreement that GMCL "will not be renewing the Dealer Sales and Service Agreement" between GMCL and each of the Class Members at the expiry of its current terms on October 31, 2010;
>
> (iv) stating in the Wind-Down Agreement that "it has always been and continues to be [GMCL's] position that the Acts are not applicable to the Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator";
>
> (v) stating in the Notice of Non-Renewal, the Wind-Down Agreement and the May 19, 2009 HIDL broadcasts that GMCL's offer of the Wind-Down Agreement was conditional upon all of the Non-Retained Dealers accepting the offer on or before May 26, 1009; or
>
> (vi) breaching any terms of the Wind-Down Agreement;

(d) Did GMCL have a duty to disclose material facts concerning its restructuring to franchisees at the times of soliciting the Wind-Down Agreement? If so, did it fail to disclose material facts and did it breach such duties?

(e) If all Class Members had a statutory right to associate, did GMCL interfere with, prohibit, restrict, penalize, attempt to penalize or threaten to penalize the Class Members' exercise of this right by:

(i) delivering the Wind-Down Agreements to the Class Members on or after May 20, 2009 and requiring acceptance of the Wind-Down Agreements by 6 p.m. EST on May 26, 2009;

(ii) not disclosing to the Class Members the identities of dealers offered a Wind-Down Agreement;

(iii) stating in the Notice of Non-Renewal and Wind-Down Agreement that GMCL "will not be renewing the Dealers Sales and Service Agreement" between GMCL and each of the Class Members at the expiry of its current term on October 31, 2010;

(iv) stating in the Wind-Down Agreement that "it has always been and continues to be [GMCL's] position that the Acts are not applicable to the Dealer Agreement or the relations between GM and Dealer and/or Dealer Operator";

(v) stating in the Notice of Non-Renewal, the Wind-Down Agreement and the May 19, 2009 HIDL broadcasts that GMCL's offer of the Wind-Down Agreement was conditional upon all of the Non-Retained Dealers accepting the offer on or before May 26, 2009; or

(vi) any terms of the Wind-Down Agreement;

(f) Are the waiver and release contained in s. 5 of the Wind-Down Agreement null, void and unenforceable in respect of the class members' rights under ss. 4 and 11 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member);

....

(j) Did Cassels Brock & Blackwell LLP ("Cassels") owe contractual duties to some or all of the class members and, if so, did Cassels breach those duties;

(k) Did Cassels owe fiduciary duties as lawyers to some or all of the class members and, if so, did Cassels breach those duties;

(l) Did Cassels owe duties of care to some or all of the class members and, if so did Cassels breach those duties.?

[9] The defendants argue also that in the event that the court should determine, on appeal, that some or all of the above issues were not properly certified as common issues, the question of whether a class action is the preferable procedure would necessarily be reopened.

[10] On this motion, the defendants must meet at least one of the two-pronged tests under rule 62.01(4)(a)or (b). Under Rule 62.02(4)(b), the moving parties need not demonstrate that the motions judge was wrong or probably wrong but only that the correctness of the order is open to serious debate and that the proposed appeal involves a matter of general importance (see *1176560 Ontario Ltd. v. Great Atlantic and Pacific Co. of Canada*, [2003] O.J. No. 1089 (Div. Ct.) at 39).

[11] With respect to issues (c), (d), (e) and (f), the moving party GMCL argues that the questions cannot be answered without findings of fact specific to each class member.

[12] Notwithstanding the dicta of Cullity J. in *Landsbridge Auto Corp. v. Midas Canada Inc.*, [2009] O.J. No. 1279, I am not persuaded that the question at (c) is debatably one which can only be answered on a case by case inquiry into the motivations and circumstances of each dealer who is a member of the class.

[13] In this respect it seems to me necessary to deconstruct the cause of action into its various components. The cause appears to be grounded in an allegation of breach of a statutory duty. Not every breach of a statutory duty results in loss or damage – in the same way that not every act of negligence results in loss or damage.

[14] The question, as posed, is focused squarely and solely on the conduct of the defendant. As it is uncontroverted that GMCL's conduct in relation to the offeree dealers was identical, it follows that an analysis as to whether the conduct breaches the statutory duty would apply across the board.

[15] If the answer is "no", there is no need to inquire into whether the breach caused loss or damage to any of the class members. If the answer is "yes", then there would need to be individual inquiry directed to the motivations and circumstances of each of the members of class to ascertain whether the conduct of GMCL in the manner of its offer had an impact on the member which constituted an unfairness; if so, what, and, finally, whether the impact resulted in monetary loss. I agree that in this regard, the answer for one member of the class does not address the issue for all and that individual analysis is required.

[16] The latter inquiry, however, is not subsumed in issue (c) which addresses only the issue of whether the conduct breaches the statutory duty, the threshold inquiry, and does not deal with liability in damages.

[17] With respect to issue (d), I am of the view that the issue, as posed, is problematic in that it contains an imbedded issue: what are the material facts concerning its restructuring that it is alleged were not disclosed that ought to have been disclosed?

[18] A reading of the amended statement of claim does not assist because it fails to set out the facts alleged by the plaintiff Trillium to have been improperly withheld.

[19] A second problem is that materiality is in part in the eye of the beholder. There is an objective aspect to materiality, but a fact that is important to one member may be inconsequential to another in his/her decision making process. Similarly, the knowledge base of the members of the class cannot be assumed to be identical.

[20] For both the above reasons, I accept the submission that it is open to serious debate whether issue (d) is suitable for certification as a common issue.

[21] Issue (e) is also a conglomerate of issues and seems to conflate the issue of GMCL's conduct with the issue of its effects.

[22] The conduct relied upon as evidencing an infringement of the class members' rights under the statute to associate is the same conduct relied upon in support of the proposition that GMCL breached the statutory duty of fair dealing.

[23] In issue (e), however, there is, unless the issue is directed solely at the intention and motivation of GMCL behind its conduct and not at the result of its conduct, the imbedded issue of the effect on class members. A number of different effects are named: interference, prohibition, restriction, penalization. As well, the issue is raised whether the conduct was an attempt to penalize or a threat to penalize.

[24] The effect of GMCL's conduct, whatever the intention or motivation behind it, may vary from one member of the class to another. Prior to the deadline, some members of the class did associate in relation to the offers and it seems apparent that there are variations both in whether there was impact at all and in the kind of impact on members where there was any.

[25] If the question is directed only to the intention and motivation of GMCL and not to the effect of the conduct, the issue would be unobjectionable. But since the issue as posed does appear to contemplate an analysis of the effects of the conduct, it would arguably require an examination into the individual actions, reactions and circumstances of the class members in response. Certainly the attitudes and reactions of one member could not be representative of the attitudes and reactions of the whole class. I am therefore persuaded that it is open to serious debate whether this issue was correctly certified as a common issue.

[26] With respect to issues (d) and (e), I am satisfied that the question of additional issues imbedded within ostensibly common issues is important not only to these parties but also to the development of class proceedings procedure. Where questions certified as common go forward for a common trial, they should be clear of ambiguities, particularly ambiguities that could either be construed as begging another question or attracting an inquiry that is necessarily individual.

[27] Issue (f) concerns the waiver and release in the wind-down agreement in which the members release claims arising out of or relating to "any and all applicable statute, regulation, or other law, including Ontario's *Arthur Wishart Act* (Franchise Disclosure), 2000, Alberta's *Franchises Act*, Prince Edward Island's *Franchises Act* and/or any other similar franchise legislation which may be enacted or proclaimed into force in the future...."

[28] In *1518628 Ontario Inc. v. Tutor Time Learning Centres, LLC.*, [2006] O.J. No. 3011 (S.C.J.) aff'd (12 April 2007), Toronto 598/06 (Div. Ct.), Cumming J. held that s. 11 of the *Arthur Wishart Act* does not apply to a release given with advice of counsel by a franchisee in the settlement of a dispute for existing known breaches of the Act by the franchisor in respect of its disclosure obligations which would otherwise entitle the franchisee to rescission.

[29] It is conceivable that upon the facts as ultimately found at trial, s. 11 of the *Arthur Wishart Act* does not apply to the agreement. Given, however, that the members were all in the same position *vis-à-vis* GMCL at the time of the making of the offer and in the same position upon execution of the agreement, all having had the benefit of legal advice, there is, in my view, in the absence of a reply pleading by the plaintiff that the release is unenforceable for unconscionability (*see 405341 Ontario Limited v. Midas Canada Inc.*, [2009] O.J. No. 4354 (S.C.J.), per Cullity J., aff'd [2010] O.J. No. 2845 (C.A.) at para 28), no analysis that requires an examination of the individual circumstances of the members of the class.

[30] I am therefore not persuaded that there is good reason to doubt the correctness of the motion judge's disposition on this issue and, in my view, neither *Tutor Time* nor *Midas* are conflicting decisions. If it is found at trial that the agreement between the plaintiff and GMCL is, as a factual matter, a settlement as contemplated in *Tutor Time,* it is open to GMCL to argue that the reasoning there should equally apply in this case.

[31] Leave is therefore not granted in respect of issue (f).

[32] I turn now to the issues certified as common concerning Cassels, Brock & Blackwell LLP:

> (j) Did Cassels Brock & Blackwell LLP ("Cassels") owe contractual duties to some or all of the class members and, if so, did Cassels breach those duties;
>
> (k) Did Cassels owe fiduciary duties as lawyers to some or all of the class members and, if so, did Cassels breach those duties;
>
> (l) Did Cassels owe duties of care to some or all of the class members and, if so did Cassels breach those duties; ....

[33] The motions judge gave generous benefit of the doubt to the plaintiff's pleading and concluded that these causes were sufficiently set out such that, assuming the allegations to be true, they satisfy s. 5(1)(a) of the Act.

[34] The motions judge identified the gist of the claims against Cassels as the loss of the opportunity to be represented as a collective and to negotiate an improvement on GMCL's offer.

[35] At paragraph 93 of his reasons, the motions judge stated:

> I do not agree that in order to advance such a claim against Cassels the plaintiff must plead that it would not have signed the W.D.A. "but for" Cassels'

negligence. As I have noted earlier, the plaintiff's claim is based on loss of a chance, a recognized claim at common law.

[36] It is contended on behalf of Cassels that an essential component of the plaintiff's case against it, whether in contract or tort, is causation, and that it must be pleaded and proved.

[37] In *Laferrière v. Lawson*, [1991] S.C.J. No. 18, an appeal from the Quebec Court of Appeal, the plaintiff had sued for medical malpractice arising from the failure to inform of and to follow up on a cancerous condition and alleged the loss of chance to benefit from proper medical care. Gonthier J. (for the majority) wrote, at para 153:

> As I have stated earlier, I am inclined to favour an approach which focuses on the actual damage which the doctor can be said to have caused to the patient by his or her fault, and to compensate accordingly. First, as I have said, I can see no basis for treating acts and omissions differently. Accordingly, there is no theoretical imperative directing courts to abandon traditional causal analysis and to adopt instead an essentially artificial loss of chance analysis. Secondly, while I concede that loss of chance analysis is less objectionable when used to evaluate damages in cases where the defendant's responsibility is otherwise clearly established or, perhaps, where no other causal factors can be identified, this type of analysis must be viewed with extreme caution in cases where there are serious doubts as to the defendant's causal role in the face of other identifiable causal factors. Even though our understanding of medical matters is often limited, I am not prepared to conclude that particular medical conditions should be treated for purposes of causation as the equivalent of diffuse elements of pure chance, analogous to the non-specific factors of fate or fortune which influence the outcome of a lottery. Thirdly, as has been pointed out frequently, in the medical context the damage has usually occurred, manifesting itself in sickness or death. In Savatier and Penneau's terms, the chance is not suspended or crystallized as is the case in the classical loss of chance examples; it has been realized, and the morbid scenario has necessarily played itself out. It can and should be analyzed by means of the generally applicable rules regarding causation.

[38] At para 161 he summarized:

> ... I would make the following brief, general observations:
>
> - The rules of civil responsibility require proof of fault, causation and damage.
> - Both acts and omissions may amount to fault and both may be analyzed similarly with regard to causation.
> - Causation in law is not identical to scientific causation.
> - Causation in law must be established on the balance of probabilities, taking into account all the evidence: factual, statistical and that which the judge is entitled to presume.

- In some cases, where a fault presents a clear danger and where such a danger materializes, it may be reasonable to presume a causal link, unless there is a demonstration or indication to the contrary.

- Statistical evidence may be helpful as indicative but is not determinative. In particular, where statistical evidence does not indicate causation on the balance of probabilities, causation in law may nonetheless exist where evidence in the case supports such a finding.

- Even where statistical and factual evidence do not support a finding of causation on the balance of probabilities with respect to particular damage (e.g. death or sickness), such evidence may still justify a finding of causation with respect to lesser damage (e.g. slightly shorter life, greater pain).

- The evidence must be carefully analyzed to determine the exact nature of the fault or breach of duty and its consequences as well as the particular character of the damage which has been suffered, as experienced by the victim.

- If after consideration of these factors a judge is not satisfied that the fault has, on his or her assessment of the balance of probabilities, caused any real damage, then recovery should be denied.

[39] In *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173, Winkler J. wrote, at p. 242,

> Reliance is not established by a mere showing that a plaintiff was a recipient of a representation. Rather the representation must have caused the recipient to act in a certain manner. In these actions, this means that not only will the details of the actual representations made to the individual class member have to be analyzed, but that the actions taken by the class member after each representation was made will have to be scrutinized as well.

[40] In *Ristimaki v. Cooper*, [2004] O.J. No. 2699, rev'd on other grounds [2006] O.J. No 1559 (C.A.) the plaintiff sued her solicitor for negligence arising out of a settlement of certain motions in a matrimonial dispute alleging, *inter alia*, that the solicitor had negligently failed to disclose that he had received advice that it was necessary to have $7 million placed into trust to protect her equalization. At para 150, Stinson J. adopted the reasoning in *Allied Maples Group Limited v. Simmons & Simmons*, [1995] 4 All E.R. 970 (Eng C.A.) paras. 30 – 37:

> 1. What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the plaintiffs depends in the first instance on whether the negligence consists of some positive act or misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact. The Court has to determine on the balance of probability whether the defendant's act, for example the careless driving, caused the plaintiff's loss consisting of his broken leg. Once established on balance of probability, that fact is taken as true and the plaintiff recovers his damage in full. There is no

> discount because the judge considers that the balance is only just tipped in favour of the plaintiff; and the plaintiff gets nothing if he fails to establish that it is more likely than not that the accident resulted in the injury.
>
> ... .
>
> 2. If the defendant's negligence consists of an omission, for example to ... give proper ... advice, causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if the ... advice [had been] given. This can only be a matter of inference to be determined from all the circumstances. The plaintiff's own evidence that he would have acted to obtain the benefit or avoid the risk, while important, may not be believed by the judge, especially if there is compelling evidence that he would not ... .
>
> Although the question is a hypothetical one, it is well established that the plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour ... .
>
> 3. In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case does the plaintiff have to prove on balance of probability, as Mr. Jackson [counsel for the appellants/defendants] submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?
>
> ....

[41] In the result, Stinson J. held that the plaintiff failed in that she had not demonstrated that she would have acted differently had the solicitor fully advised her.

[42] In *Folland v. Reardon*, [2005] O.J. No. 216 (C.A.), the plaintiff was convicted of sexual assault and was subsequently granted a new trial following admission of fresh evidence on the appeal. The Crown did not proceed with the retrial. The plaintiff sued the lawyer who acted for him at the original trial, alleging that his negligence resulted in the wrongful conviction and incarceration.

[43] At para. 73, Doherty JA wrote:

> Whatever the scope of the lost chance analysis in fixing liability for tort claims based on personal injuries, lost chance is well recognized as a basis for assessing damages in contract. In contract, proof of damage is not part of the liability inquiry. If a defendant breaches his contract with the plaintiff and as a result a plaintiff loses the opportunity to gain a benefit or avoid harm, that lost

> opportunity may be compensable. As I read the contract cases, a plaintiff can recover damages for a lost chance if four criteria are met. First, the plaintiff must establish on the balance of probabilities that but for the defendant's wrongful conduct, the plaintiff had a chance to obtain a benefit or avoid a loss. Second, the plaintiff must show that the chance lost was sufficiently real and significant to rise above mere speculation. Third, the plaintiff must demonstrate that the outcome, that is, whether the plaintiff would have avoided the loss or made the gain depended on someone or something other than the plaintiff himself or herself. Fourth, the plaintiff must show that the lost chance had some practical value: Chaplin v. Hicks, [1911] 2 K.B. 786; Spring v. Guardian Assurance Plc., [1995] 2 A.C. 296 per Lord Lowry at 327 (H.L.); Eastwalsh Homes Ltd. v. Anatal Developments Ltd. (1993), 12 O.R. (3d) 675 at 689-90 (C.A.), leave to appeal to S.C.C. refused (1993), 15 O.R. (3d) xvi, [1993] S.C.C.A. No. 225; Multi-Malls Inc. v. Tex-Mall Properties Ltd. (1980), 28 O.R. (2d) 6 (H.C.), aff'd (1981), 37 O.R. (2d) 133 (C.A.), leave to appeal to S.C.C. refused, [1982] 1 S.C.R. xiii; Sellars v. Adelaide Petroleum N.L. (1992) 179 C.L.R. 332 at 349-55, 362-65 (H.C); G.H.L. Fridman, The Law of Contract in Canada 4th ed. (Scarborough: Carswell, 1999) at 795; S. Waddams, Law of Damages, supra, para. 13.260.

[44] I am satisfied on the basis of the foregoing that there are conflicting authorities as to whether a requisite component of the action, whether in tort or in contract, for damages for loss of chance is that the plaintiff would have acted differently but for the breach. As the motions judge's disposition of the issue appears to be at odds with the authorities, I am of the view that it is desirable that leave be granted in respect of all three issues relating to Cassels as set out above.

[45] I am also satisfied that there is good reason to doubt the correctness of the decision to certify the three issues as common since the question of whether each of the class members would have acted differently in the absence of breach by Cassels, assuming the duty of care is proved, is a question that requires individual inquiry.

[46] I turn finally to the contention that the motions judge erred in refusing to stay the action against Cassels in the face of the inconsistent claims.

[47] Stay of an action is discretionary and is fact driven. The party seeking a stay must show that continuation of the action would be unjust because it would be oppressive or vexatious to it or would otherwise be an abuse of process and a stay would not cause an injustice to the plaintiff.

[48] The motions judge fairly characterized the plaintiff's claims against Cassels and GMCL at paragraphs 175 to 177 of his reasons. Given the complexion of the claims and their relationship to each other, I am not satisfied that there is reason to doubt the correctness of motions judge's refusal to order a stay on the basis that a stay would be oppressive and prejudicial to the plaintiff.

[49] I am not satisfied that *Pryshlack v. Urbancic et al,* [1975] O.J. No 2488, *Himelfarb Proszanski LLP v. Obradovich,* [2009] O.J. No 3836, *Samuel v. Klein et al,* [1976] O.J. No 2327

or *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1979] O.J. No 1172 are conflicting decisions.

[50] For the foregoing reasons, the motion is granted in part.

[51] Success has been divided. If the parties are unable to agree concerning costs, I may be spoken to upon arrangement with my assistant.

Low J.

Released: June 22, 2011

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TRILLIUM MOTOR WORLD LTD.

Plaintiff (Respondent)

– and –

GENERAL MOTORS OF CANADA LIMITED and CASSELS BROCK & BLACKWELL LLP

Defendants (Appellants)

REASONS FOR JUDGMENT

Low J.

Released: June 22, 2011