CITATION: Trillium Motor v. General Motors, 2012 ONSC 463
DIVISIONAL COURT FILE NO.: 133/11 and 135/11
DATE: 20120326

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: Trillium Motor World Ltd., Plaintiff/Respondent

AND:

General Motors of Canada Limited and Cassels Brock & Blackwell LLP, Defendants/Appellants

BEFORE: Aston, Sanderson, Lauwers JJ.

COUNSEL: *Allan Dick, David Sterns, Bryan Finlay, Q.C., Marie-Andree Vermette, Michael Statham*, for the Plaintiff/Respondent

David Morritt, Jennifer Dolman, Evan Thomas, for the Defendant/Appellant General Motors of Canada Limited

HEARD: January 12, 2012

ENDORSEMENT

ASTON J.

[1] On March 1, 2011, Strathy J. granted a motion by Trillium Motor World Ltd. ("Trillium") for certification of a class proceeding. Both defendants appeal from that order, having obtained the requisite leave to do so. The two certification motions and appeals proceeded in tandem. This endorsement deals with the General Motors of Canada Limited ("GMCL") appeal.

Background

[2] In 2009 GMCL needed to obtain government financing for its continued survival. As part of its restructuring plan, as required by governments, GMCL offered approximately 240 of its dealers, including Trillium, a Wind-Down Agreement ("WDA") under which those dealers would close their respective dealerships by the fall of 2010 and release any claims against GMCL in exchange for monetary compensation which varied from one dealer to the next.

[3] More than 200 dealers, including Trillium, executed the proffered WDA and collectively received more than $123,000,000 in Wind-Down payments from GMCL. In each case, the dealer obtained independent legal advice.

[4] GMCL, the governments of Canada and Ontario, and perhaps other stakeholders, apparently relied on this out-of-court restructuring of the dealer network to proceed with the government financing package.

[5] On behalf of the class, Trillium seeks to set aside the releases to GMCL given by all class members, rescind the WDAs and claim substantial damages for alleged breaches of the statutory duty of fair dealing and statutory right of association provided under franchise legislation. The causes of action are founded entirely on the *Ontario Arthur Wishart Act (Franchise Disclosure)* 2000 (the "*AWA*") and analogous franchise legislation in Alberta and Prince Edward Island.

Issues and Scope of this Appeal

[6] Paragraph 5 of the certification order of March 1, 2011 certifies thirteen common issues in sub-paragraphs (a) through (m). Ten of those issues relate to GMCL. GMCL sought leave to appeal four of those ten issues. On June 22, 2011, Low J. granted leave to appeal two of the four – sub-paragraphs 5(d) and 5(e). GMCL seeks to set aside or vary those two sub-paragraphs and, if successful in doing so regarding one or both, also asks this Court to review the broader question of whether Strathy J. erred in concluding that a class proceeding is the preferable procedure to resolve the class members' claims against GMCL.

Standard of Review

[7] GMCL submits that the standard of review is correctness because the legal issues raised are matters of "general principle" and are central to the proper application of s. 5 of the *Class Proceedings Act* ("*CPA*"). Trillium agrees that identifiable errors of law in the application of s. 5 of the *CPA* displace the deference that is normally accorded to a motions judge in a certification application. However, Trillium submits that ultimately the determination of common issues and preferable procedure engages a degree of discretion and the weighing or balancing of competing factors. It submits that such an exercise engages deference, and findings of fact or mixed fact and law should be reviewed on a standard of palpable and overriding error.

[8] The parties do not appear to disagree that extricable questions of law are reviewable on a standard of correctness while issues of mixed fact and law are reviewable on a deferential standard. However, they disagree on the characterization of the issues. We will address the characterization of the question or issue in the course of these reasons.

"Issue 5(d)" – GMCL's Duty of Fair Dealing

[9] Paragraph 5(d) of the certification order of March 1, 2011 reads as follows:

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

[10] This issue is directly connected to s. 3(1) of the *AWA* which provides: "Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement". Subsection 3(2) goes on to say that a party to a franchise agreement has a right of action for damages against another party who breaches this duty of fair dealing.

[11] GMCL submits that this issue necessarily requires individual findings of fact for each class member.

[12] In granting leave to appeal Low J., addressed this submission in paragraphs 17 to 19 of her decision. She identified two reasons why the correctness of this part of the certification order is open to serious debate:

(i) it is inherently ambiguous because it does not particularize the "material facts" that were allegedly not disclosed; and

(ii) it does not address the individual aspects of "materiality" or each class member's knowledge.

[13] GMCL submits that its duty of fair dealing in relation to any franchisee necessitates an individual inquiry into what facts are "material" for that particular car dealer. Trillium submits the issue, as framed, only focuses on GMCL's conduct and the issue is not dependent upon individual findings of fact, which will only ultimately have to be made later on in the damages phase.

[14] On its face, Issue 5(d) only refers to the duty and conduct of GMCL. In our view, the scope of this issue is not "inherently ambiguous" or open ended for several reasons.

[15] First, the Statement of Claim establishes specific parameters. It alleges that GMCL made statements intended to lead the franchisees receiving a WDA proposal to believe that if all of them did not sign a WDA, GMCL would file for creditor protection under the *CCAA*. This is quite specific and, as Strathy J. observed, franchisees could not make an informed decision concerning the risks associated with accepting or rejecting the WDA without adequate disclosure of GMCL's financial condition and restructuring plans. This goes to the very purpose of s. 3 of the *AWA*.

[16] Second, there is also a temporal boundary implicit in Issue 5(d). The Statement of Claim, and the defined issue, pinpoints "the time of soliciting the Wind-Down Agreement" as the time in question. The time constraints faced by GMCL can be taken into account within the ambit of the defined issue.

[17] Third, the Supreme Court of Canada decision in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.* [2011] 2 S.C.R. 175 at paragraphs 6, 44-46, 50 and 61 confirms that the common law test for materiality is an objective test.

[18] Rothstein J., writing for the Court, concluded as follows at paragraph 61 of the decision:

> [61] In sum, the important aspects of the test for materiality are as follows:
>
> i. Materiality is a question of mixed law and fact, determined objectively, from the perspective of a reasonable investor;
>
> ii. An omitted fact is material if there is a substantial likelihood that it *would* have been considered important by a reasonable investor in making his or

her decision, rather than if the fact merely *might* have been considered important. In other words, an omitted fact is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available;

iii. The proof required is not that the material fact would have changed the decision, but that there was a substantial likelihood it would have assumed actual significance in a reasonable investor's deliberations;

iv. Materiality involves the application of a legal standard to particular facts. It is a fact-specific inquiry, to be determined on a case-by-case basis in light of all of the relevant considerations and from the surrounding circumstances forming the total mix of information made available to investors; and

v. The materiality of a fact, statement or omission must be proven through evidence by the party alleging materiality, except in those cases where common sense inferences are sufficient. A court must first look at the disclosed information and the omitted information. A court may also consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. As well, evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations is relevant to the materiality assessment. However, the predominant focus must be on a contextual consideration of what information was disclosed, and what facts or information were omitted from the disclosure documents provided by the issuer.

[19] "Materiality" is properly characterized as a question of mixed fact and law. Facts concerning GMCL's financial circumstances and restructuring plans will be "material" based upon whether there was a substantial likelihood that the disclosure of the particular fact (in and of itself or in combination with other facts) would have assumed actual significance in a "reasonable franchisee's" deliberations respecting the execution of a WDA.

[20] Moreover, section 1(1) of the *AWA* defines "material fact" in a manner that supports, by analogy, the use of an objective test:

> "Material fact" includes any information about the business, operations, capital or control of the franchisor or franchisor's associate, or about the franchise system, that would reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the decision to acquire the franchise. [*emphasis added*]

[21] GMCL characterizes the cause of action as essentially based upon misrepresentation by omission. If the claim is founded upon negligent misrepresentation, then reliance upon the

misrepresentation by any individual plaintiff is an essential element of the cause of action. If reliance upon the misrepresentation by any individual plaintiff is an essential element of the cause of action , then Strathy J. applied an incorrect test and, according to GMCL's submission, erred on an extricable question of law. Issue 5(d) as defined would not advance the litigation because (a) the answer to the question raised by Issue 5(d) would not be capable of extrapolation to each member of the class; (b) the common issue would necessarily be dependent on individual findings of fact that have to be made with respect to each individual claimant; and (c) there would be no workable methodology for determining the issue on a class-wide basis. We disagree with this characterization of the plaintiff's claims by GMCL.

[22] The plaintiffs' claims are not based on negligent misrepresentation, by omission or otherwise. Rather, they assert a statutory cause of action based on alleged breaches of the *AWA* or comparable legislation in other provinces. To establish a breach of duty of fair dealing under s. 3 of the *AWA* a franchisee need not prove the elements required in an action for negligent misrepresentation, specifically reliance. As Winkler, C.J.O. stated in *Salah v. Timothy's Coffees of the World* (2010) 268 OAC 279 at paragraph 28, s. 3(2) of the *AWA* "focuses on the conduct of the breaching party, not the injury to the other side".

[23] Consequently, Strathy J. did not apply an incorrect legal test. A deferential standard of review therefore applies.

[24] In conclusion, materiality is determined objectively, from the perspective of a reasonable franchisee. The subjective views or circumstances of the individual plaintiffs do not need to be determined when deciding whether a particular fact is material to the alleged breach of the statutory duty of fair dealing. The predominant focus is on the disclosed and omitted information on the part of GMCL. Questions of materiality do not require an analysis on a franchisee-by-franchisee basis in the first instance. The question of whether the failure to disclose material facts caused any damages to an individual class member (including the question of whether a particular class member would have otherwise acted differently if an undisclosed material fact had been disclosed to that class member) is outside the scope of Issue 5(d). The fact that a particular class member may not have suffered any loss as a result of the failure to disclose material facts does not mean that there was no breach of a statutory duty to disclose in the first place.

[25] The appeal in relation to Issue 5(d) is therefore dismissed.

"Issue 5(e)" – Unlawful Interference with the Right to Associate

[26] Paragraph 5(e) of the certification order of March 1, 2011 reads as follows:

> (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 Dealer 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 the 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?

[27] This issue is founded upon s. 4(1) of the *AWA* which provides that: "A franchisee may associate with other franchisees and may form or join an organization of franchisees". The section goes on to say that franchisors "shall not interfere with, prohibit or restrict, by contract or otherwise," a franchisee from forming or joining an organization of franchisees, or associating with other franchisees.

[28] With respect to this issue, Low J. had this to say in granting leave to appeal (paragraphs 23 to 25):

> [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.
>
> [5] 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.

[29] GMCL's submission on this issue is that a common issue cannot be dependent on individual findings of fact which have to be made with respect to each claimant.

[30] Like the claim based on breach of the duty of fair dealing under s. 3 of the *AWA*, this claim is also a statutory cause of action, rather than one founded on any common law duty. The legal framework and analysis parallels that noted above regarding s. 5(d).

[31] GMCL is quite correct in its assertion that the effect of GMCL's conduct on individual class members will have to be examined at the damages or remedy stage, but on the question of GMCL's conduct, there is no need for individual inquiry. GMCL treated all its dealers in exactly the same way. Issue 5(e) is limited to an examination of GMCL's conduct and the specific determination of whether, and if so how, its conduct breached s. 4 of the *AWA*. Strathy J. makes this limitation clear in paragraph 115 of his reasons.

[32] The analysis of a common issue focused upon the conduct of the franchisor, even in the absence of proof of loss by any particular franchisee, can avoid duplication of fact finding and legal analysis. See, for example, *2038724 Ontario Ltd. v. Quizno's-Canada Restaurant Corp.* (2010), ONCA 466 (CA) affirming [2009] OJ No. 1873 (Div.Ct.) reversing [2008] OJ No. 833 (SCJ).

[33] It is a question of mixed fact and law in any particular case as to whether the resolution of such common issues would significantly advance the litigation, even if damages could not be dealt with on a class-wide basis. The existence of individual issues does not necessarily detract from the capacity of common issue to materially advance the action. The decision of the motions judge on Issue 5(e) is reasonable.

Conclusion

[34] The appeal as it relates to issues 5(d) and 5(e) is dismissed. The appeal on the more general issue, of whether a class proceeding is the preferable procedure, was conditional on some success relating to Issue 5(d) or 5(e). That aspect of the appeal is therefore also dismissed.

[35] If counsel are unable to agree on costs, brief written submissions may be served and filed on the following timetable: Trillium Motor World's submission within 21 days, GMAC's submission within 15 days thereafter, any reply within 5 days after that.

Aston J.

Sanderson J.

Lauwers J.

Date: March 26, 2012