Court File No. CV-10-397096CP
Court File No.

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

TRILLIUM MOTOR WORLD LTD.

Plaintiff
(Respondent)

and

GENERAL MOTORS OF CANADA LIMITED and CASSELS BROCK & BLACKWELL LLP

Defendants
(Appellant)

NOTICE OF APPEAL

THE APPELLANT, CASSELS BROCK & BLACKWELL LLP ("Cassels") APPEALS to the Court of Appeal from the judgment of the Honourable Justice Thomas McEwen dated July 8, 2015 made at Toronto.

THE APPELLANT ASKS for an Order that:

a) The appeal be allowed, and the judgment be set aside;

b) The action be dismissed against Cassels with costs;

c) In the alternative to (b) above, a new trial be ordered;

d) The costs of this appeal; and

e) Such further and other relief be granted as this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

1. Trillium Motor World Ltd. ("Trillium") is the representative plaintiff in a class proceeding brought on behalf of auto dealers who received, and executed, Wind-Down Agreements ("WDAs") from General Motors of Canada Limited ("GMCL") in May 2009 (the "Class").

2. Contrary to Trillium's allegations, Cassels never acted for the dealers as GMCL never made a filing under the *Companies' Creditors Arrangement Act* ("*CCAA*"). Cassels was retained by the Canadian Automobile Dealers' Association ("CADA"), and would act for the dealers only if GMCL made a *CCAA* filing, which never occurred. The Steering Committee of dealers set up to give instructions to Cassels directed Cassels that it was to act only in the event of a *CCAA* filing, and directed Cassels that its mandate did not extend to giving advice on the WDAs received by dealers. All of the dealers in the Class retained other lawyers to provide them with legal advice on the WDA and to provide them with certificates of independent legal advice.

3. In any event, once GMCL delivered the WDAs on May 20, 2009, there was no realistic prospect of negotiating with GMCL on behalf of a collective of the terminated dealers in the six days provided to the dealers to consider GMCL's offer. The dealers were differently situated. A collective negotiation would have risked GMCL filing for *CCAA* protection, out of which the dealers would have received little or no compensation.

4. The trial judge, in Reasons dated July 8, 2015, erred in finding Cassels liable to the plaintiff and to the Class, and in awarding aggregate damages.

5. The Reasons of the trial judge are deficient, internally inconsistent, fail to properly characterize the evidence at trial, and do not demonstrate that the trial judge considered material aspects of the evidence before him.

Cassels was Not Retained

6. The trial judge erred in finding that a retainer existed between a group of General Motors of Canada Limited ("GMCL") dealers (including both Class members and non-class members) and Cassels in May 2009.

7. As testified to by Cassels' lawyers and the in-house counsel to the CADA, and as supported by the documents made exhibits at trial, Cassels was retained by CADA, and would act for dealers only in the event of a *CCAA* filing by GMCL, which never occurred.

8. The trial judge erred in finding that monies sent by a group of GMCL dealers to CADA in May 2009, which were sent on the basis that the funds would only be used in the event that GMCL commenced *CCAA* proceedings, grounded a general retainer with Cassels of unlimited scope.

9. The trial judge erred in finding a retainer existed between a group of dealers and Cassels, in the absence of any evidence capable of demonstrating the formation of a contract between Cassels on the one hand and an unascertained collectivity of dealers on the other.

10. The trial judge erred in failing to consider relevant factors demonstrating that there was no retainer between Cassels and the GMCL dealers in May 2009, including that:

(a) The class members each retained other lawyers to provide legal advice on the WDA;

(b) There were no privileged discussions between the class members and Cassels; and,

(c) Cassels gave no legal advice to members of the class.

Any retainer was for representation in the event of a CCAA filing by GMCL

11. In the alternative, if Cassels was retained by any dealers, any contemplated retainer was exclusively with respect to representation in a future *CCAA* proceeding commenced by GMCL.

12. The trial judge erred in failing to define the scope of the retainer he found, and instead defining it negatively as "not limited to representation in a *CCAA* filing".

13. The trial judge erred in finding that the retainer included the provision of advice to dealers on the WDA, given, among other things, the following evidence:

(a) In early May 2009, none of the dealers, CADA or Cassels knew that GMCL was going to send WDAs to dealers. It could not have been in the contemplation of the parties on May 4, 2009 that any representation of all the dealers would include legal advice on a document none of them expected and which was only sent to some of the dealers;

(b) When they actually received WDAs, each dealer engaged separate counsel to provide legal advice about the WDAs. They did not seek this advice from Cassels;

(c) The WDA affected the members of the Class differently depending on their individual circumstances. For this reason, CADA and Cassels recommended that dealers obtain individual legal advice on its terms;

(d) The Steering Committee set up by the dealers directed Cassels not to provide legal advice on the WDAs; and

(e) On a CADA telephone call with a group of unidentified dealers on May 24, 2009, and in written communications from CADA to the dealers leading up to that call, the dealers were told to obtain their own independent legal advice as to the WDAs, as the WDAs themselves required.

14. The trial judge erred in holding that Cassels bears the onus of identifying limits on the scope of the retainer, and barring such evidence, that the retainer will be construed as a general retainer. There is no such thing in law as a general retainer. A retainer is a contract, and must be interpreted in accordance with principles of contract law.

The Steering Committee was Not Conflicted

15. The trial judge erred in disregarding the confirmation and direction of the Steering Committee on May 15, 2009 that Cassels was only to act in the event of *CCAA* proceedings and was not retained to provide advice on the WDAs.

16. The trial judge erred in finding that there was a conflict between the retained and non-retained dealers on the Steering Committee on May 15, 2009, when the distinction between retained and non-retained dealers did not exist at that time. The dealers only learned whether they were retained or non-retained on May 20, 2009.

17. The trial judge erred in finding that a potential future conflict between the members of the Steering Committee prevented the Committee from defining the scope of a retainer with Cassels. The Steering Committee was approved by the dealers that contributed to the CADA trust fund, and

had actual and ostensible authority to define the scope of any retainer. The trial judge's decision is without support in the jurisprudence.

18. The trial judge erred in holding that a potential future conflict nullifies the instructions given by clients in a group retainer. On the trial judge's approach to conflicts, no lawyer could have acted for any group of dealers in May 2009, including the group of dealers who received WDAs, whose interests also materially varied.

No Conflict due to the Canada Retainer

19. The trial judge erred in finding that there was a conflict between any dealer retainer and Cassels' retainer by the Department of Justice to assist in negotiations with GMCL (the "Canada retainer").

20. The Canada retainer was reported in the press and disclosed to CADA.

21. The trial judge erred in finding that Canada and the dealers were adverse in interest in May 2009. Both Canada and the dealers had the same interest in avoiding *CCAA* proceedings.

22. The trial judge erred in failing to properly address the ethical wall established at Cassels, which meant that the lawyers representing CADA had no knowledge of the matters covered by the Canada retainer. The trial judge ignored the uncontroverted evidence of Cassels' lawyers that the ethical wall was properly maintained, and that no information passed across the ethical wall.

23. The trial judge erred in rejecting the evidence of expert witnesses called by Cassels "as they relate to the Canada Conflict issue", in the absence of any contrary evidence on this issue from the expert called by the plaintiff.

24. The trial judge erred in inferring that Cassels acted differently in its representation of dealer interests as a result of the Canada retainer. Cassels' lawyers testified unequivocally that they did not "pull their punches" because of the Canada retainer. They were not cross-examined on this evidence. The trial judge's finding that, because of the Canada retainer, Cassels' lawyers failed to act as vigorously as they otherwise would have for the dealers, was made without any evidentiary foundation (the evidence was to the contrary), violates the rule in *Browne v. Dunn* and offends basic principles of fairness.

Standard of Care

25. The trial judge erred in his application of the law of negligence.

26. The trial judge failed to define the standard of care for lawyers retained in a group retainer in the circumstances of this case. Indeed, he rejected the evidence of the sole standard of care witness called by the plaintiff.

27. Having not defined the applicable standard of care, the trial judge erred in finding that any standard of care was breached by Cassels.

28. The trial judge erred in his characterization of the evidence at trial about the "wait and see approach".

29. The trial judge erred in failing to refer to the extensive standard of care evidence led by Cassels, despite rejecting the evidence of Trillium's expert on standard of care. The content of a lawyer's obligations in a highly specific, technical and time-sensitive context cannot be made by the trial judge in the absence of expert evidence as to the standard of care in Ontario at the relevant time.

30. The trial judge erred by implying, though not explicitly finding, that the standard of care required lawyers representing the dealers to reject the WDA offers and negotiate for more money from GMCL:

(a) The trial judge erred by failing to address the expert evidence that it was reasonable for lawyers not to recommend rejecting the WDA and thereby risk a *CCAA* filing in which the dealers would have received little or nothing;

(b) The trial judge erred in assessing the standard of care without evidence of the number of dealers that sent monies to the CADA. Only the CADA, which collected the monies that the trial judge held grounded the retainer with Cassels, was aware of this information, and no evidence as to this issue was led at trial. As held by the trial judge, the bargaining position of the dealers would depend in large part on the number of dealers prepared to reject the WDA;

(c) The trial judge erred by failing to address the extensive expert evidence establishing that Cassels could not possibly have accomplished the following in four business days:

(i) identified all or substantially all of the non-retained dealers, when a significant number of dealers had not even identified themselves to CADA;

(ii) created a new mechanism for receiving instructions from the group, including a new Steering Committee composed entirely of non-retained dealers;

(iii) somehow create a mechanism to bind non-continued dealers to a settlement where their identity was unknown;

(iv) determined the individual circumstances of the dealers in order to determine whether and for which dealers the WDA offer was beneficial;

(v) sought and obtained instructions from the non-retained dealers, who according to the trial judge were in a state of shock;

(vi) resolved conflicts in the approaches the group wished to take, with the knowledge that a rejection of the offer by a significant number might result in GMCL retracting the offer for all; and

(vii) exerted pressure on GMCL to compel it to negotiate, despite it having refused to negotiate with the Saturn dealers and despite the fact it was obvious (according to the trial judge) that the dealers would seek to avoid a *CCAA* filing at all costs.

31. The trial judge made findings in the case against Cassels which contradict his findings in the case against GMCL.

32. The trial judge erred in finding that Cassels, had it not been retained by Canada, would have taken steps to negotiate the WDAs on a group basis, without making a finding that any applicable standard of care required Cassels to do so, and without addressing the expert evidence that it would have been problematic and below the standard of care to do so.

33. The trial judge erred in failing to consider or apply the concept of professional judgment to his findings.

34. The trial judge erred in basing his conclusions on hindsight.

Causation

35. The trial judge erred in making findings of causation, as causation was not a certified common issue.

36. The trial judge erred in finding that the breaches he attributed to Cassels caused any loss to the dealers.

37. The trial judge erred in failing to provide a chain of reasoning to link any of the breaches he attributed to Cassels to any loss.

38. The trial judge erred in his application of the law of "loss of chance":

(a) in finding that the plaintiff had overcome the evidentiary threshold to establish that the Class had a substantial chance of achieving a collective negotiation that would have led to a beneficial outcome;

(b) in arbitrarily setting at 55% the likelihood of such an outcome.

39. The trial judge erred in failing to identify the causal chain between his finding that, had Cassels advised the Steering Committee that it was conflicted on May 15, the loss to the dealers could have been prevented:

(a) the trial judge recognized the "serious practical problems" with the plaintiff's expert, Gerald Kandestin's, suggestion that Cassels should have established a mock Steering Committee;

(b) the trial judge failed to address the expert evidence on this issue from the experts called by Cassels;

(c) instead, the trial judge found in error that he "need not explore" what steps could have been taken had a conflict been disclosed, and that "whatever it would have done, the affected dealers would have been better prepared for GMCL's offer on May 20".

40. The trial judge erred in finding that, because of the Canada retainer, Cassels' lawyers failed to act as vigorously as they otherwise would have for the dealers. This finding was made in the absence of evidence (the evidence was to the contrary), and basic principles of fairness expressed in the rule in *Browne v. Dunn*.

41. The trial judge erred in failing to address the very real possibility that, had the dealers been told about a perceived Steering Committee conflict, or a conflict with the Canada retainer, they would have done nothing differently in relation to the WDAs, about which they were all in the hands of their own legal advisors.

Class Members' Evidence

42. The trial judge erred in his ruling during trial as to the admissibility of class member evidence.

43. The trial judge erred in his reliance on the evidence of the class members who testified.

44. The trial judge erred in concluding on the basis of the evidence of three hand-picked class members that most if not all of the class members would have agreed to reject the WDA and negotiate for more money if such a recommendation had been made by Cassels. This was an individual issue not amenable to determination on a class basis, and could not be inferred from the evidence of three class members. Cassels was precluded, by the structure of the class action, from discovering or effectively testing evidence as to this issue.

45. The trial judge erred in dismissing the considerable differences in the testimony of the class members about their understanding of the retainer.

Saturn Dealers

46. The trial judge erred in his treatment of the Saturn dealer members of the class, who were differently situated from the other class members.

47. The trial judge erred in making findings about the Saturn dealers in the absence of any evidence.

Aggregate Damages

48. The trial judge erred in assessing aggregate damages both where causation had not been certified as a common issue and at all.

49. The trial judge erred in concluding that the class had suffered any damages as a result of the breaches he attributed to Cassels.

50. The trial judge erred in ordering an award for aggregate damages without sufficient evidence to ground such an award, and in the face of uncontradicted evidence from GMCL witnesses that they would not have negotiated with the dealers.

51. The trial judge erred in admitting "expert" evidence on aggregate damages which was not proper opinion evidence and which was therefore inadmissible.

52. The trial judge erred in his assessment of damages.

53. The trial judge erred in his calculation of damages, using the amount of monies paid out by GMCL under the WDAs, instead of the amount of monies offered by GMCL under the WDAs, in order to ground his conclusion that a further $92 million was available.

54. The trial judge erred in assessing damages as though all 181 Class members had contributed monies to the CADA, when there was no evidence to support this finding.

55. The trial judge erred in failing to provide any analysis for his 55% probability finding, and instead providing the probability as a bald total without accounting for all contingencies.

56. Such further and other grounds as may arise from the settlement of the judgment from which this appeal is made.

57. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

a) The Order appealed from is a final order of a judge of the Superior Court of Justice;

b) Section 6(1)(b) of the *Courts of Justice Act*;

c) Leave to appeal is not required.

August 4, 2015

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Defendants
(Appellants)

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PROCEEDING COMMENCED AT TORONTO

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