COURT OF APPEAL FOR ONTARIO

CITATION: Trillium Motor World Ltd. v. General Motors of Canada Limited, 2016 ONCA 702
DATE: 20160923
DOCKET: M46726 (C60838)

Huscroft J.A. (In Chambers)

BETWEEN

Trillium Motor World Ltd.

Plaintiff (Appellant/Respondent by Cross-Appeal/Responding Party)

and

General Motors of Canada Limited and Cassels Brock & Blackwell LLP

Defendants (Respondents/Appellant by Cross-Appeal/Moving Party)

David S. Morritt and Evan Thomas, for the respondent/moving party

David Sterns and Andy Seretis for the appellant/responding party

Heard: September 9, 2016

ENDORSEMENT

[1] General Motors of Canada Limited ("GM") seeks an order requiring Trillium Motor World Ltd. ("Trillium") to pay security for costs prior to continuing its appeal.

[2] GM seeks $5,353,133.77, which includes $5,478,005.32 in costs awarded to GM following its successful defence at trial, less $500,000 (security for costs

already paid by Trillium), plus $375,128.45, which GM estimates to be the costs of responding to Trillium's appeal on a partial indemnity basis.

[3] During the course of the hearing, GM indicated that an order for $1.8 million in respect of the appeal costs plus some percentage of the trial costs would not be unfair. Ultimately, GM encouraged the court to exercise its discretion to make an order for any quantum it considered just.

[4] For the reasons that follow, I have concluded that it is too late in the day to order security for costs, both as to the trial costs and the appeal costs. I am not satisfied that it would be appropriate to award security for costs in any event.

[5] Accordingly, the motion is dismissed.

Background

[6] This case arises out of a number of "wind down" agreements ("WDAs") GM entered with 202 GM dealers, including Trillium, when GM's business was restructured in 2009. Pursuant to the WDAs, GM dealerships were closed and payments were made to the dealers in exchange for a full and final release of all claims against GM. Trillium received a wind down payment of $642,000. Over $123 million was paid to the other dealers.

[7] In 2010, Trillium brought a class action against GM seeking over $800 million in damages on behalf of all dealers who had signed WDAs with GM, claiming that GM had breached its common law obligations as well as its

statutory obligations under the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3, and similar franchise legislation in other provinces. Trillium also claimed that Cassels Brock & Blackwell LLP, which was retained by some of the dealers, breached contractual and fiduciary duties to the dealers and was negligent in its provision of legal services.

[8] GM counterclaimed against the class members for breaching the WDAs by bringing a class action and sought costs of the action against all class members and their respective principals personally.

[9] The claim was certified as a class proceeding on March 1, 2011 and the counterclaim was certified on January 18, 2012. Following opt-outs, there are 181 members of the class certified in Trillium's action against GM.

[10] GM brought a motion for security for costs in 2012. The motion was settled by a consent order pursuant to which Trillium posted $500,000 in security for costs. The settlement was made without prejudice to GM's right to bring another motion for security for costs following the first round of examination for discovery, but no additional motion was brought.

[11] Trillium's action against GM was dismissed following a 41-day trial before McEwen J., in a decision dated July 8, 2015. GM's counterclaim was also dismissed.

[12] Trillium's action against Cassels Brock & Blackwell was successful and Trillium was awarded $45,000,000 in damages plus costs. That judgment, which is under appeal, is not relevant for purposes of this motion.

Trillium and its principal

[13] Trillium operated a car dealership in Scarborough, Ontario from 1991 until 2009, when the business was wound up pursuant to the WDA it signed with GM.

[14] It is common ground that Trillium is insolvent. Trillium owes: (1) approximately $3.5 million to the Business Development Bank of Canada ("BDC"), which is its first-ranking secured creditor; (2) approximately $200,000 to Canada Revenue Agency; and (3) $135,000 to the Government of Ontario. BDC has given notice to GM that it claims any monies payable to Trillium arising out of the litigation.

[15] The sole director, officer, and shareholder of Trillium is Thomas Hurdman. Mr. Hurdman is resident in the United States and it is common ground that he is insolvent. He owes approximately $1 million to BDC and approximately $625,000 to a friend.

The authority to order security for costs

[16] The court's jurisdiction to order security for costs flows from r. 61.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provides:

> (1) In an appeal where it appears that,
>
> (a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;
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> (b) an order for security for costs could be made against the appellant under rule 56.01; or
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> (c) for other good reason, security for costs should be ordered,
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> a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just.

Rule 56.01, which is incorporated into r. 61.06(b), provides:

> (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
>
> (a) the plaintiff or applicant is ordinarily resident outside Ontario;
>
> (b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
>
> (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
>
> (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
>
> (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or

> (f) a statute entitles the defendant or respondent to security for costs.

[17] In short, provided the relevant criteria are satisfied, this court has the discretion to award security for costs, for the trial as well as the pending appeal, as it considers just.

The positions of the parties

GM

[18] GM submits that it is entitled to an order for security for costs under r. 61.06(1)(b), which provides that an order for security for costs may be made if it appears that such an order could be made under r. 56.01. GM submits that r. 56.01(d) is the relevant provision: there is good reason to believe that Trillium has insufficient assets in Ontario to pay its costs. But, says GM, Trillium is not impecunious and it would not be unjust to require it to post security for costs.

[19] GM contends that Trillium has failed to establish that it cannot borrow or otherwise raise the funds required to post security for costs from creditors, class members, or Mr. Hurdman's spouse. GM says that Trillium's creditors and class members stand to reap the rewards of the class action litigation, which is fronted by an insolvent company, and that they should bear the burden of adverse cost consequences by contributing security for costs. There is no evidence that they lack assets to so contribute, and no evidence that they were asked to contribute.

[20] According to GM, if Trillium is not impecunious it must demonstrate that its appeal has a good chance of success, but it has not done so. GM submits that an appeal with a low prospect of success, coupled with an appellant from whom it would be nearly impossible to collect costs, constitutes a good reason to order security for costs under r. 61.06(c): *Henderson v. Wright*, 2016 ONCA 89, [2016] O.J. No. 533.

Trillium

[21] Trillium submits that this court should exercise its discretion to dismiss the motion because of GM's delay in bringing it and the resulting prejudice. Trillium argues, further, that GM does not meet the requirements to be granted security for costs in any event.

[22] Trillium submits that a motion seeking security for costs should be brought promptly, once the defendant learns of the plaintiff's inability to satisfy a costs award, and that in the absence of a reasonable explanation for delay it is unfair to award security for costs.

[23] Trillium submits, further, that GM's delay in bringing this motion results in prejudice: (1) it lost the option of applying to the Class Proceedings Fund in advance of the trial; (2) its potential fundraising efforts have been hampered now that it has a judgment against it; and (3) it has incurred substantial costs in advancing the action and the appeal.

[24] As to the merits of the motion, Trillium submits that an order for security for costs would be unjust because: (1) it is impecunious and its shareholder is unable to post security; (2) its appeal has a good chance of success; (3) GM caused it to lose its business; and (4) GM's counterclaim is for the same costs for which it seeks security on the motion.

Analysis

[25] I deal first with the timeliness of GM's motion, which is determinative of the outcome. It is convenient to address the trial and appeal costs separately.

Trial costs

[26] I decline to award security for costs for the trial because of GM's delay and the prejudice it has caused Trillium.

[27] From the outset, it was understood by all involved that this was complex litigation that would be both time consuming and expensive. Trillium's ability to pay costs was an issue early in the proceedings. On September 8, 2011, GM requested particulars as to Trillium's assets. It queried whether Trillium was a shell corporation and asserted that it was not a suitable representative plaintiff if it was. GM asked for: (1) confirmation that no insolvency proceedings had been commenced by or against Trillium; (2) particulars of its assets in Ontario; and/or (3) confirmation that Trillium would move to add new or additional representative

plaintiffs that could satisfy an adverse costs award. GM stated that it if it did not receive satisfactory assurances it would "bring an appropriate motion".

[28] Trillium replied on September 19, 2011 that it was out of business, but that no insolvency proceedings had been commenced by or against it. Trillium noted that GM had not challenged Trillium's suitability as a class representative on this or any other basis, and asked for confirmation of GM's instructions concerning the bringing of a motion prior to a case conference scheduled for September 28, 2011.

[29] At the case conference, GM advised that it would be seeking security for costs from Trillium if the action proceeded.

[30] Following dismissal of GM's appeal from the decision certifying the class proceedings against it on March 26, 2012, GM requested information from Trillium concerning any indemnification agreement it had concerning costs, and was informed that there was no such agreement.

[31] Although GM brought a motion for security for costs in 2012, that motion resulted in a consent order dated July 19, 2012 requiring Trillium to pay only $500,000 in security for costs up to the conclusion of the first round of examinations for discovery. GM had the right to bring a further motion seeking security for costs following the first round of discovery, and contemplated doing so; it raised the matter in an email to Trillium dated June 13, 2014. However, on

June 16, 2014 Trillium refused to pay further security for costs voluntarily and said that it would oppose any motion for security for costs. GM did not bring a motion for security costs until now – over two years later, well after the trial was completed.

[32] GM has known that it was defending a complicated class action against an insolvent representative plaintiff since at least 2012. This is clear from the notice of motion it brought for security for costs in 2012, in which GM made the following statements: (1) Trillium no longer carries on business in Ontario, or at all; (2) its controlling shareholder and directing mind, Mr. Hurdman resides in the United States; (3) no one has agreed to indemnify Trillium against any costs awards; (4) Trillium has not applied to the Class Proceedings Fund; (5) none of the members of the class were willing to be added or substituted as representative plaintiffs; and (6) Trillium has insufficient assets to pay GM's costs. GM stated specifically:

> If security for costs is not granted, GMCL will be required to defend this very large commercial case with effectively no potential to recover costs awarded in its favour if it is successful.

[33] Yet, GM took no action. It neither moved to have Trillium replaced as representative plaintiff nor to have Trillium post security for costs. Instead, it defended the action aggressively and ran up enormous costs in doing so, costs

that are only partly offset by the approximately $5.5 million costs award the trial judge made in its favour.

[34] GM's decision not to bring a motion for security for costs was made for tactical reasons. At the hearing of the motion, GM stated candidly that it did not bring a motion earlier because it was not willing to expose its people to cross-examination. That was GM's choice, and GM must bear the burden of that choice. It would be inappropriate for this court to relieve GM of the consequences of its tactical decisions.

[35] GM's decision not to seek security for costs prior to the end of the trial results in prejudice to Trillium in at least two ways. First, it is too late for Trillium to seek funding from the Class Proceedings Fund, now that its claim has been dismissed. At the hearing of the motion, GM argued that Trillium had no intention of applying for funding, not least because it would have had to give up 10% of any damages it received in exchange for funding. But Trillium need not establish that it would have applied for funding in order to establish prejudice. It is enough that Trillium lost the option of applying for funding as a result of GM's decision. Second, Trillium's ability to fundraise from class members to contribute to its costs has been compromised; it is obviously more difficult to fundraise in light of the dismissal of the action than it would have been before the action was heard.

[36] For these reasons, I decline to award security for costs for the trial.

Appeal costs

[37] I decline to award security for costs for the appeal, again because of GM's delay and the prejudice it has caused.

[38] Trillium's claim and GM's counterclaim were dismissed by the trial judge on July 8, 2015. Trillium filed a notice of appeal on August 7, 2015 and GM filed notice of its cross-appeal on August 20, 2015.

[39] At the parties' request, this court has provided case management from the outset. Security for costs was discussed by the parties but nothing was agreed and, for whatever reason, GM chose not to bring a motion for security for costs. Trillium proceeded to perfect its appeal in accordance with the time limits set by the case management judge on consent of the parties – that is, some ten months following service of its notice of appeal.

[40] It is important to note that nothing had changed during this period. GM knew that Trillium was insolvent prior to the trial. Once Trillium gave notice that it was appealing, GM knew that it would incur substantial additional costs that it would not be able to recoup if it were successful on the appeal.

[41] GM says that it could not bring a motion for security for costs until it received the trial judge's costs order on March 22, 2016. I do not accept this. It was open to GM to bring a motion before it received the costs order, just as it was open to GM to bring a motion after March 22, 2016 and prior to perfection of

Trillium's appeal in June. GM offers no explanation for its delay in this period, other than suggesting that it was acting out of courtesy to counsel, and that it did not want to "pile on".

[42] GM has, by its actions, allowed Trillium to perfect its appeal at great expense. This is no small matter. The complicated nature of the appeal is evidenced by the length of the factum filed by Trillium, which runs over 90 pages, and the supporting materials that have been prepared and filed. It would not be just to make an order for security for costs at this late stage.

[43] It is possible, of course, to order security for costs from perfection onward, as Trillium submitted, but GM has already served and filed its responding materials. In the circumstances, the only costs still to be incurred by GM would be for preparation of the argument and for the appearance of counsel on the appeal. This is such a small amount as to be insignificant in the context of this litigation. GM did not seek security for these costs and I do not order them.

Is security for costs appropriate in any event?

[44] Given the way in which this motion was argued, it is appropriate to note that even if I concluded that GM's application had been made in a timely fashion, I am not satisfied that this would have been an appropriate case for security for costs in any event.

[45] GM argued that Trillium is not impecunious because its creditors as well as the members of the class have significant assets, and there is no evidence that either have been asked to provide security.

[46] Although there is authority to support the argument that creditors who stand to benefit from litigation may be required to fund it, there is no indication that any of Trillium's creditors motivated or directed the litigation such that their assets should be taken into account in determining whether Trillium is impecunious: see e.g. *Intellibox Concepts Inc. v. Intermec Technologies Canada Ltd.* [2002] O.J. No 3876(S.C.); *United General Contracting Ltd. v. Sioux Lookout (Municipality)*, 2012 ONSC 542.

[47] As for the class members, GM provided no authority for the proposition that the ability of class members to contribute to security for costs is a relevant consideration in making such an order against a representative plaintiff. GM submitted that that this was an unusual case that would not set a precedent because the members of the class are well known and have financed the litigation from the outset. In these circumstances, GM says, they are active participants in the litigation and their assets can properly be taken into account in making an order for security for costs against Trillium.

[48] It is enough to note my concern that such an order might undermine the concept of a class proceeding, one of the premises of which is that class

members have no liability for costs, except with respect to the determination of their own individual claims: s. 31(2) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. Whether it is a corollary of this statutory protection that the assets of class members are not relevant in determining the ability of a representative plaintiff to provide security for costs can be left for another day.

Disposition

[49] The motion is dismissed. By agreement of the parties there is no order as to costs.