COURT OF APPEAL FOR ONTARIO

CITATION: Trillium Motor World Ltd. v. General Motors of Canada Limited, 2017 ONCA 545
DATE: 20170704
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Cronk, van Rensburg and Pardu JJ.A.

BETWEEN

Trillium Motor World Ltd.

Plaintiff (Appellant/ Respondent by way of cross-appeal)

and

General Motors of Canada Limited and Cassels Brock & Blackwell LLP

Defendant (Respondent/ Appellant by cross-appeal)

David Sterns, Allan D.J. Dick, Andy Seretis, Bryan Finlay Q.C., Marie-Andrée Vermette and Michael Statham, for the appellant/respondent by cross-appeal Trillium Motor World Ltd.

Kent Thomson, John McCamus, Sean R. Campbell, Sarah L. Weingarten, David S. Morritt and Karin Sachar, for the respondent/appellant by cross-appeal General Motors of Canada Limited

Heard: January 16, 17, 18 and 19, 2017

On appeal from the judgment of Justice Thomas J. McEwen of the Superior Court of Justice, dated July 8, 2015 and March 22, 2016, with reasons reported at 2015 ONSC 3824, 30 C.B.R. (6th) 1 and 2016 ONSC 666.

Pardu J.A.:

[1] This is the first of two appeals and cross-appeals that arise out of the public bailout of General Motors of Canada ("GMCL") in the spring of 2009. This decision addresses a class action against GMCL brought by franchisees whose dealerships were terminated as part of the bailout and a counterclaim by GMCL against the franchisees. The second decision addresses a class action brought by the terminated franchisees against the law firm Cassels, Brock & Blackwell LLP for its alleged mishandling of their interests. That decision is being released concurrently with this one: *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*, 2017 ONCA 544.

A. INTRODUCTION

(1) The GMCL Insolvency and the Wind-Down Agreements

[2] GMCL was insolvent in May 2009. To survive and avoid proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-26 ("*CCAA*"), it required bailout money. The Canadian and American governments demanded that GMCL aggressively restructure as a condition of providing the assistance.

[3] GMCL accordingly had to rationalize the number of its franchisee automobile dealers. It had franchise agreements with far too many dealers, some of whose businesses were doomed by the decisions of its American parent

company to discontinue the Saturn and Pontiac brands. Unless a sufficient number of dealers agreed to terminate their relationship with GMCL, GMCL would have to file under the *CCAA*.

[4] On May 20, 2009, GMCL delivered Wind-Down Agreements ("WDAs") to 240 dealers. The WDAs offered payment in exchange for a release of all claims, including those that could be advanced under the *Arthur Wishart Act (Franchise Disclosure)*, *2000*, S.O. 2000 c. 3 (the "Act"), and provided for an end to the dealers' business relationships with GMCL.

[5] The WDAs also contained a promise by the signing dealer not to sue GMCL. They required the dealer to opt out of or disclaim any interest in any future class proceeding that purported to assert claims released by the WDAs. They required any dealer who failed to opt out to indemnify GMCL against any damages and legal costs GMCL might subsequently incur by defending a class proceeding.

[6] The dealers were given six days to sign the WDAs. The agreements were conditional on the dealers first obtaining certificates of independent legal advice.

[7] 202 out of the 240 dealers who were offered WDAs signed them and accepted the payment offered.

(2) The class proceeding

[8] After GMCL made its final payments, a class proceeding was brought on behalf of all dealers who signed the WDAs, claiming that GMCL breached the rights provided to these franchisees under the Act. It was certified by Strathy J. (as he then was) in March 2011. The appellant Trillium Motor World Ltd.(“Trillium”) was named as the representative plaintiff.

[9] At trial, GMCL argued that it had complied with the Act and that, in any event, the proceedings were barred by the releases in the WDAs. It also brought a counterclaim for damages, arguing that the dealers breached the covenants not to sue in the WDAs by commencing their class proceeding or by not opting out of it.

[10] Following a long trial in 2014, the trial judge held that GMCL acted honestly and fairly and did not breach the dealers’ rights under the Act. He further held that the releases barred the dealers’ class proceeding. Trillium appeals these rulings to this court.

[11] The trial judge also concluded that the dealers’ promises not to sue GMCL, and to indemnify GMCL should a dealer fail to opt out of class proceedings, were void on public policy grounds. He found that the covenant not to sue and the indemnity were severable from the rest of the WDA, and dismissed GMCL’s

action for damages arising from the dealers' breach of those provisions. GMCL cross-appeals these rulings.

[12] The dealers raise a number of grounds of appeal impugning the trial judge's ruling that the manner in which GMCL secured the dealers' agreement to the WDAs did not breach the duty of fair dealing under the Act. Specifically, they maintain that the six-day window given by GMCL to sign the WDAs breached the Act.

[13] However, I agree with the trial judge's observation, at para. 295 of his reasons, that the issue whether the releases in the WDAs are valid and enforceable is a "threshold question." If the releases are valid, the dealers' other claims under the Act are barred.

[14] I agree with the trial judge that the releases are valid, and on that ground I would dismiss Trillium's appeal.

[15] I would also uphold the trial judge's decision that the covenant not to sue and the indemnity in the WDAs were unenforceable against the dealers. I would therefore dismiss the cross-appeal by GMCL.

B. THE COMMON ISSUE

[16] The certification judge certified the following common issue regarding the release in the WDAs:

> (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*?

[17] Section 4(1) of the Act guarantees to franchisees the right to associate with each other, and s. 4(4) stipulates that "any provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising any right under this section is void."

[18] Section 11 of the Act provides that "any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void."

[19] The releases in the WDAs were comprehensive. They barred any and all claims, including claims under the Act for the following:

- Breach of the duty of fair dealing in the performance, enforcement or exercise of any right under the parties' franchise agreements (s. 3);
- Interference with the dealers' rights to associate with each other (s. 4);
- Misrepresentation in a disclosure document or statement of material change (s. 5);
- Rescission for failure to provide a disclosure document (s. 5); and
- Rescission for providing a deficient disclosure document (s. 5).

[20] On their face, the WDAs provided for a release of claims under the Act. At trial, the arguments turned on whether the WDAs were settlement agreements and therefore fell within the judicially-developed exception to the application of s. 11 of the Act articulated in *1518628 Ontario Inc. v. Tutor Time Learning Centres, LLC*, 2006 CanLII 25276 (S.C.), and approved by this court in *405341 Ontario Limited v. Midas Canada Inc.*, 2010 ONCA 478, 264 O.A.C. 111.

[21] As I have said, GMCL required that any dealer signing a WDA obtain independent legal advice in order to qualify for the payment. Trillium concedes that there is no issue as to the fact or adequacy of that advice.

[22] The trial judge found that the WDA was a settlement of known and existing claims, stating at paras. 308, 315 and 328 of his reasons:

> The factual matrix surrounding the WDA and the Release demonstrates the intention and understanding of the parties: that the WDA was to be a full and final settlement of any claims the dealers might have had from the non-renewal of their [franchise agreements], including any claims, statutory or otherwise, in connection with the Notice of Non-Renewal or the WDA.
>
> …
>
> First, the [certificate of independent legal advice] is not the only indication that the dealers knew about their potential claims. An inference can be drawn, from the abundance of clear facts facing the dealers at the time, that they had a variety of contractual and statutory claims. Upon entering into the WDAs, the dealers knew everything they needed to know to assert the claims they now bring. They knew that they only had six days to consider the WDA, obtain independent legal advice,

> and make their decision. They also knew they had not received, and would not be receiving, a disclosure document in relation to the WDA.
>
> …
>
> The WDA and Release were designed to bring the franchise relationship to an end. Thus, for the reasons above, this case falls within the *Tutor Time* exception. The dealers reviewed the WDA and Release, received legal advice, and decided whether or not to sign the agreement. In short, the Release was clearly entered into with legal advice and in settlement of existing and fully known claims. Notwithstanding its important remedial purpose, the *Wishart Act* does not permit franchisees to resile from their settlement agreements in the circumstances of this case. Unlike [*Midas*], the claims that the franchisees seek to bring against the franchisor were fully known when the Release was given. The, not unsophisticated, franchisees received independent legal advice regarding the Release which was carefully drafted to address the specific dispute in question – namely, any breach of the [dealership agreements] and any breach relating to the *Wishart Act*. In this case, the importance of ensuring that full and final settlements are indeed, full and final, requires the court to answer "no" to Common Issue (f).

[23] On appeal, Trillium reiterates the arguments made to the trial judge and submits that he erred in concluding that the *Tutor Time* exception applied.

C. STANDARD OF REVIEW

[24] The validity of the releases in the WDAs involves issues of mixed fact and law, where "principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 50.

[25] There may be rare instances where a question of law can be extricated from the interpretive exercise: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 21. These are reviewed on a standard of correctness. Otherwise, an appellate court owes deference to the trial judge's interpretation of the contract: *Sattva*, at paras. 51-53.

[26] The trial judge's findings of fact or conclusions of mixed fact and law are also owed deference. Intervention on appeal is not justified absent palpable and overriding error. A finding contains a palpable error if the error is obvious or if the finding is clearly wrong, unreasonable or unsupported by the evidence: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10-15; and *Waxman v. Waxman* (2004), 185 O.A.C. 201 (C.A.), at paras. 296, 297 and 299. The error must be significant enough to "vitiate the challenged finding of fact": *Waxman*, at para. 297.

D. THE APPELLANT'S POSITION

[27] Trillium argues that the trial judge erred in concluding that the release bars the class members' claims under the Act. It makes four arguments.

[28] First, Trillium says that the trial judge made an overarching error by failing to consider the purpose of the Act in finding that the releases are operative. The purpose of the Act is to protect franchisees, and that purpose should trump

commercial certainty and the promotion of settlements. Trillium submits that a "hard times" defence by a franchisor should not be allowed to overwhelm the protective purposes of the Act.

[29] Second, and related, Trillium submits that the *Tutor Time* exception to the application of s. 11 of the Act should be construed narrowly. It says that the exception is limited to cases where a franchisee has: (a) given a release with the advice of counsel; (b) in settlement of a dispute; and (c) in relation to existing and fully known breaches of the Act. Trillium argues that these conditions were not met in this case.

[30] Third, Trillium submits that the manner in which GMCL obtained the releases breached GMCL's duty of fair dealing with its franchisees. This makes the releases unenforceable.

[31] Finally, Trillium submits that the trial judge's conclusion that the covenant not to sue and the indemnity were void for public policy reasons means that the whole release should be void. Mere severance of this clause is incompatible with the protective purpose underlying the Act. GMCL cross-appeals the finding that these provisions were void and severable in the first place.

[32] I now turn to consider these arguments. I will proceed by considering Trillium's first, second and third submissions when addressing its appeal and by considering its fourth submission when addressing GMCL's cross-appeal.

E. THE APPEAL

(1) Overarching error

[33] I do not accept Trillium's argument that the trial judge erred by failing to take into account the remedial purposes of the Act. He explicitly stated that the "overarching purpose" of the Act is to "mitigate and alleviate the power imbalance that exists between franchisors and franchisees": at para. 276.

[34] The perilous financial circumstances GMCL faced at the time were an important part of the factual context. Section 3(3) of the Act makes it clear that the duty of fair dealing "includes the duty to act in good faith and in accordance with reasonable commercial standards" (emphasis added).

[35] In addition, GMCL also owed duties to the dealers who did not sign WDAs. Insolvency proceedings could have been catastrophic for them. To use the language of Strathy J., as he then was, in *Fairview Donut Inc. v. The TDL Group Corp*, 2012 ONSC 1252, aff'd, 2012 ONCA 867, leave to appeal refused, [2013] S.C.C.A. No. 47, the decision to reduce the size of the dealer network was a "rational business decision" made for "valid economic and strategic reasons, having regard to both GMCL's own interests and the interests of its franchisees": at para. 674. The time pressures to deal with the bloated dealer network were neither artificial nor arbitrary. They were imposed by the Canadian and American governments as a condition to the provision of bailout funds.

(2) The *Tutor Time* exception

(a) Interpretation of *Tutor Time*

[36] I accept the trial judge's finding that the *Tutor Time* exception applied in this case.

[37] In *Tutor Time*, the franchisor failed to provide a disclosure document required under the Act when the franchisee acquired the business from a predecessor franchisee. The franchisee, represented by counsel, participated in settlement discussions that culminated in a settlement agreement with the franchisor. The agreement provided certain benefits to the franchisee and released the franchisor from any claims. The franchisee attempted to repudiate the settlement, arguing that it was void under s. 11 of the Act.

[38] The motion judge in *Tutor Time* held at paras. 106 and 108-109:

> Parties who reach a settlement are to be held to their bargain. The policy reasons for enforcing a valid release mirror the policy principles underlying the doctrines of *res judicata* and issue estoppel.
>
> …
>
> In my view, s. 11 does not have application to a release given (with the 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 a statutory rescission.
>
> The settlement of a claim arising from and consequential to an existing statutory right of rescission

> is not in itself "a waiver or a release" of that statutory right to rescission. It is a release of the claim arising from having exercised the right of rescission or being in the position to exercise the right of rescission. In my view, if a franchisee, as in the instant situation, with full knowledge of a breach of the franchisor's obligations to disclose as required by the *Act* and regulations, and with the benefit of independent legal advice, chooses to affirm the franchise agreement as a term of a settlement of the claims that arise from the franchisor's breach, then the franchisee can no longer rescind and make a claim to the remedies afforded by s. 6(6) of the *Act*. [Citations omitted.]

[39] *Tutor Time* was endorsed by this court in *Midas*.

[40] In *Midas*, the release was prospective in operation, and it was invalid. Upon entering into the franchise agreement, the franchisee was required to agree that it would, in the future, release all potential claims against the franchisor as a condition of renewal of the franchise agreement. At the beginning of the franchise relationship, there were no known claims or disputes. The franchise came up for renewal after the franchisee had sued the franchisor for breach of its duties under the Act. The franchisor tried to extract a release as a condition of renewal while the lawsuit was pending with a view to ending the lawsuit.

[41] This court held that *Tutor Time* had no application but in so doing implicitly affirmed its validity. MacFarland J.A. wrote, at paras. 24 and 30:

> *Tutor Time* simply has no application to the facts of this case. In *Tutor Time*, the motion judge concluded that s.

> 11 did not apply to a release given by a franchisee, with the advice of counsel, in settlement of a dispute for existing and fully known breaches of the Act that would otherwise have entitled the franchisee to a claim.
>
> …
>
> The purpose of the Act is to protect franchisees. The provisions of the Act are to be interpreted in that light. Requiring franchisees to give up any claims they might have against a franchisor for purported breaches of the Act in order to renew their franchise agreement, unequivocally runs afoul of the Act. To suggest that by accepting the terms of the Agreement, the respondents have in effect "settled" their claims within the meaning of *Tutor Time*, in my view, misapprehends and misstates the ratio of that case. Here there has been no settlement of the respondent's rights; the respondent is merely trying to assert its rights through its claims. The assertion that it has waived or released those rights contravenes s. 11 of the Act.

[42] According to *Tutor Time*, a voluntarily-negotiated settlement of existing statutory claims, entered into with the benefit of legal advice, in settlement of a dispute for existing and known breaches of the Act is not caught by s. 11 of the *Act*.

[43] In the present case, the trial judge found that these requirements were met. As I will explain, these conclusions were reasonable and not affected by any palpable and overriding error.

(b) Application of the *Tutor Time* exception

(i) Advice of counsel

[44] Each dealer who signed a WDA obtained legal advice. The certificate of independent legal advice accompanying each WDA explicitly addressed all the claims advanced in this action. The trial judge stated at paras. 317 and 319 of his reasons:

> Regardless of what the ILA Certificate could have said, it clearly stated that the advising lawyer (1) had read the WDA; (2) had explained the nature and effect of the WDA, including the dealer's waivers, releases and indemnification obligations; and (3) had verified that the dealer had carefully read the WDA and was fully advised and informed with regard to all of the foregoing matters. Simply put, the ILA Certificate, as drafted, adequately supports an inference that the dealers who signed the WDAs knew they were giving up any legal claims they might have against GMCL.
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> …
>
> Trillium asserts that GMCL failed to examine Hurdman and Turpin on the legal advice they received regarding any claims against GMCL arising out of the Notice of Non-Renewal. I agree with GMCL that nothing can be inferred from this. Trillium expressly agreed that no challenge has been or would have been made to the accuracy or sufficiency of the legal advice that it and other Class Members received from their lawyers. Each lawyer for each Class Member expressly confirmed, in writing, that he or she explained "the nature and effect of the Wind-Down Agreement, including the Dealer's and the Dealer Operator's waivers, releases and obligations contained therein."

[45] At trial, counsel for Trillium conceded "that there was no challenge to the accuracy or sufficiency of the legal advice" and that it "did not challenge in any way the contents or accuracy of the ILA Certificates." As he wrote in the passage quoted above, the trial judge concluded that the "dealers who signed the WDA knew they were giving up any legal claims they might have against GMCL."

(ii) Settlement of a dispute

[46] The trial judge concluded that each WDA constituted a settlement of claims arising out of GMCL's decision not to renew the franchise agreements of the terminated dealers. He explained, at para. 312:

> Given the factual matrix leading up to the signing of the WDAs – notably, the looming *CCAA* filing and the known restructuring of GMCL's dealer network – the parties must have understood that the central purpose of the WDA was a full and final settlement of any legal claims arising from non-renewal of the [franchise agreements] and the WDA itself. Indeed, Hurdman and Turpin, both dealers who received WDAs, testified that they were aware that GMCL intended to rely on their acceptance of the WDA to determine whether a *CCAA* filing could be avoided. Anything less than a full settlement would have undermined the purpose of this out-of-court restructuring.

[47] A settlement is a voluntary arrangement that brings a dispute or potential dispute to an end: *Data General Canada Ltd. v. The Molnar Systems Group Inc*. (1991), 6 O.R. (3d) 409 (C.A.), at p. 415.

[48] I agree with the trial judge's conclusion. The release in this case characterized the WDA document as a settlement:

> Release; Covenant Not to Sue; Indemnity
>
> (a) Each of Dealer and Dealer Operator … hereby absolutely and irrevocably … releases, settles, cancels, discharges and acknowledges to be fully satisfied any and all claims, demands, complaints … and causes of action of every kind and nature whatsoever … which any of the Dealer parties may have … against GM … arising out of or relating to:
>
> > (i) the Dealer Agreement, or this Agreement or any predecessor agreement(s);
> >
> > …
> >
> > (iv) any and all applicable statute … including Ontario's Arthur Wishart Act (Franchise Disclosure), 2000 … Dealer and Dealer Operator specifically acknowledge that it and they are hereby waiving any and all rights given to it or them under the Acts … and further acknowledge that they are doing so with full awareness of such rights, obligations and requirements, and intend to waive its and their rights to: (1) any Claim for a breach of the duty of fair dealing in the performance or enforcement of or exercise of any right under the Dealer Agreement; (2) any claim for GM and/or any of the other GM Entities penalizing, attempting to penalize or threatening to penalize the Dealer and/or the Dealer Operator for associating with other GM Dealers or retailers; (3) any claim for damages for a misrepresentation contained in a disclosure document or a statement of material change as required by the Acts; (4) any Claim for rescission for failure to provide a

> disclosure document or a statement of material change within the time required by the Acts; (f) any Claim for rescission for providing a deficient disclosure document or statement of material change as required by the Acts; and (g) any other Claims arising under one or more or all of the Acts … [Emphasis added.]

(iii) Existing claims

[49] The trial judge held that, when Trillium and the other dealers signed the WDAs, they knew everything they needed to know to assert their statutory claims. They knew that they had only six days to consider the WDA, obtain independent legal advice and make their decision. They knew that they did not and would not receive a disclosure document in relation to the WDA.

[50] The dealers knew that GMCL was purporting to terminate the dealership agreements and that, arguably, it did not have the right to do so. At trial, Trillium argued that the WDA was a "franchise agreement" under the Act and that the failure to provide a disclosure document 14 days in advance made the WDA void under s. 5 of the Act. It argued that GMCL's obligation to provide the disclosure document was triggered only when the WDAs were signed, and so the fact that the releases were contained in the WDAs made it impossible to say that signing the WDAs released an existing claim.

[51] The trial judge held otherwise, concluding that Trillium knew it would not be receiving a disclosure document. He held, at para. 327:

> In my view, given the factual matrix in this case – including the fact that Trillium received independent legal advice regarding the Release – there is nothing inherently wrong with a Release "fixing" breaches relating to its own procurement. Trillium and the other dealers were sophisticated commercial actors, with experience of entering into contracts, and signed the WDA with the benefit of independent legal advice.

[52] The release specifically included "any Claim for rescission for failure to provide a disclosure document." The trial judge's conclusion that the release was for existing and known claims was reasonable.

(3) Breach of the duty of fair dealing

[53] The question of whether the release in the WDA was contrary to GMCL's duty of fair dealing under s. 3 of the Act was not certified as a common issue. Rather, the common issue certified for trial vis-à-vis the release was whether the waiver and release in the WDA were void and unenforceable "in respect of the Class Member's rights under ss. 4 and 11" of the Act.

[54] In any event, the trial judge held that GMCL did not breach the duty of dealing fairly with the terminated dealers when presenting them with the WDAs. That conclusion was reasonably open to him and there is no basis for this court to intervene.

F. THE CROSS-APPEAL: THE COVENANT NOT TO SUE AND SEVERANCE

[55] Section 5(c) of the WDA contained a covenant by the dealer not to sue GMCL, and it required the signing dealer to opt out of or disclaim any interest in any class proceeding that purported to assert claims released in the WDA. Section 5(d) required any dealer who failed to opt out to indemnify GMCL against any damages and legal costs incurred by defending the class proceeding.

[56] GMCL brought a counterclaim against each of the dealers who were part of the class. The following issue was certified on the counterclaim:

> (a) Did each member of the Dealer Subclass breach section 5(c) of their respective Wind-Down Agreements by commencing the Class Action and/or failing to opt out of the class action?

[57] Although the trial judge found that the release was generally enforceable, he accepted Trillium's argument that s. 5(c) of the WDAs offended the right of association under s. 4 of the Act. He held that s. 4 guaranteed the franchisees' rights to protect their legal interests through collective action.

[58] He also concluded that s. 5(c) was void for public policy reasons. He explained, at para. 355:

> The class action lawsuit plays an important role in Canadian society and has fundamental advantages over a multiplicity of individualized suits. In my view, the public policy principles articulated by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, render s.

> 5(c) of the WDA void to the extent that it denies the affected dealers the right to bring an action against GMCL collectively. I do not believe this to be inconsistent with my finding that the Release bars Trillium's claims against GMCL. The result is that the WDAs cannot preclude a class action, but the Release provides GMCL with a defence to that class action.

[59] GMCL argues that the trial judge erred in concluding that the covenant not to sue and the indemnity for defence costs are void for public policy reasons and because they constrain the franchisees' right of association provided by s. 4 of the Act. It submits that these provisions are the twin mechanisms necessary to give force to the release validly given of all claims. It submits that the decision that these provisions are void is inconsistent with the conclusion that the *Tutor Time* exception applies to the release. Public policy, GMCL submits, favours both settlement agreements and provisions that enforce them.

[60] GMCL further argues that the trial judge's conclusion leads to an absurd outcome. As it states in its factum:

> [A]n individual dealer who unsuccessfully sued GMCL in violation of the terms of the Covenant Not to Sue would be legally obligated to indemnify GMCL for its costs and expenses associated with defending the action; however … that same individual, as a willing participant in an unsuccessful class proceeding, would face no such obligation.

[61] However, in my view, this difference in treatment between individual litigants and members of a class is expressly contemplated by s. 31(2) of the *Class Proceedings Act, 1992*, S.O. 1992 c. 6, which provides:

> Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims.

Section 31(2) insulates class members from costs awards where, as in the usual course, they do not actively participate in the proceedings: see *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (S.C.), at para. 29; and *Silver v. Imax Corp.*, 2012 ONSC 4064, 40 C.P.C. (7th) 60, at paras. 10-12.

[62] GMCL's counterclaim is, in essence, a claim for reimbursement of its costs in defending the class proceeding. Whether that claim is advanced as a claim for damages for breach of the covenant not to sue or as a claim for costs in the class proceeding is a matter of form rather than substance. Given that the legislature has adopted a policy that class members are not liable for costs, I see no error in the trial judge's conclusion that public policy barred enforcement of the covenant not to sue.

[63] Trillium argues that, having decided that s. 5(c) of the WDAs offends the statutory right of association, the trial judge should have declared the entire document void, rather than "blue-penciling" the offending covenant.

[64] In response, GMCL relies on *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152, 124 O.R. (3d) 776.

[65] In *Cora,* two franchisees sued the franchisor, alleging breaches of the Act. In an effort to mitigate their losses, they decided to sell their businesses. The

franchisor insisted that they sign a release of all claims against it before consenting to an assignment to a successor franchisee. The franchise agreement explicitly provided for such a release as a condition of giving consent to the assignment:

> 22.6.4 Franchisee and its directors, officers and shareholders signing and delivering in favour of Franchisor and its directors, officers, shareholders and employees, a general release in the form specified by the Franchisor or any claims against Franchisor and its officers, directors, shareholders and employees.

[66] In so far as it purported to release future unknown claims under the *Act*, the release was void. The issue in *Cora* was whether the release could be read down to limit it to claims other than those asserted under the Act, or whether the entire clause was void.

[67] Justice van Rensburg held, at para. 21, that the decision whether the clause was entirely unenforceable or whether it could be read down raised issues of mixed fact and law, reviewable on a deferential basis.

[68] She reviewed the general principles governing severance and stated, at paras. 35-37:

> Where part of a contract is unenforceable because enforcement would be contrary to statute or the common law, rather than setting aside the entire contract, courts may sever the offending provisions while leaving the remainder of the contract intact. Severance lies along a spectrum of remedies available when a provision of a contract is illegal, including

> voiding the contract in whole or in part. The appropriate remedy will depend on the particular context. Courts are generally reluctant to sever contractual provisions because severance alters the terms of the original agreement between the parties.
>
> Severance takes two forms: "blue-pencil" and "notional". Blue-pencil severance involves removing part of a contract, as if by drawing a line through it. Notional severance "involves reading down a contractual provision so as to make it legal and enforceable." Where severance is appropriate, courts choose the technique that "in light of the particular contractual context involved, would most appropriately cure the illegality while remaining otherwise as close as possible to the intentions of the parties expressed in the agreement."
>
> Courts will consider the context of the contract at issue and any relevant policy considerations when assessing whether and how to sever provisions. Severance engages policy concerns to a certain degree beyond protecting the parties' intentions, because the court is being asked to assist one party to enforce an otherwise unenforceable provision. [Citations omitted.]

[69] Applying these principles to the franchise context, at para. 48, van Rensburg J. A. identified three factors which could affect the decision whether to sever the offending provision: (1) whether the purpose or the policy of s. 11 of the Act would be subverted by severance; (2) the relative bargaining positions of the parties and their conduct in reaching the agreement; and (3) the potential for the franchisee to enjoy an unjustified windfall.

[70] In *Cora*, modification of the contractual clause would have required insertion of additional contractual terms. It was not a matter of simply striking out the offending provision.

[71] In this case, the trial judge held that the *Tutor Time* exception applied, and he favoured the public policy of giving effect to settlements of known and existing claims reached with the benefit of legal advice. He also held that GMCL acted fairly and honestly in difficult circumstances. In light of these rulings, I cannot identify any palpable and overriding error in his conclusion that, although the release was valid, the covenant not to sue was void but was severable. In contrast to *Cora*, the WDAs were negotiated to put an end to a contractual relationship. They were not negotiated to release the franchisor from unknown future claims at the outset of the relationship. The dealers who signed the WDAs were enriched by execution of the agreements; they received payments to which they would not have been otherwise entitled. They knew that GMCL would rely on their decisions in deciding whether or not to file under the *CCAA*. Had a filing been undertaken, there is a strong likelihood the terminated dealers would have received very little, if anything.

G. CONCLUSION

[72] For these reasons, I would dismiss Trillium's appeal on the basis that the class members were bound by the releases contained in the WDAs. I would

dismiss GMCL's cross-appeal from the trial judge's decision refusing to award damages for breach of the covenant not to sue.

[73] Counsel may make brief written submissions as to costs, due from GMCL within 30 days of the date of release of these reasons, and from Trillium within 15 days after receipt of GMCL's submissions.

"G. Pardu J.A."
"I agree E.A. Cronk J.A."
"I agree K. van Rensburg J.A."

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