CITATION: Trillium Motor v. General Motors, 2012 ONSC 1443
DIVISIONAL COURT FILE NO.: 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: Lauwers, Aston, Sanderson 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

Peter Griffin, Rebecca Jones, for the Defendant/Appellant, Cassels Brock & Blackwell LLP

HEARD: January 12, 2012

ENDORSEMENT

LAUWERS J.

[1] On March 1, 2011, Strathy J. granted a motion by Trillium Motor World Ltd. ("Trillium") for certification of a class proceeding (see 2011 ONSC 1300, [2011] O.J. No. 889). Low J. granted leave to appeal the decision, with reasons dated June 22, 2011 (see 2011 ONSC 3939, [2011] O.J. No. 2873). This Endorsement deals with the appeal by Cassels Brock & Blackwell LLP ("Cassels"). It is the companion to the decision of the Court in Divisional Court file 133/11, authored by Aston J., and reported at 2012 ONSC 463.

Background

[2] I adopt the background text from the companion decision and repeat it here for convenience:

> 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.

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.

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.

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.

[3] The motion judge set out the facts relating to Cassels' involvement in paragraph 17 to 20:

Many of the GMCL dealers were members of the Canadian Automotive Dealers' Association ("CADA"), a federation of provincial and regional automotive dealer associations. On May 4, 2009, CADA announced that it had formed a General Motors Steering Committee to ensure that the interests of all GMCL dealers were represented "should General Motors of Canada Ltd. file for bankruptcy protection in Canada in the near future." CADA announced that the steering committee would provide policy direction and instructions to legal counsel who would represent the dealers in any bankruptcy filing and that it had retained Cassels "to handle our interests". CADA asked the dealers to contribute either $2,500 or $5,000 (depending on the number of vehicles the dealer had sold in the previous year) to a war chest that was to be held by CADA in trust for the payment of professional services associated with representing the dealers in restructuring or insolvency proceedings. A number of the GMCL dealers, including Trillium, made payments into the fund.

On May 22, 2009, after the distribution of the W.D.A.s to the affected GMCL dealers, CADA sent an email to its members enclosing a memorandum concerning the W.D.A. and pointing out the necessity of each dealer reviewing the document with its advisors. It emphasized the importance and urgency of executing and returning the W.D.A. before the May 26th, 2009 deadline if the dealer wished to accept it. The email also informed the dealers that CADA proposed to organize a conference call of all dealers whose franchises had been terminated.

Trillium pleads that Cassels drafted or assisted in drafting the May 22, 2009 memorandum to the affected dealers. It pleads that the memorandum offered no

advice or strategy to the dealers about a response to the W.D.A. and did not advise the dealers of their rights under the *A.W.A.*

A conference call with terminated dealers, organized by CADA, was held on May 24, 2009. The terminated dealers were entitled to call in and participate, and a number chose to do so. It is alleged that two lawyers from Cassels participated in the call. The call lasted several hours, but there is no evidence before me concerning what advice, if any, was provided to the dealers by Cassels.

[4] On behalf of the class Trillium seeks to sue Cassels for breach of contract, breach of fiduciary duty and negligence in its representation of the class.

[5] The motion judge described the gravamen of the plea against Cassels:

> The plaintiff pleads causes of action against Cassels for breach of contract, breach of fiduciary duty, and negligence. In connection with the claims for breach of contract and breach of fiduciary duty, the plaintiff pleads that Cassels had a solicitor-client relationship with the class, that it had an undisclosed conflict of interest which caused it to breach its duty of fidelity and its duty to act in the client's best interests, and that it failed to properly advise the affected dealers in their response to the W.D.A. It is alleged that Cassels failed to advise the dealers of their rights under the *A.W.A.*, including their right to a disclosure document, their right to a reasonable time to review it, and their right and opportunity to associate for the purpose of negotiating a better deal. In the negligence claim, Trillium claims that independent of any retainer, Cassels owed a duty of care to the class. The pleading is that in the "unique circumstances" of Cassels' involvement, the actions or inaction of Cassels left the dealers with no alternative but to take advice from their own personal lawyers, without the benefit of any collective action or negotiation. [Reasons, at para. 79.]

Issues on this appeal

[6] Paragraph 5 of the Certification Order certifies three common issues against Cassels:

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

[7] Cassels essentially reargued the Certification Motion.

Discussion

[8] Cassels' most serious objection to the Certification Order is about causation in relation to the plaintiff's claim for damages for lost opportunity:

> Justice Strathy's decision (at paragraph 139 in particular) suggests that the "but for" test does not apply in loss of chance cases. However, the case law is clear that a plaintiff must demonstrate that he or she *would have acted differently* and *would have pursued the opportunity* had counsel provided different advice [emphasis by appellant].
>
> Justice Strathy erred in rejecting Cassels' argument that the plaintiff must plead (and ultimately prove) that each proposed Class Member would not have signed the WDA but for Cassels' alleged breaches. Instead, Justice Strathy found at paragraph 158 of his Decision that "the individual motivations of class members are irrelevant." This finding is contrary to the case law.
>
> Justice Strathy erred in finding that the plaintiff need not plead or establish that it would have acted differently but for Cassels' alleged negligence or breach of contract. As the fiduciary duty claim arises from the contract claim, it fails for the same reason.

[9] Cassels also argues that since each Class Member obtained independent legal advice before signing the WDA, "untangling what each proposed Class Member would have done had Cassels acted differently will be a complex and individualized exercise."

[10] I disagree with these submissions. The causes of action on which the plaintiff relies against Cassels do require proof of causation, but not in the way that Cassels suggests.

[11] To establish the context for the analysis, I set out motions judge's reasoning on the factual commonalities, and on the issues of loss of chance and causation:

> There are some obvious factual commonalities with respect to the claim against Cassels which give rise to common issues of fact:
>
> * Cassels was centrally retained and centrally instructed by CADA - individual class members neither retained nor instructed Cassels - the scope and content of Cassels' retainer was therefore uniform across the class and can therefore be determined as a common issue;
>
> * Cassels dealt with and communicated with the dealers as a group, rather than individually;
>
> * there is no evidence that Cassels had separate dealings with any class member or that it disclosed its alleged retainer by Canada to any member of the class.

> The determination of whether Cassels owed a contractual duty, a fiduciary duty or a duty of care to the class can be made without considering the particular circumstances of individual class members. The same is true of the question whether Cassels breached those duties. There is no evidence that Cassels had dealings with individual class members that would make the answers to these questions dependent on individual communications or circumstances. [Reasons, at paras. 134-35.]

[12] The motion judge separated out for analytical purposes the damages phase of the case from the liability phase at paragraph 118 of the decision. This is entirely appropriate. The assessment of damages will be individualized but that does not compromise the usefulness of a class action to determine the common issues.

[13] The motion judge rejected Cassels' argument that "the diversity of circumstances of the Class members means that these issues are not common because they will be answered differently for different Class Members."

> In my view, Cassels' submission on this issue mis-characterizes the plaintiff's case. That case is that Cassels' actions or inactions deprived class members of the opportunity to collectively exercise their rights to get a better deal from GMCL. Resolution of the issues depends on legal and factual inquiries that are independent of individual class members, including the following inquiries:
>
> * the circumstances of Cassels' retainer and the nature and scope of that retainer;
>
> * whether Cassels disclosed its alleged conflict of interest to CADA or the class;
>
> * whether Cassels owed duties to the class and whether it breached those duties;
>
> * whether class members have *A.W.A.* rights in relation to the W.D.A.;
>
> * whether the exercise of class members' *A.W.A.* rights would have resulted in any increase in the compensation they were paid. [Reasons, at para. 138]
>
> The plaintiff will say that it is irrelevant that all dealers obtained independent legal advice before signing the W.D.A. and that some would have signed the W.D.A. in any event or returned it early. The plaintiff's case is that all dealers had a chance, through Cassels, to obtain a better deal and that due to Cassels' breaches of duty they lost that chance. [Reasons, at para. 139.]

[14] The motion judge concluded that the individual motivations of the class members were not relevant to the common issues to be certified:

> Cassels' submission ignores two important points. First, it ignores the significance of three important common issues, which can be summarized as follows:
>
> (a) was Cassels in a solicitor and client relationship with all class members?
>
> (b) did Cassels owe contractual, fiduciary or other duties to the class and if so what was the content of those duties?
>
> (c) did Cassels breach those duties?
>
> These are weighty questions. A negative answer to the first two questions will send the plaintiffs packing insofar as Cassels is concerned. A positive answer to all will significantly advance the claims of the class against Cassels.
>
> Second, as I have observed earlier, in focusing on the decision of each individual class member to sign the W.D.A., Cassels fails to join issue with the claim as framed by the plaintiff. The plaintiff does not say to Cassels: "If you had properly represented me, I would not have signed the W.D.A." On the contrary, the plaintiff puts his case against Cassels on the following basis:
>
> > If you had properly advised me and all your other clients, you would have told us that we had inalienable rights under the *A.W.A.* and you would have recommended that we use those rights and our bargaining power, as a potential spoiler of GMCL's bail-out, to negotiate a better deal with GMCL. By doing nothing because of your undisclosed conflict of interest, you deprived us of our only chance to negotiate a better deal and instead recommended that we speak to our individual lawyers, knowing that this would make it impossible for us to act collectively.
>
> Framing the claim in this fashion, as the plaintiff has every right to do, the individual motivations of class members are irrelevant. [Reasons paras. 155 to 158]

[15] I accept the implicit assumption in the motion judge's decision that retainers can change their character as events unfold. Even though Cassels was initially retained to help the dealers cope with a GM bankruptcy, its advice in May was provided in a different context, suggesting that the retainer had morphed. This is a factual issue to be determined on the evidence.

[16] Assuming that the retainer had morphed, the plaintiff's allegation is that an informed and competent lawyer in Cassels' position, but without its inside knowledge and its conflict of interest, would have urged the dealers to take collective action that would have produced a better deal than the WDA. This is not an implausible theory and it is not obviously impossible to prove to the standard required by, for example, *Folland v. Reardon* (2005), 74 O.R. (3d) 688 at paras. 61 and 73 (C.A.), and *Laferrière v. Lawson*, [1991] 1 S.C.R. 541 at pp. 608-609.

[17] If that loss of chance were proven, then the causation element would be satisfied from the viewpoint of contract or tort; it seems axiomatic that if the trier of fact ultimately finds on the evidence that another conflict-free lawyer would have negotiated a better deal, then the plaintiffs would plainly have accepted it instead of the WDA and the damages would be easily made out.

[18] I would otherwise dispose of the other issues raised by Cassels in the appeal in the same manner and for the same reasons given by the motion judge. Accordingly, the appeal as it relates to issues (j)-(l) is dismissed.

[19] 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.

Lauwers J.

Aston J

Sanderson J.

Date: March 26, 2012