CITATION: Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP, 2018 ONSC 5497
COURT FILE NO.: CV-10-397096CP
DATE: 20181010

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
TRILLIUM MOTOR WORLD LTD.	)	*David Sterns*, *Andy Seretis*, *Bryan Finlay*,
	)	*Marie-Andree Vermette*, and *Michael*
Plaintiff	)	*Statham*, for the Plaintiff
	)	
– and –	)	
	)	
GENERAL MOTORS OF CANADA LIMITED and CASSELS BROCK & BLACKWELL LLP	)	*Peter H. Griffin* and *Danielle Glatt*, for the Defendant Cassels Brock & Blackwell LLP
	)	
Defendants	)	
	)	
	)	**HEARD:** July 27, 2018

REASONS FOR DECISION

MCEWEN J.

[1] These reasons deal with two issues with respect to this ongoing matter: costs of the administration of the settlement, and the quantification of damages.

[2] I will deal with each in turn.

COSTS OF ADMINISTRATION OF THE SETTLEMENT

[3] Trillium seeks an order that Cassels pay for all reasonable costs and expenses incurred by Class Counsel in the administration and distribution of the proceeds of the judgment to the Class Members (the "Administration Costs").

[4] Trillium estimates that these costs will not exceed $100,000.00, although that remains to be seen.

[5] Cassels opposes this motion.

[6] In my view, it is fair and appropriate that Cassels be ordered to pay reasonable Administration Costs to be agreed upon by the parties at the conclusion of the administration or determined by me if the parties cannot agree.

[7] Subsection 26(9) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, provides as follows:

> (9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment **or may make such other order as it considers appropriate**. [emphasis added]

[8] In my view it is appropriate to make such an order.

[9] In this regard I agree with the comments of Justice Lederman in *Kerr v. Danier Leather* (2005), 76 O.R. (3d) 60 (S.C.J.), wherein he stated:

> [69] Administration fees incurred in distributing judgment proceeds resemble disbursements and are reasonably within the expectation of the defendants. They should be the type of item for which the plaintiff's class should be indemnified.
>
> [70] Just as the defendants would have been responsible for the cost of delivering judgment proceeds to multiple plaintiffs if individual law suits had been brought, they should similarly bear the costs of distributing funds among the class.
>
> [71] Accordingly, the defendants are to pay for all reasonable legal fees, costs and expenses incurred in the administration and distribution of the proceeds to class members.

[10] In my view, it was certainly within the reasonable expectation of Cassels that the Administration Costs would be borne by them if they were unsuccessful in the litigation.

[11] Cassels raises two primary objections, neither of which dissuades me from making the order sought by Trillium.

[12] First, Cassels submits that a claim for Administration Costs was not pleaded in the amended statement of claim, nor was it sought at the conclusion of trial as part of Trillium's legal costs and disbursements. I do not believe this is material. The amended statement of claim provides for "other relief" in the usual way. In my view, such other relief could and should include the Administration Costs. The fact it was not argued at the conclusion of trial, when legal costs and disbursements were considered, does not preclude Trillium from now raising the issue

at this time when a number of issues are being dealt with as a result of the decision of the Court of Appeal.

[13] It is reasonable that this issue be determined now that the Court of Appeal has rendered its decision. The conclusion of the appeal has caused the issue of Administration Costs to be raised. I see no prejudice to Cassels.

[14] Second, Cassels complains it may be exposed to open-ended liability notwithstanding the estimate provided by Trillium. I disagree. As I have advised counsel at the motion I will remain seized of this issue if counsel cannot ultimately resolve it. Obviously any claim for Administration Costs would have to be a reasonable one and there is no risk of an unlimited liability.

[15] In these circumstances Cassels ought to pay the reasonable Administration Costs to be agreed upon or assessed by me.

QUANTIFICATION OF DAMAGES

[16] This issue has returned to me as per the direction of the Court of Appeal: see *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*, 2017 ONCA 544 at para. 404, 72 B.L.R. (5th) 177:

> [404] For these reasons, I would hold that the question of the final quantification of damages be returned to the trial judge for further consideration in accordance with the following:
>
> 1) the proper starting value for the loss of chance should be $74.5 million (and not, as the trial judge found, $92 million). Applying a 55 percent contingency, the damages award would be $40.975 million. This figure should be rounded to $41 million;
>
> 2) account should be taken of the opt-outs from the Class, (10 percent), bringing the figure to $36.9 million; and
>
> 3) a determination should be then made, to the extent possible, of how many class members were Participation Form Dealers (*x* percent) to arrive at a new, final number.

[17] It is worth noting that Trillium, subsequent to the hearing of the appeal, brought a motion to vary the direction in para. 404. The Court of Appeal dismissed the motion, 2017 ONCA 840, 2017 CarswellOnt 16870 and stated as follows:

> [10] The July 2017 reasons of this court must be read as a whole and in the context of the issues raised and arguments advanced on

> appeal. The reasons do not address the mathematical approach to the calculation of damages at issue on this motion, as urged by CBB before the motion judge and rejected by him. That issue was not argued on the appeal.
>
> [11] Given this court's decision on appeal, the appropriate methodology and process for the calculation of damages in this case, including whether or not to adopt a mathematical approach to the quantification of damages in the manner urged by CBB, will be for the trial judge to determine at the new damages hearing. Subject to the directions provided by this court at para. 404, nothing in this court's reasons purports to constrain the trial judge's discretion in this regard.

[18] Subsequent to the aforementioned decisions of the Court of Appeal, the parties have determined that there were 141 Participation Form Dealers.

[19] It also bears noting that another error has crept into this case.

[20] At the trial the parties agreed that 202 of the 240 dealers accepted Wind-Down Agreements ("WDAs").

[21] Post-appeal, in June 2018, counsel determined that in fact 211 dealers accepted WDAs. Cassels argues that I should recalculate damages to incorporate this new information to reduce the award of damages.

[22] This new discovery should not alter the calculation of damages for two reasons:

- At the material time when a negotiation could have taken place the number of 202 dealers who accepted WDAs was correct. It was only later that 9 additional dealers accepted WDAs. Thus, the basis of my analysis with respect to the number of dealers that have accepted WDAs (202) remains sound during the time period when a negotiation may have taken place. On this basis I am not persuaded that a further deduction is in order. Many factors were considered in my damage assessment. It would be inappropriate to tinker further based on this new information, which if accepted, could result in a modest adjustment.

- It is simply too late to revisit this issue in any event. Post-trial, and after the release of my reasons, the parties returned to deal with the error concerning the number of Participation Form Dealers. They have now identified another issue with respect to the number of Dealers that have accepted WDAs. I accept the submissions of Trillium that the revisiting of the factual context of this case has to come to an end at some point in time. The matter

was not raised before the Court of Appeal. Further, even if I am wrong with respect to what I have stated above, it would result, as noted, in a modest adjustment at best.

[23] With respect to the issue with quantification Cassels argues that I should adopt a mathematical approach. Cassels has submitted a number of proposals to me.

[24] If I were to accept a mathematical approach, in my view, the most sensible one would result in damages in the amount of $28,745,304.00 as follows: 141/181 x $36.9 million dollars. This adopts my prior reasoning and the ruling of the Court of Appeal with respect to the starting point of $36.9 million.

[25] Trillium urges me not to adopt a mathematical approach. Rather, Trillium submits that such an approach would accept Cassel's argument that aggregate damages were inappropriate in this case, which has been rejected.

[26] Instead, Trillium urges me to adopt what it describes as a proportional mathematical approach.

[27] Trillium submits that the 141 Participation Form Dealers received 81.6% of the total wind-down payments made to the 181 Class Members. It therefore submits that the proportional mathematical approach yields damages of $30.1 million dollars ($36.9 million dollars x 81.6%).

[28] Trillium goes on to submit that the group of 141 Participation Form Dealers was comprised of sizeable dealers including most of the large dealers that were terminated. Trillium therefore submits that such a group had a positive and disproportionate bargaining position. In light of this, Trillium submits that a fair and principled approach to determining damages, while recognizing this self-described negotiating leverage, is to adopt a midpoint between the $36.9 million dollar ceiling mandated by the Court of Appeal and the $30.1 million dollar amount noted above which is yielded by the proportional mathematical approach.

[29] Trillium therefore submits that an aggregate damages award of $33.5 million dollars best reflects the damages to which the Classes are entitled and reflects an appropriate reduction for the smaller seize of the Client group while acknowledging their alleged enhanced bargaining power.

[30] Alternatively, it seeks the amount of $30.1 million dollars.

[31] I prefer Cassels' approach and award damages in the amount of $28,745,304.00.

[32] As I noted in my previous reasons (see for example para. 589) the value of the loss chance cannot be determined with any certainty because of the multiple hypotheticals involved.

[33] With that in mind, it is entirely reasonable and logical to apply the same approach as I did in my original reasons with the only difference, of course, being the reduction in Participation Form Dealers from 181 to 141 Dealers.

[34] In my view, I properly assessed the multiple hypotheticals when I first considered this issue in my original reasons. This consideration has already covered, in a general sense, the arguments now raised by Trillium. For example, in paragraphs 541 and 604 of my reasons I deal with the issue of the leverage the dealers would have as a result of negotiating as a group.

[35] Furthermore, I do not accept Trillium's submission that the evidence adduced at trial supports this argument that the 141 Participation Form Dealers enjoyed a disproportionally favourable bargaining position. While there was some evidence in support of this contention, I do not accept that, when one weighs all of the evidence, this would result in an increase in damages over and above the approach that I have already taken. The evidence Trillium now relies on is not persuasive. In any event, I see no reason to base the damages award on the weight of 141 Participation Form Dealers as opposed to the entire group.

[36] The method of calculation that I adopted in my original reasons was not appealed by Trillium and I see no principled reason, based on the above, why damages should now be differently calculated. The method of calculation I adopted does not endorse an individualized approach to damages or reject the principles of aggregate damages.

[37] Last, Trillium's submission would also invite me to reconsider a number of other issues in calculating damages. For example, should I base the calculations on the 141 Participation Form Dealers or rather on the basis of the entire group of 240 GMCL Dealers? How would the Saturn Dealers factor into any such calculation? In light of my comments above, I see no useful reason to engage in such an exercise. I have already completed this work in my original Reasons for Judgment.

[38] After considering submissions from both Trillium and Cassels I see no reason, either based on the evidence or the principles of aggregate damages, to stray from my previous formula. Accordingly, damages in the amount of $28,745,304 are consistent with the evidence and the principles of aggregate damages.

Disposition

[39] For the reasons above I find that Cassels is responsible for the costs of the administration of the settlement to be agreed upon or assessed by me.

[40] I further find that Trillium is entitled to damages against Cassels in the amount of $28,745,304.00.

McEwen J.

Released: October 10, 2018

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Defendants

REASONS FOR DECISION

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