CITATION: Kalra v. Mercedes Benz, 2022 ONSC 941
COURT FILE: CV-16-550271-CP
DATE: 20220223

SUPERIOR COURT OF JUSTICE – *ONTARIO*

RE: **YOGESH KALRA,** Plaintiff / Moving Party

AND:

MERCEDES BENZ CANADA INC., DAIMLER AG, MERCEDES BENZ USA LLC and MERCEDES BENZ FINANCIAL SERVICES CANADA CORPORATION, Defendants / Responding Parties

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward Belobaba

COUNSEL: *Peter Griffin, James Sayce, Brian Kolenda and Mari Galloway* for the Plaintiff

Steven Rosenhek, Vera Toppings and Nicholas Carmichael for the Defendants

HEARD: February 9, 2022 via video

Settlement Approval

[1] This "defeat device" class action, targeting the Mercedes Benz line of BlueTEC diesel automobiles[1] and certified as a class proceeding five years ago,[2] has settled. The value of the settlement, including cash payments and non-cash services could well exceed $500 million.

[2] Class counsel ask that the settlement agreement — which also provides for $14 million in legal fees (to be paid by the defendant) and a requested $15,000 honorarium for the representative plaintiff (to be paid out of the class settlement) — be approved under s. 29(2) of the *Class Proceedings Act.*[3]

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[1] The BlueTEC vehicle models at issue are the following: the ML320, ML350, GL320, E320, E250, E250, S350, R320, R350, E Class, GL Class, ML Class, R Class, S Class, GLK Class, GLE Class and Sprinter.

[2] *Kalra v. Mercedes Benz*, 2017 ONSC 3795.

[3] *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA").

[3] At the conclusion of the settlement approval hearing, I advised counsel that the settlement agreement, the legal fees payment and a reduced honorarium would be approved and that my written reasons would follow shortly. These are the reasons.

Background

[4] Yogesh Kalra, the representative plaintiff, purchased one of the BlueTEC vehicles in 2012. He commenced this class proceeding in 2016 on behalf of all current and former owners and lessees of the impugned line of BlueTEC automobiles (model years 2009 to 2016). About 80,000 such vehicles were sold or leased in Canada over the course of the applicable time period.

[5] The plaintiff's basic allegation is that, contrary to the defendant's representations that the BlueTEC vehicles were "clean diesels" with low emissions, they actually contained a pre-programmed "defeat device" that turned off the emission control system when the ambient air temperature dropped below 10 degrees Celsius (50 degrees Fahrenheit). In other words, argued the plaintiff, the defendants' BlueTEC vehicles were emitting high (and illegal) levels of nitrogen oxide pollution for most of the time that they were being driven on Canadian roads.

[6] As I noted in the certification decision,[4] this was primarily an action for negligent misrepresentation. The core common law claim was for the damages sustained by the class members because of an alleged overpayment for a diesel automobile that failed to deliver on its emissions control promise.[5]

[7] Unlike other "defeat device" actions that settled fairly quickly such as the class action against Volkswagen,[6] here the litigation was unusually hard fought. Class counsel did not have the benefit of regulatory findings, criminal prosecutions or admissions of fault. Mercedes Benz, as was their right, denied any and all wrongdoing and resisted almost every procedural step. As a result, this court convened numerous case conferences and heard many motions. It was only after several years of difficult litigation and a number of unsuccessful mediations that the parties concluded the settlement herein.

The settlement agreement

[8] The settlement will provide financial compensation to between 73,000 and 82,000 class members whose BlueTEC vehicles allegedly contained the defeat device. It will also provide a wider benefit — the vehicles, which currently pollute above the permitted level, will be modified and brought into compliance with environmental standards by the no-charge installation of an Approved Emission Modification or AEM (referred to in the settlement agreement as "the Field Measure".)

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[4] *Supra,* note 2, at para. 6.

[5] *Supra,* note 2, at para. 8.

[6] See for example, *Quenneville v. Volkswagen,* 2017 ONSC 2448.

[9] The settlement includes three key features:

- the no-charge installation in every eligible vehicle of a Field Measure to correct the BlueTEC emissions system;
- an extended modification warranty for the newly installed Field Measure; and
- a cash payment of up to $2925 predicated on the installation of the Field Measure.

[10] The defendant has also agreed, as part of the settlement, to pay class counsel's legal fees in the amount of $14 million, plus disbursements and taxes. This means that the monetary compensation paid to each settlement class member will not be reduced to pay counsel fees. It will only be reduced by the 10 per cent levy payable to the Class Proceedings Fund.[7]

[11] According to class counsel, the value of the overall settlement (the no-charge Field Measure, the extended warranty and the cash payment) is in the range of $530 million. The cash payment component alone, given at least 73,185 eligible recipients and assuming full take-up, is about $215 million.

The objections

[12] Class counsel received 24 written objections opposing the settlement. Several of the objectors also participated in the video hearing and made compelling oral submissions. I recognize that 24 objections out of some 75,000 class members is a tiny percentage. Nonetheless, at a settlement approval hearing, every class member's objection must be taken seriously and carefully considered. As they were here.

[13] Most of the objections focused on the fact that the compensation payment under the parallel American settlement was 30 percent higher than under the Canadian settlement herein.[8] However, class counsel in their written submissions and again at the hearing attributed this difference in cash compensation amounts to the realities of government regulation — in this case very aggressive in the U.S. but non-existent in Canada.

[14] By imposing significant financial penalties and threatening additional penalties, American state and federal agencies were able to persuade the defendant to install the Field Measure in at least 85 per cent of the vehicles by a fixed date. The defendant agreed to the higher cash payments in the civil settlement in the U.S. in order to motivate take-up and help ensure that the required level of Field Measure installations would be achieved by the prescribed deadline and the imposition of additional financial penalties would be avoided.

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[7] O. Reg. 771/92.

[8] The U.S. class action was commenced in 2016 and settled in 2020.

[15] In the Canadian settlement, class counsel did not have this leverage. There were no pre-existing regulatory sanctions or orders. The installation of the Field Measure (and the costs to the defendant) had to be negotiated as a *de novo* benefit. This allowed the defendant to press for a lower cash compensation in the overall settlement package. I understand and accept this explanation for the comparative difference in cash compensation amounts.

[16] There were several other objections but, here again, class counsel provided a reasonable response and explanation to each of them.

[17] Some objectors wanted to be reimbursed for the expenses incurred trying to repair the defeat device. Class counsel doubted, on the evidence, that the defeat device could be corrected with compensable repairs and, in any event, these repair costs would not have been recoverable in the litigation — not to mention the no-charge installation of the Field Measure.

[18] For the objectors who raised concerns about the performance impact of the Field Measure, class counsel noted that the settlement itself provides additional compensation where the Field Measure impacts the vehicles' performance in certain ways.

[19] Some objectors suggested that a full buy-back and replacement of their vehicle was the only appropriate outcome. However, as class counsel pointed out, given that the Field Measure corrected the defeat device, it did not make sense to require buy-back or replacement when a no-charge, government-approved repair coupled with cash compensation would reasonably resolve the problem. Under the terms of the settlement, it is only where there is no approved Field Measure and a vehicle therefore cannot be re-registered with the regulator that the defendant is required to provide a buyback option.

[20] One objector raised the issue of the 2015 ML350 being incorrectly excluded from the settlement. This error was identified and corrected by the parties.

[21] In sum, each of the 24 objectors raised genuine concerns about certain aspects of the settlement. Nonetheless, the content of the objections do not dislodge my overall finding, explained in more detail below, that for the overwhelming majority of class members the settlement is fair and reasonable.

Settlement approval

[22] Section 29(2) of the CPA requires court approval of a class action settlement before it can take effect. Judges must be satisfied that the proposed settlement is fair and reasonable and in the best interests of the class.[9] Or, put somewhat differently, that the settlement amount falls within a range or zone of reasonableness.[10] The overarching approval criterion supports a utilitarian

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[9] *Dobbs v. Sun Life Assurance*, (1998) 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998) 41 O.R. (3d) 97 (C.A.).

[10] *Ibid.*, at para. 30 (Gen. Div.)

analysis — the goal is not a perfect outcome for every class member but a reasonable outcome for the majority of class members.

[23] My finding that the settlement herein is fair and reasonable is based on two key points. First, the settlement compares favorably to the U.S. settlement but for the increased level of cash compensation provided by the latter. However, the larger cash-component in the American settlement has been satisfactorily explained by class counsel. Otherwise, the Canadian settlement is very similar to that in the U.S. and thus falls within a zone of reasonableness.

[24] Secondly, the risks of further litigation were particularly significant. Pressing ahead to trial in an effort to extract more cash compensation could easily have resulted in class members getting nothing at all. Class counsel were well aware of this court's recent decision in *Maginnis*[11] and the finding of no compensable harm when vehicles with defeat devices were subject to a recall by the manufacturer and were repaired.[12] By securing cash payments of up to $2,925 for every eligible vehicle, class counsel have negotiated a cash compensation component that would probably not have been available to class members at trial had the defendant unilaterally recalled the vehicles to implement the Field Measure.

[25] This risk of a unilateral recall and installation of the Field Measures by the defendant, coupled with the lack of regulatory enforcement in Canada, meant that the ability to negotiate a cash payment matching or exceeding the amount in the US settlement was significantly limited.

[26] Another obstacle arose out of the fact that aggregate damages were not certified as a common issue in part because the defendant's monetary liability could not reasonably be determined without proof by individual class members.[13] There was every indication that thousands of individual trials would be needed to prove causation and damages — a costly and time-consuming process that could well result in little to no compensation for a great many class members. One only has to recall the *Mackinnon* decision[14] and the difficulties that were faced by the class in trying to monetize the "clean diesel" promise, let alone doing so in the context of literally thousands of individual trials – trials that would probably never proceed because few is any class members would want to advance personal funds to retain lawyers and experts when the likelihood of success was slim at best.

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[11] *Maginnis and Magnaye v. FCA Canada et al*., 2020 ONSC 5462

[12] *Ibid,* at para 36.

[13] *Kalra, supra,* note 2, at para. 67.

[14] *Mackinnon v. Volkswagen,* 2021 ONSC 5941. The low emissions or "clean diesel" feature is typically not itemized as such on the manufacturer's invoice. Proving the value of this feature on a class-wide basis is almost an insurmountable challenge.

[27] Suffice it to say, I am persuaded that the proposed settlement and its package of cash and non-cash benefits is fair and reasonable and very much in the best interests of the vast majority of class members.

Legal fees approval

[28] In the usual class action settlement, class counsel typically claims the percentage recovery that was agreed to in the retainer agreement. My approach in these cases, as set out in *Cannon*[15] and *Brown,*[16] is to recognize that "risk incurred" is best measured over many years of wins and losses, presume the validity of the retainer agreement, and approve the agreed-to contingency fee. Where the settlement is a "mega settlement", more than say $50 million, different considerations apply as I explained in the *Macdonald* decision.[17]

[29] Here, the defendant as part of the settlement process agreed to pay class counsel's legal fees in the amount of $14 million, plus $490,000 in disbursements and applicable taxes. The court's primary concern in a case such as this — where the defendant agrees to pay class counsel's legal fees directly as part of the settlement — is the possibility of collusion. The concern is that the defendant's agreement to pay class counsel's legal fees directly may have been achieved at the expense of the absent class members — that the "settlement pie" was "pre-cut" in favour of the defendant and class counsel rather than in the best interests of the class.[18]

[30] In cases where legal fees are paid by the defendant as part of the settlement agreement, the court must be satisfied that the core settlement agreement (and in particular class member compensation amounts) was fully negotiated and concluded *before* counsel turned their attention to the question of legal fees. The court will generally be satisfied if class counsel file an affidavit, as was done here, confirming that legal fees were negotiated only after the economic terms of the settlement had been achieved. The class action judge must assume that class counsel, as officers of the court, are telling the truth. I therefore accept that the negotiation of the $14 million in legal fees as part of the settlement agreement was not at the expense of absent class members.

[31] The next question is whether $14 million is a reasonable legal fee given the recovery herein. I have no difficulty concluding that it is more than reasonable.

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[15] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

[16] *Brown v. Canada (Attorney General)*, 2018 ONSC 3429.

[17] *MacDonald et al v. BMO Trust Company et al*, 2021 ONSC 3726.

[18] Koniak, *"How like a Winter – The Plight of Absent Class Members Denied Adequate Representation"* (2004) 79 Notre Dame L. Rev. 1787 at 1797.

[32] Consider only the cash-compensation component of the settlement and the typical case where legal fees are determined by the retainer agreement and paid out of class compensation. If class counsel had recovered only $50 million in cash compensation and requested the 28 per cent contingency fee agreed to in the retainer agreement, I would have approved the requested $14 million in legal fees. Here, class counsel's recovery, in terms of cash and non-cash benefits was more than $500 million. The negotiation of a $14 million legal fee that would be paid directly by the defendant is — to repeat — more than reasonable.

[33] I am therefore satisfied that the payment by the defendant of $14 million for class counsel's legal fees, plus disbursements and taxes, should be approved.

Honorarium

[34] Class counsel ask that Mr. Kalra, the representative plaintiff, be paid a $15,000 honorarium out of the settlement amount for the good work that he did over the five years of litigation. However, as class counsel well understand, representative plaintiffs do not receive additional compensation for simply doing their job as class representatives. An honorarium is justified only where the representative plaintiff can demonstrate a level of involvement and effort that goes beyond what is normally expected and is truly extraordinary or where there is evidence that he was financially harmed because he agreed to be a class representative.[19]

[35] Here, in the motion record as initially presented, there was no evidence that the efforts of the representative plaintiff were "truly extraordinary" or that he sustained any related economic harm. I allowed Mr. Kalra to file a supplementary affidavit to provide more detail and he quickly did so.

[36] Mr. Kalra explained in this additional affidavit that he was a self-employed software consultant. Every hour he took to meet with counsel or attend at cross-examinations was otherwise billable time. He noted that by his estimate he had dedicated more than 100 hours or about $14,000 in lost income opportunities fulfilling his obligations as a representative plaintiff. However, he then added, quite wisely in my view, that he "[did] not wish to be seen as asking the Court to reimburse me for my time." He was right to recognize that every representative plaintiff, self-employed or otherwise, necessarily assumes significant and time-consuming responsibilities when they commence a class action that *per se* do not justify financial reimbursement or the payment of an honorarium.

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[19] *Aps v. Flight Centre Travel Group*, 2020 ONSC 6779, at para. 43; *Casseres v. Takeda Pharmaceutical Company*, 2021 ONSC 2846 at para. 10. I note that my colleague Perell J. in *Doucet v. The Royal Winnipeg Ballet*, 2022 ONSC 976, has recently concluded that judges should no longer under any circumstances approve the payment of an honorarium to a representative plaintiff. I would not go that far. In my view, there will be cases of extraordinary effort or personal financial harm that will justify such a payment: see, for example, *MacDonald et al v. BMO Trust Company et al*, 2021 ONSC 3726 (at paras. 54-59) where I approved a large honorarium for a representative plaintiff who commenced a class action at enormous personal and financial sacrifice — he was *de facto* black-balled in his industry, couldn't obtain comparable employment and sustained significant financial harm.

[37] However, Mr. Kalra made a further point in his supplementary affidavit that caught my attention. About two months after filing the proposed class proceeding, Mr. Kalra traded his polluting BlueTEC vehicle for another automobile. He "no longer wanted to drive [the vehicle]" and he "did not expect to recover any compensation pursuant to any settlement or judgment that could be reached in this action having traded the vehicle in."

[38] Nonetheless, with no expectation of recovery, Mr. Kalra continued as representative plaintiff over the next five years of time-consuming document reviews, cross-examinations and meetings with counsel. He did this because, as he put it:

> I felt it was my duty to continue acting as the representative plaintiff. I felt strongly that class members were entitled to redress for the defendants' alleged conduct, and I sought to act in their best interests to achieve an outcome that would rectify the alleged defects in the eligible vehicles and maximize class members' recovery.

[39] With no expectation of personal gain and at considerable cost to his consulting business, Mr. Kalra stayed on board as the representative plaintiff for what turned out to be five long and bumpy years of litigation. In my view, this is the kind of extraordinary effort that justifies a significant honorarium. This class action succeeded because of his continued commitment.

[40] I approve the payment of an honorarium in the amount of $10,000.

Disposition

[41] The settlement agreement is approved, as are class counsel's legal fees (plus disbursements and HST) and a $10,000 honorarium for the representative plaintiff.

[42] Orders to go as per the draft orders that were signed on February 14, 2022.

Signed: *Justice Edward Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective and binding from the date it is made and is enforceable without any need for entry and filing. Any party to this Judgment [Order] may submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

Date: February 23, 2022