CITATION: Quenneville v. Volkswagen, 2017 ONSC 2448
COURT FILE NO.: CV-15-537029-CP
DATE: 20170426

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Matthew Robert Quenneville, Luciano Tauro, Michael Joseph Pare, Therese H. Gadoury, Amy Fitzgerald, Renee James, Al-Noor Wissanji, Jack Mastromattei and Jay MacDonald, *Plaintiffs*

AND:

Volkswagen Group Canada Inc., Volkswagen Aktiengesellschaft, Volkswagen Group of America Inc., Audi Canada Inc., Audi Aktiengesellschaft, Audi of America Inc. and VW Credit Canada Inc., *Defendants*

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Charles Wright, Harvey Strosberg, Reidar Mogerman, David O'Connor and Emilie Maxwell* for the Plaintiffs

Cheryl Woodin, Robert Bell, Robert Charbonneau and Robin Squires for the Defendants

HEARD: March 31, 2017 and written submissions

VW SETTLEMENT APPROVAL (2.0 LITRE DIESEL)

[1] This class action relating to VW 2.0-litre diesel vehicles was certified for settlement purposes in December[1] about two months after the American settlement was

[1] *Quenneville v. Volkswagen*, 2016 ONSC 7959 (December 19, 2016).

judicially approved.[2] The proposed Canadian settlement ("the Settlement"), worth about $2.1 billion, mirrors much of what was provided to American class members in the U.S. settlement, worth about $10 billion.

[2] Given that the number of affected VW owners and lessees in Canada is around 105,000 and amounts to about one-fifth of the 500,000 or so that reside in the U.S., the settlement proportions appeared to be appropriate. And, on their face at least, the buy-back provisions and damages payments in the Canadian settlement appeared to be reasonable.

[3] However, I needed a benchmark against which the Settlement could sensibly be measured. The most obvious was a legal benchmark. For example, how much would the class members in Canada have recovered under provincial consumer protection legislation or under the common law of tort?

[4] Because all of the vehicles have been driven and none of them can be returned in their original condition, the remedy provided under s. 18(1) of the Ontario *Consumer Protection Act*,[3] namely rescission of the purchase agreement, return of the car and recovery of the full purchase price, is not available. Under s. 18(2) of the Ontario Act and under tort law generally, the measure of damages that applies here, put simply, is "Price paid minus value received."[4] I will refer to this formula as "the tort approach."

[5] At the March 31, 2017 hearing of this motion for settlement approval I advised class and VW counsel that I was not prepared to approve the proposed $2.1 billion Settlement until I was reassured that the amounts payable under the Settlement were at least equal to the amounts that the class members would receive under the tort approach.

[6] Over the course of the last two weeks, class and VW counsel responded in detail to my numerous questions with written submissions and email exchanges, culminating with an in-person meeting on April 18. At the end of all of this, I can comfortably say that all of my concerns have been addressed and resolved.

---

[2] *In re Volkswagen "Clean Diesel" Marketing Sales Practices and Products Liability Litigation,* MDL, No. 2672 (CRB)(JSC) (U.S. District Court, Northern District of California, October 25, 2016).

[3] *Consumer Protection Act, 2002,* S.O. 2002, c. 30, Schedule A.

[4] Discussed in *Ramdath v. George Brown College*, 2014 ONSC 3066, at paras. 15-16.

[7] For the reasons set out below, I am now satisfied that, in the overall, class members could well receive *more* under the Settlement than they would have recovered under the tort approach. The Settlement is therefore fair and reasonable and in the best interests of the class. I signed the approval Order on April 21, 2017 with reasons to follow.

[8] These are my reasons.

(1) What class members will receive under the Settlement

[9] The 105,000 class members purchased or leased one of the following VW or Audi 2-Litre diesel automobiles in the affected model years 2009 to 2015: VW Jetta 2009-15; VW Jetta Wagon 2009; VW Beetle 2013-15; VW Golf 2010-13 and 2015; VW Golf Wagon 2010-14; VW Golf Sportwagon 2015; VW Passat 2012-15; and Audi A3 2010-13 and 2015.

[10] The Settlement provides a defined cash payment to all eligible owners and lessees and for many class members it also provides a choice to sell or trade in their vehicle, terminate their lease without any early termination penalty, or keep their vehicle and get an emissions modification once this is approved by government regulators, coupled with an extended emissions warranty.

[11] For my purposes here, it is sufficient if I focus on what the average owner-class member will receive under the Settlement.[5] He or she will have a choice:

- *Return the vehicle* for the Buyback Price (the CBB wholesale value at mid-September, 2015 before the "defeat device" fraud was made public) PLUS a Damages Payment ranging from $5100 to $8000; or

- *Keep the vehicle*, obtain an emissions modification once it is approved by the regulators PLUS a Damages Payment ranging from $5100 to $8000;

  [If the emissions modification for the particular vehicle is not approved and implemented, the class member can choose the Buyback plus the Damages Payment OR he or she can opt out of the Settlement and together with any others in the same position continue to litigate under this court's supervision.]

[5] Of the 105,000 class members, about 98,000 are owners and only about 7,000 are lessees.

[12] The chart below shows what six of the representative plaintiffs will receive under the Settlement and provides a fair representation of the range of recovery for all eligible owners:

Representative Plaintiff	Model	MY	Date of Purchase	Total Purchase Price	Current Mileage (km)	Damages Payment	Buyback Vehicle Value[1]	Total Settlement Payment
Tauro	Golf	2015	3/25/2015	$23,904	51,355	$7,000	$17,650	$24,650
Tauro	Golf	2015	7/31/2015	$27,689	45,908	$7,000	$21,800	$28,800
Tauro	Jetta	2012	11/1/2011	$33,720	158,301	$5,250	$13,500	$18,750
Tauro	Jetta	2012	12/12/2011	$33,665	188,843	$5,250	$11,990	$17,240
Tauro	Golf	2015	3/25/2015	$27,700	62,102	$7,000	$20,800	$27,800
Pare	Passat	2012	8/29/2012	$38,908	133,000	$5,250	$18,450	$23,700
Gadoury	A3	2010	12/15/2012	$32,635	91,000	$5,100	$16,950	$22,050
Fitzgerald	Beetle	2013	7/3/2013	$32,336	56,240	$5,500	$17,050	$22,550
James	Beetle	2013	3/9/2013	$30,612	119,574	$5,500	$15,050	$20,550
MacDonald	Golf	2011	9/9/2010	$38,181	157,000	$5,100	$14,750	$19,850

[13] I will use Mr. Pare as an example. Mr. Pare can return his 2012 Passat under the Buyback option and receive a total of $23,700, or keep his car (assuming the emissions modification can be done) and receive a damages payment of $5250.

[14] Is this fair and reasonable? How does this recovery compare to what Mr. Pare would have recovered under the tort approach?

(2) What class members would have received under the tort approach

[15] Of the approximately 105,000 class members, only 36 opted out of the class action and only a tiny percentage objected to the Settlement. Some 522 class members filed valid pre-hearing objections, 10 spoke at the hearing on March 31, and a further 128 class members (probably including some duplications) forwarded post-hearing letters to my attention. I considered every objection and letter and I am grateful that these class members took the time to voice their concerns. Most of the objections and letters focused on issues that were unique to the class member's personal situation and about which I can do very little, such as not receiving compensation for roof racks or extended warranties. But many of the letters also addressed a more generalized issue and urged me to find that class members were entitled to nothing less than a full refund of their purchase price.

[16] A full refund of the purchase price is a non-starter. It is important to repeat again that under Canadian law, whether consumer protection legislation or tort law, no such recovery of the full purchase price is possible. No class member is entitled in law to rescind the sales agreement and recover his or her full purchase price because, in every case, the affected automobile has been driven and used for many months if not years - both before and after the "defeat device" fraud was publicly disclosed by the American EPA on September 18, 2015.

[17] I discussed this matter at length with counsel and I reviewed the applicable legal authorities. I am satisfied that the tort approach requires not only that the residual (CBB) value of the class member's vehicle be deducted from the purchase price but that the balance must then be further reduced to reflect the fact that the car was used, that is driven, over the time period in question.

[18] Consider again Mr. Pare's situation. Mr. Pare purchased a 2012 VW Passat in August 2012 for $38,908, including taxes. Let's assume that he learned about the VW "defeat device" fraud on or about September 18, 2015. By this Announcement Date, Michael had driven his Passat just over three years, logging about 88,000 kilometres.

[19] As set out in the chart below, the CBB wholesale value of his car on the day before the Announcement was $18,450. It follows that up until the Announcement Date, Michael's use of the car (driving some 88,000 km) could be valued at $20,458 (that is $38,908 minus $18,450). The CBB wholesale value in November, 2015, shortly after the Announcement, was $17,450. That is, the core "loss" caused by the Announcement was only $1000. The CBB wholesale value today is about $13,492.

Representative Plaintiff	Model	MY	Sep 2015 Buyback Value	Nov 2015 Buyback Value	Mar 2017 Buyback Value
Mr. Pare	Passat	2012	$18,450	$17,450	$13,492
Ms. Gadoury	A3	2010	$16,950	$15,900	$13,500
Ms. Fitzgerald	Beetle	2013	$17,050	$15,950	$14,900
Ms. James	Beetle	2013	$15,050	$13,950	$12,592
Dr. MacDonald	Golf	2011	$14,750	$13,800	$9,167

[20] Thus, under the tort approach, had Michael sued VW in say November, 2015 he would have received Purchase Price minus Residual Value, i.e. $38,908 minus $17,450, for an initial balance of $21,458. But Canadian law is clear that the car owner must

account "for any benefit he may have derived from the use of the property."[6] That is, he must "make allowance" for depreciation.[7] In Michael's case, the value to him of having the use of his car for some 37 months - driving some 88,000 km - is best measured by the depreciation[8] which is $20,458. Deducting his amount from the initial balance of $21,458 leaves Michael with a core damages award of $1000. He would also be allowed to claim incidental losses but these would probably be quite modest – let's say he would get $2000 in overall damages.

[21] If Mr. Pare waited and sued VW today when the CBB value of his 2012 Passat is $13,492, his recovery under the tort approach would, again, be Purchase Price minus Residual Value minus Use Value over the last 4½ years of driving. That is, $38,908 minus $13,492 minus $24,416 equals $1000. If you add $1000 for incidentals, the total recovery under the tort approach is $2000.

[22] In short, the most Mr. Pare would probably recover under provincial consumer protection legislation or tort if he sued VW in fraud or fraudulent misrepresentation is $1000 to $2000 in damages. But he would still have his car with (hopefully) a completed emissions fix and a CBB value of $13,492. Thus, under the tort approach, he would net out at $15,492 consisting of $2000 in damages and a car worth $13,492.

[23] Under the Settlement, Mr. Pare will net out at $23,700 if he returns the car for the Buyback and Damages, and $18,742 (Damages Payment of $5250 plus CBB Value of $13,492) if he keeps the car and gets the emissions modification.

[24] Thus, Mr. Pare will receive $8208 more under the Settlement than under the tort approach if he returns the car and chooses the Buyback option and $3250 more if he keeps the car.

[25] There is another benefit to the Buyback option. The Buyback amount is frozen at the pre-Announcement September, 2015 vehicle value. This is significant for class members who continue to use their vehicle up to the date of their Buyback. In addition to the $23,700 Settlement amount that Mr. Pare will receive, he will be able to use and drive

---

[6] *Addison v. Ottawa Auto and Taxi Co.*, (1913) 16 D.L.R. 318 (C.A.) at para. 8. Also see *Vieira v Prestige Auto Sales Inc* (2004), 12 MVR (5th) 297 at paras 51 and 63 (Ont SCJ); *Wu v Volvo Cars of Canada Ltd*, (2004), 130 ACWS (3d) 188 (Ont Div Ct); and *Marcil v Eastview Chevrolet Pontiac Buick GMC* Ltd, 2016 ONSC 3594 (Div Ct).

[7] *Addison, supra*, note 6, at para. 8.

[8] *Vieira, supra*, note 6, at paras. 63-64.

his car until the Buyback takes place without regard for the further use-related depreciation of $3,958. This is almost a $4000 additional benefit up to March, 2017 and it will continue to increase until the car is returned for the Buyback.[9]

[26] It is therefore not surprising that in the U.S. the overwhelming majority of American class members are choosing the buyback option. According to a recent letter from VW's American counsel reporting on the progress of the U.S. Settlement Program, VW has thus far completed almost 240,000 buybacks or early lease terminations and has performed emission modifications to just over 6000 vehicles in the 2015 model year.[10]

[27] I fully expect the Canadian experience to be similar, with the majority of class members here as well choosing the Buyback because under the Settlement this option provides the class member with a larger recovery than keeping the car and pocketing the Damages Payment or suing under the tort approach.

[28] The analysis set out above deals only with one example, but the same analysis will result in similar findings for other owner-class members. I am therefore satisfied that in the overall the Settlement provides a larger recovery for class members, whether owners or lessees, than what would have been recovered under provincial consumer protection legislation or tort.

[29] I am pleased to find that the Settlement is fair and reasonable and in the best interests of the class.

Disposition

[30] The proposed Settlement is approved.

[31] An honorarium in the amount of $49,975, ranging from $725 to $2925 in individual payments to the 31 representative plaintiffs residing in New Brunswick, Nova

---

[9] Although not part of the tort analysis, it will be comforting to class members to note that the Buyback plus Damages Payment will exceed the retail values of the eligible vehicles as of the day before the Announcement by as much as 112 to 128 percent. This "surplus" will address many of the individualized concerns about not being sufficiently compensated for the cost of accessories or extended warranties.

[10] Canadian counsel advise that VW has filed emission modification plans with American regulators for model years 2009 to 2014 inclusive and are currently awaiting approval. VW counsel are hopeful that emissions modifications will soon be approved for all of the affected VW and Audi diesel vehicles.

Scotia, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia is also approved as fair and reasonable.

[32] Order to go as per the Approval Order signed on April 21, 2017.

_____

Belobaba J.

Date: April 26, 2017