



**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL COURT  
GROUP PROCEEDING LIST**

Case: S ECI 2020 04789

Filed on: 05/07/2022 02:09 PM  
S ECI 2020 04789

BETWEEN

**BEECHAM MOTORS PTY LTD (ACN 010 580 551)**

Plaintiff

and

**GENERAL MOTORS HOLDEN AUSTRALIA NSC PTY LTD (ACN 603 486 933)**

Defendant

**DEFENCE TO THIRD FURTHER AMENDED STATEMENT OF CLAIM**

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Date of document: ~~7/03/2022~~ 5/07/2022

Filed on behalf of: The defendant

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In answer to the plaintiff's ~~third~~ second further amended statement of claim dated ~~1 February~~ 31 May 2022, the defendant says as follows:

**The plaintiff and Group Members**

- 1 It does not plead to paragraph 1 as that paragraph makes no allegations against it.
- 2 It does not plead to paragraph 2 as that paragraph makes no allegations against it.
- 3 It admits paragraph 3.

**The defendant and the Holden brand**

- 4 As to paragraph 4:
  - (a) it admits subparagraphs (a), (b) and (d);
  - (b) save to say that the network was established as pleaded in subparagraph (d), it admits subparagraph (c);
  - (c) it says that it is a wholly owned subsidiary of General Motors Holdings Australia Pty Ltd, which is a wholly owned subsidiary of General Motors Holdings LLC,

which is a wholly owned subsidiary of General Motors Company and otherwise admits subparagraph (e).

5 As to paragraph 5:

- (a) it admits subparagraphs (a) to (c), and (g);
- (b) it says that, between 2017 and 2020, General Motors Company or one of its subsidiaries (other than the defendant) had contracts in place with PSA Groupe or a subsidiary thereof for the manufacture and supply of motor vehicles under the brand name Holden and otherwise admits sub-paragraph (d);
- (c) it denies subparagraph (e);
- (d) as to subparagraph (h):
  - (i) it says that the first Holden branded motor vehicle was manufactured and sold in 1948; and
  - (ii) it otherwise admits subparagraph (h).

### **Agreement**

6 As to paragraph 6, it:

- (a) admits that it entered into an agreement dated 1 January 2018 with the plaintiff, pursuant to which it appointed the plaintiff to its network of authorised dealers for the period 1 January 2018 to 31 December 2022 (**Agreement**);
- (b) says that the Agreement was wholly in writing;
- (c) says that pursuant to the Agreement, the plaintiff was appointed to sell and service new Holden vehicles and used Holden and General Motors vehicles, and sell parts for new and used Holden and General Motors vehicles;
- (d) says further that it will refer to the written Agreement at trial for its full terms and effect; and
- (e) otherwise denies paragraph 6.

7 (not used).

8 It admits paragraph 8, and says it will refer at trial to the written Agreement for its full terms and effect.

9 It admits paragraph 9, and says that:

(a) the Agreement also contained, among others, the following terms:

(i) **10.4 Purchase Orders**

...

*(d) All purchase orders are subject to acceptance by [the defendant]. [The defendant] is not bound to accept any purchase order.*

...

(ii) **24 Entire Agreement**

*This agreement and the documents to which it refers (including, without limitation, the Particular Terms and the Manual) constitute the entire agreement of the parties about their subject matter and supersedes all previous agreements, understandings and negotiations on that subject matter.*

(iii) **26.9 Force Majeure**

*Other than an obligation to pay money, an obligation of a party under this agreement or under a supply contract made pursuant to this agreement will be superseded during the time and to the extent that the party is prevented from or delayed in complying with that obligation by an event beyond that party's reasonable control.*

it will otherwise refer at trial to the Agreement for its full terms and effect.

10 It admits paragraph 10, and says that:

(a) the Manual also provides:

*'7.1. The purpose of The Holden Dealer Standards is to provide guidance to Holden dealers on what Holden believes to be best practice in customer Service and Quality. The ultimate utility of that advice will depend upon the abilities and commitment of a Holden dealer, its Managers and Standards Coordinators to fully implement the Standards and respond to market and economic conditions.*

*Because of these factors Holden Ltd does not warrant the achievement of any particular outcome or result.*

*Holden Ltd and its contractors do not warrant the accuracy, completeness or adequacy of the information in this document.'*

- (b) it will refer at trial to the Manual for its full terms and effect.
- 11 It denies paragraph 11 and says that:
- (a) no such term is necessary to give business efficacy to the Agreement;
  - (b) such a term contradicts the express terms of the Agreement, including clauses 10.4(d) and 24; and
  - (c) if a term were to be implied (which is denied), in accordance with the definition of 'Products' in the Agreement, it would apply to new Holden brand motor vehicles only and not any 'substitute thereto'.
- 11A It denies paragraph 11A.
- 11B As to paragraph 11B, it:
- (a) says that from in or about August 2020, it ceased any trading activity in the Australian new motor vehicle retailing industry; and
  - (b) does not know and therefore cannot admit whether, from in or about August 2020, the plaintiff or any of the Group Members continued any trading activity in the Australian new motor vehicle retailing industry;
  - (c) otherwise admits paragraph 11B.
- 11C It denies paragraph 11C, refers to and repeats paragraph 11A above and says further that the alleged term is not or cannot be incorporated into the Agreement.
- 11D It admits paragraph 11D, and says that the Franchising Code also provides that:
- (a) in assessing whether the Statutory Good Faith Obligation has been complied with, regard may be had to whether a party acted honestly and not arbitrarily (s 6(3)(a));
  - (b) the Statutory Good Faith Obligation does not prevent it from acting in its legitimate commercial interests (s 6(6));

- (c) the Statutory Good Faith Obligation is not contravened by it not giving the plaintiff an option to renew the Agreement (or the Group Members, the Group Member Agreements) or by it not allowing the plaintiff to extend the Agreement (or the Group Members, the Group Member Agreements) (s 6(7)).

11E As to paragraph 11E, it:

- (a) admits that:
- (i) the Statutory Good Faith Obligation formed an implied term of the Agreement; and
- (ii) the Statutory Good Faith Obligation required it to act towards the plaintiff (and each Group Member) in good faith within the meaning of the unwritten law, in respect of any matter arising under or in relation to the Agreement (or Group Member Agreements);
- (b) otherwise denies paragraph 11E.

12 It admits paragraph 12 and says it will refer at trial to the Addenda constituting the Particular Terms for their full terms and effect.

### **The Group Member Agreements**

13 As to paragraph 13, it:

- (a) admits that it entered into an agreement dated 1 January 2018 with each Group Member, pursuant to which it appointed each Group Member to its network of authorised dealers for the period 1 January 2018 to 31 December 2022 (**Group Member Agreements**);
- (b) says each of the Group Member Agreements was wholly in writing;
- (c) says that pursuant to the Group Member Agreements, the Group Members were appointed to sell and service new Holden vehicles and used Holden and General Motors vehicles, and sell parts for new and used Holden and General Motors vehicles;
- (d) says further that it will refer to the written Group Member Agreements at trial for their full terms and effect; and
- (e) otherwise denies paragraph 13.

14 (not used).

15 As to paragraph 15, it:

- (a) admits that each Group Member Agreement is substantially the same as the Agreement;
- (b) refers to and repeats paragraphs 8 to 11C and 11E above; and
- (c) otherwise denies paragraph 15.

### **Breach**

16 It admits paragraph 16, and says that the media statement also announced that:

- (a) the provision of servicing and spare parts would continue for at least 10 years; and
- (b) all current Holden dealers would be offered the opportunity to transition to Holden authorised service outlets, as was the fact.

17 It admits paragraph 17 and says it will refer at trial to the bulletin it so issued to Holden dealers (**26 February 2020 Bulletin**) for its full terms and effect.

17A As to paragraph 17A, it:

- (a) says that by 23 March 2020 it had preferenced or cancelled all un-preferenced orders for new Holden vehicles in its electronic ordering system as at 17 February 2020;
- (b) otherwise admits paragraph 17A.

17B It admits paragraph 17B.

17C It admits paragraph 17C.

18 It denies paragraph 18 and says that:

- (a) the statements pleaded in paragraph 16 and contained in the 26 February 2020 Bulletin were published in circumstances in which the defendant would cease to be able to acquire Holden branded motor vehicles from about April or May 2020 because the manufacturers would then cease to manufacture Holden branded motor vehicles;

- (b) the last Holden branded motor vehicles available for distribution to dealers were manufactured in or around April or May 2020; and
- (c) the last Holden branded motor vehicles available for distribution to dealers were imported into Australia between May and August 2020, with deliveries occurring thereafter.

19 As to paragraph 19, it:

- (a) says that it so informed David Nicholson of the Australian Holden Dealer Council, rather than the network of authorised dealers; and

#### **Particulars**

Email of 23 April 2020 from Michael Jackson of the defendant to David Nicholson of the Australian Holden Dealer Council

- (b) says that the alleged statement was an accurate statement of fact;
- (c) otherwise admits paragraph 19.

20 As to paragraph 20, it says that:

- (a) the allocation of remaining stock of new Holden branded vehicles to its network of authorised dealers continued until at least August 2020;
- (b) from 30 March 2020 to 1 October 2020, it invited Holden dealers to participate in a "Liquidation Allowance Program", whereby dealers were offered reduced liquidation pricing, and therefore increased profit margins, on remaining new Holden vehicles.

#### **Particulars**

The details of the program are set out in the document entitled "Holden liquidation Allowance Program" dated 28 February 2020, a copy of which may be inspected at the offices of the solicitors for the defendant by prior appointment.

- (c) it otherwise denies paragraph 20.

21 As to paragraph 21, it:

- (a) admits subparagraph (a); and
- (b) says that:

- (i) it allocated “packs” of vehicles to dealers in accordance with the 26 February Bulletin;
- (ii) the allocation of “packs” of available stock was based on each dealer’s sales history over the previous six months;
- (iii) the mix of Holden vehicles in the “packs” allocated to each dealer was based on stock availability and did not in each case proportionally conform with the mix of Holden brand vehicles sold by each dealer in the previous six months; and
- (iv) it otherwise denies subparagraph (b).

22 It denies paragraph 22, and repeats paragraphs 17 to 21 above.

23 It admits paragraph 23.

24 It denies paragraph 24 and it:

- (a) refers to clause 7.1 of the Manual (pleaded at paragraph 10(c) above) and says clauses 7.17.14.1, 7.17.14.2, 7.17.14.3 and 7.17.14.3 of the Manual are not promissory and do not impose on it any obligation capable of breach;
- (b) says further, even if any of clauses 7.17.14.1, 7.17.14.2, 7.17.14.3 and 7.17.14.3 of the Manual do create obligations on it capable of breach (which is denied):
  - (i) clause 7.17.14.2 is directed to the fair and equitable distribution of new Holden vehicles *between* dealers;
  - (ii) clauses 7.17.14.2 and 7.17.14.3 require Holden to *endeavour* to distribute/supply vehicles;
  - (iii) clause 7.17.14.4 is subject to capacity and logistic constraints; and
  - (iv) it complied with those clauses by reasons of the matters referred to in paragraphs 17, 20 and 21 above.

25 It denies paragraph 25, and says that:

- (a) neither clause 10.4(a) or 10.4(c) obliged it to accept or consider any purchase order; and



- (b) clause 10.4(d) of the Agreement (set out at paragraph 9(a)(i) above) and of the Group Member Agreements expressly provides that it is not bound to accept any purchase order.

26 It denies paragraph 26, and refers to and repeats paragraphs 11 to 11C and 11E above.

26A It denies paragraph 26A, refers to and repeats paragraphs 11D, 25 and 26 above, and says that:

- (a) it has acted honestly and not arbitrarily;

#### **Particulars**

It refers to paragraphs 5(g) and 16 of the third further amended statement of claim and paragraphs 18, 20 and 21 above and 27(a) and 40 below and says that after it became unable to obtain new Holden brand vehicles it allocated available stock, and offered dealers discounted liquidation pricing, and therefore increased profit margins, as set out in paragraph 21(b), and made offers of compensation to all dealers (as described in paragraph 27(a)).

- (b) the Statutory Good Faith Obligation did not require it to:
- (i) accept or consider purchase orders for New Vehicles from the plaintiff or any Group Member in light of the circumstances pleaded in paragraphs 5(g) and 16 of the third further amended statement of claim and paragraphs 16, 18 and 40, or at all;
- (ii) ensure the availability for supply of New Vehicles, or a substitute therefor, for the duration of the Term.

#### **Particulars**

In addition to the Agreement expressly providing that it is not bound to accept any purchase order, the Agreement also provided that it was able to change the New Vehicles a dealer was authorised to sell at any time (clause 10.1(a)).

It disclosed to the plaintiff and each Group Member that it was an importer and distributor of vehicles, not a manufacturer of vehicles. (Disclosure document provided to the plaintiff and each Group Member, in or around

November 2017, in accordance with clauses 8 and 9 of the Franchising Code (Disclosure Document), clauses 2.3 and 3.2).

A copy of the Disclosure Document may be inspected at the offices of the solicitors for the defendant by prior appointment.

## Damages

27 It denies paragraph 27, and further and alternatively, says that:

- (a) in or around May 2020, following the making of the announcement referred to in paragraph 16 above, the defendant made offers of compensation to all dealers, including the plaintiff and the Group Members;

### Particulars

| Recipient of offer   | Details of offer   |
|--|--|
| Beecham Motors Pty Ltd (ACN 010 580 551) trading as Beecham Holden               | Email from the defendant to Chris Beecham (dealer principal) of Beecham Holden at 1.33pm on 8 May 2020       |
| Gaukroger Sales Pty Ltd (ACN 001 601 565) trading as Gaukroger Sales Holden      | Email from the defendant to Mark Palmer (dealer principal) of Gaukroger Sales Holden at 2.46pm on 8 May 2020 |
| ERNBRO Pty Ltd (ACN 092 274 238) trading as Island Coast Holden                  | Email from the defendant to Brian Ernst (dealer principal) of Island Coast Holden at 1.48pm on 8 May 2020.   |
| Nobes Motor Company Pty Ltd (ACN 609 550 576) trading as Swan Hill Holden        | Email from the defendant to Paul Nobes (dealer principal) of Swan Hill Holden at 9.09pm on 8 May 2020        |
| Heartland Motors Pty Ltd (ACN 096 561 385) trading as Heartland Holden Blacktown | Email from the defendant to Kieran Turner (dealer principal) of Heartland Holden at 2.39pm on 8 May 2020     |

|  |  |
|--|--|
| Heartland Motors Pty Ltd (ACN 096 561 385) trading as Heartland Holden Penrith       | Email from the defendant to Kieran Turner (dealer principal) of Heartland Holden at 2.39pm on 8 May 2020                             |
| Mid North Motor Company Pty Ltd (ACN 008 193 753) trading as Mid North Motor Company | Email from defendant to Nick Heath (dealer principal) and Ditmar Guehrer of Mid North Motor Company at 1.14pm on 10 May 2020.        |
| Spencer Motors Pty Ltd (ACN 007 783 593) trading as Spencer Holden                   | Email from the defendant to Robert Ireland (dealer principal) and Ditmar Guehrer of Spencer Holden at 12.53pm on 10 May 2020         |
| City Motors (Port Lincoln) Pty Ltd (ACN 008 017 052) trading as City Motors          | Email from the defendant to Mark Venning (dealer principal) and Ditmar Guehrer of City Motors at 12.41pm on 10 May 2020              |
| Silver City Motors Pty Ltd (ACN 127 505 855) trading as Silver City Holden           | Email from the defendant to Ditmar Guehrer (dealer principal) of Silver City Holden, sent at 12.33pm on 10 May 2020                  |
| Augusta Motor Company Pty Ltd (ACN 008 172 629) trading as Port Augusta Holden       | Email from the defendant to Peter Koeman (dealer principal) and Ditmar Guehrer of Port Augusta Holden, sent at 1.08pm on 10 May 2020 |

- (b) in the circumstance pleaded in (a) above, the plaintiff and each Group Member has not suffered any loss caused by any breach by the defendant (which is denied); and
- (c) further, in failing to accept the respective offers of compensation made by the defendant to the plaintiff and each Group Member, the plaintiff and each Group Member failed to mitigate their respective losses;
- (d) further, it refers to and repeats paragraph 20(b) above and says that if the plaintiff or any Group Member has suffered loss caused by any breach by ~~the~~ it (which is

denied), that loss was reduced by the incremental profits they derived from the liquidation allowances it provided to each of them ~~by it to each of them~~.

28 It denies paragraph 28 and says:

- (a) the Agreement and the Group Member Agreements do not provide any right or option to renew or enter into a future parts and servicing agreement;
- (b) the Agreement and each Group Member Agreement expressly provides that it has full discretion in making the decision whether to offer any dealer a further term of appointment, and the dealer has no recourse against it arising from that decision (clause 2.3(c));
- (c) it had no obligation to provide the plaintiff or any Group Member with the opportunity to enter into a Holden parts and service agreement, for a term of 10 years or any other period;
- (d) the offers of compensation it made to the plaintiff and each Group Member (as pleaded at paragraph 27(a) above) included an offer to enter into a Holden Service Operations Agreement, for parts and service, for an initial term of 5 years;
- (e) the plaintiff and each Group Member did not accept the offers of compensation made to them;
- (f) in the circumstances, if the plaintiff or any Group Member has suffered a loss of opportunity (which is denied), any such loss was not caused by the defendant.

29 It denies paragraph 29, and refers to and repeats paragraphs 26A, 27(c), 27(d), 28(f) above.

30 It admits paragraph 30.

31 As to paragraph 31, it:

- (a) admits that it did not request a Strategic Business Plan from the plaintiff or any Group Member prior to issuing the Non-Renewal Notices;
- (b) says that:
  - (i) clause 2.3(a) of the Agreement (and of the Group Member Agreements) requires the dealer to provide a Strategic Business Plan only where the

defendant has given notice, pursuant to that clause, that clause 2.3 is to apply to the dealer;

- (ii) clause 2.3(a) does not require it to request a Strategic Business Plan;
  - (iii) clause 9.1(b)(i) of the Agreement (and Group Member Agreements) requires consultation regarding plans for the dealer *within* the Term;
  - (iv) clause 9.1(b)(i) does not require it to consult with the plaintiff or any Group Member concerning its plans for *after* the Term, including in relation to, or consequent on any, renewal or a new dealer agreement;
- (c) says further that if clause 9.1(b)(i) required it to consult with the plaintiff and each Group Member regarding plans for renewal or a new dealer agreement (which is denied), it did consult with the plaintiff and each Group Member in May 2020 in making the offers of compensation referred to at paragraphs 27(a) and 28(d) above;
- (d) otherwise denies paragraph 31.

32 It denies paragraph 32, refers to and repeats paragraphs 11D, 28(a)-(c), 31(b) and (c) above and, in further answer to paragraph 32(d), says that the Disclosure Document expressly disclosed to the plaintiff and each Group Member that they did not have an option to renew, extend or enter into a new agreement and that renewal was in the defendant's absolute discretion.

### Particulars

Clause 18.1 of the Disclosure Document provides:

Franchisees do not have an option to renew, extend or enter into a new franchise agreement. The Franchisor will advise each Franchisee as to whether the Franchisor will, or will not, offer the Franchisee a further term of appointment, whether as a renewal of the Franchise Agreement or a new franchise agreement, at least six months prior to expiry of the term of the Franchise Agreement. The Franchisor has full discretion in making this decision and Franchisees have no recourse against the Franchisor arising from any adverse decision of the Franchisor. The Franchisor has absolute discretion in this regard and no guarantee is given or representation is made as to the likelihood of any renewal, extension or new agreement being offered.

Clause 18.5 of the Disclosure Document provides:

The Franchisee does not have the option to renew the Franchise Agreement and cannot extend the term of the Franchise Agreement. At

the end of the Franchise Agreement, the Franchisor may, but does not have to, extend the term of the agreement. If the Franchisor does not extend the term of the agreement, the Franchise Agreement ends and the Franchisee no longer has a right to carry on the franchised business.

- 33 It denies paragraph 33, refers to and repeats paragraph 31(b) above and says that clauses 2.3(a) and (b) of the Agreement (and the Group Member Agreements) have no operation in circumstances where no notice has been issued pursuant to clause 2.3(a).
- 34 It denies paragraph 34, and refers to and repeats paragraphs 31(b) and (c) above.
- 35 It denies paragraph 35, and refers to and repeats paragraphs 11D, 33 and 34 above.
- 36 It denies paragraph 36, refers to and repeats paragraphs 28(a)-(e) above, and says that:
- (a) it was entitled to have regard to its own commercial interests in considering whether to offer the plaintiff or any Group Member a further term of appointment as a dealer;
  - (b) it was not in its commercial interests for it to offer the plaintiff or any Group Member a further term of appointment as a dealer as it did not want to have an ongoing commercial relationship with parties with whom it had been unable to resolve disputes; and

### **Particulars**

- It refers to and repeats paragraphs 27(a), 28(d) and 28(e) above.
- (c) the Non-Renewal Notices were issued on the basis stated on their face, that is, that it did not consider it to be commercially viable to offer the plaintiff or any Group Member a further term of appointment.
- 37 It denies paragraph 37, and refers to and repeats paragraphs 11D, 32 and 36 above.
- 38 It denies paragraph 38, and refers to and repeats paragraphs 27(c), 27(d), 28, 32, 35, and 37 above.
- 39 It denies paragraph 39, and refers to and repeats paragraphs 28 above.

### **Force majeure**

- 40 In the alternative, in further answer to the whole of the claim, in the event that the Agreement and the Group Member Agreements obliged it to ensure the availability of supply of new Holden vehicles (which is denied), it says:

- (a) at all material times it sourced new Holden vehicles for supply to dealers from other General Motors Company subsidiaries, pursuant to distribution agreements;

**Particulars**

Distribution agreement between General Motors International Operations Pte. Ltd. and the defendant dated 2 September 2015, which was amended by addenda dated 2 September 2015 and 1 November 2017 and assigned by GMIO to General Motors Overseas Distribution LLC (**GMOD**) on 1 January 2020


Distribution agreement between GMOD and the defendant dated 2 September 2015

- (b) at all material times the General Motors Company subsidiaries with whom it had distribution agreements were its sole source of supply of new Holden vehicles;
- (c) it refers to and repeats paragraphs 5(g) and 16 of the ~~second~~ third further amended statement of claim and paragraph 18 above;
- (d) in the circumstances it was prevented from complying with any obligation to supply new Holden vehicles by an event beyond its reasonable control;
- (e) by reason of clause 26.9 of the Agreement (pleaded at paragraph 9(a)(iii) above) and the Group Member Agreements any obligation it had to supply new Holden vehicles was discharged.

Dated ~~7/03/2022~~ 5 July 2022

J C GILES

T SPENCER BRUCE

  
Norton Rose Fulbright Australia  
Solicitors for the defendant