



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

Case: S ECI 2020 04789
S ECI 2020 04789
Filed on: 14/08/2023 03:17 PM

BETWEEN

BEECHAM MOTORS PTY LTD (ACN 010 580 551)

Plaintiff

-and-

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

Defendant

**Plaintiff's Reply to Defence to Fourth Further Amended Statement of Claim
Filed pursuant to R 14.05 of the *Supreme Court (General Civil Procedure Rules)*
2015 (Vic)**

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In reply to the Defence to the plaintiff's ~~Second~~ ~~Third~~ **Fourth** Further Amended Statement of Claim dated ~~31 May 7 March 2022~~ **2 August 2023** (the **Defence**), the plaintiff says as follows:

1. Save for the admissions herein and save for the paragraphs or subparagraphs specifically pleaded to in this reply, the plaintiff denies each and every allegation in the Defence, and joins issue in respect of the matters raised in the Defence.
2. As to paragraphs 24 to 26 of the Defence, **the Plaintiff and each Group Member further rely upon the following as part of the commercial context, purpose, background, genesis, and surrounding circumstances of the Dealer Agreements for the purposes of contractual interpretation, to support the construction that the Defendant had an obligation under the Dealer Agreements to have New Vehicles available for supply, further or alternatively that the Defendant had an obligation**

~~under the Dealer Agreements to supply New Vehicles to the Plaintiff and each Group Member, during the Term the Defendant and the Plaintiff, and the Defendant and each of the Group Members, intended and confirmed that the Defendant had an obligation under the Dealer Agreements to have New Vehicles available for supply, further or alternatively that the Defendant had an obligation under the Dealer Agreements to supply New Vehicles to the Plaintiff and each Group Member, during the Term, by reason that:~~

- (a) pursuant to subsections 8(1), 8(3) and 9 of the Competition and Consumer (Industry Codes-Franchising) Regulation 2014 (Franchising Code) Franchising Code, the Defendant was required to create a disclosure document in the form and order of Annexure 1 and give it to the Plaintiff and each Group Member at least 14 days prior to entry into the Dealer Agreements;
- (b) by item 10.1(a) of Annexure 1, the disclosure documents were required to set out details of any requirement for the franchisee to maintain a level of inventory or require an amount of goods or services;
- (c) by item 10.1(e) of Annexure 1, the disclosure documents were required to set out details of the Defendant's obligation to supply goods or services to the Plaintiff and each Group Member;
- (d) pursuant to s 51ACB of the *Consumer and Competition Act 2010 (Cth)*, the Defendant must not contravene the Franchising Code;
- (e) the Defendant provided disclosure documents to the Plaintiff and each Group Member, which were in substantially the same form, in or about November 2017 (**Disclosure Documents**);

Particulars

Copies of the Disclosure Documents are available for inspection.

- (f) the Disclosure Documents stated under item 10.1(a):

... the Franchisee is required to hold sufficient stock of new motor vehicles by line (excluding demonstrators) to meet the number of such motor vehicles that the Franchisee is expected to sell under its applicable Notice of Sales Evaluation Guide, or to meet reasonably anticipated demand in the Area of Primary

Responsibility. The Franchisee is also required to hold sufficient stock by line of well-maintained demonstrators to meet reasonably anticipated demand for demonstration by prospective purchasers.

- (g) the Disclosure Documents stated under item 10.1(e):

The Franchisor has the obligation to arrange the supply of motor vehicles and parts and accessories for which orders have been accepted by the Franchisor. The Franchisor has the right to determine the allocation of motor vehicles between Franchisees...

- (h) the Disclosure Documents did not disclose that the Defendant had no obligation to have New Vehicles available for supply, nor that the Defendant had no obligation to supply any New Vehicles, to the Plaintiff and each Group Member, during the Term.

3. As to subparagraph 24(a) of the Defence, the plaintiff says that:

- (a) by operation of cl 9.1(g) of the Dealer Agreements, the defendant must comply with Holden's Wholesale Standards as contained in the Manual;
- (b) Holden's Wholesale Standards are contained in cl 7.17 of the Manual;
- (c) clause 7.1 of the Manual concerns Holden's dealer sales and service standards, not Holden's Wholesale Standards;
- (d) in the premises, cl 7.1 of the Manual has no presently relevant application.

- 3A. As to subparagraph 24(b)(iv) of the Defence, the Plaintiff says that the obligations in cl 7.17.14.1, 7.17.14.2, 7.17.14.3 and 7.17.14.4 of the Manual on their proper construction:

- (a) made the Defendant liable for any decision by the General Motors Company to cease supply to the Defendant of Holden branded vehicles during the Term; and/or
- (b) were breached by reason of sub-paragraph viii of the particulars to paragraph 26A of the Fourth Further Amended Statement of Claim.

4. As to subparagraph 25(b) of the Defence, the Plaintiff says that:

- (a) it refers to and repeats paragraphs 19 and 21 of the Second Further Amended Statement of Claim;

- (b) the defendant has not purported to exercise its power and does not allege that it has exercised its power under cl 10.4(d) of the Dealer Agreements;
- (c) further or alternatively, the exercise of the power under cl 10.4(d) of the Dealer Agreements to deny the supply of New Vehicles to the Plaintiff for the duration of the Term would not be an exercise of that power for a proper purpose, and/or would be a contravention of s 6(1) of the Franchise Code.

5. As to paragraph 27(b) and (c) of the Defence, the Plaintiff says that:

- (a) the offer of compensation was lower than the Plaintiff's and each Group Member's actual losses;
- (b) the offer of compensation was conditional upon the Plaintiff and each Group Member giving up valuable rights to damages for the losses suffered;
- (c) the Plaintiff's and each Group Member's refusal of the offer was not a failure to mitigate;
- (d) the Plaintiff and each Group Member have taken steps to mitigate their loss and damage in relation to a service and parts agreement for Holden vehicles, as follows:
 - (i) in or about November 2022, representatives of the General Motors Company group contacted the Plaintiff and each Group Member and offered each of them a 1-year service and parts agreement with General Motors Australia and New Zealand Pty Ltd commencing on 1 January 2023 (**1 Year Extension**);
 - (ii) in response to the offer, Mr Chris Beecham of the Plaintiff by phone asked Mr Peter MacLean (the Defendant's Senior Aftersales Business Development Manager – Qld) whether the offer was only for one year and whether a term until 31 December 2025 was possible to align the offered agreement with the original 2020 Transition Support Package offer and the 5-year Holden service and parts agreements entered into by the Holden dealerships which accepted the Transition Support Package;

- (iii) on 18 November 2022, Mr Steve Byrne (Network Development Manager - General Motors Australia & New Zealand) emailed Mr Beecham and stated that the offer was only for 12 months;
- (iv) on 18 November 2022, the solicitors for the Plaintiff wrote to the solicitors for the Defendant noting the difference between the 5-year term under the Transition Support Package and the 1-Year Extension and asked for the term of the offer to the Plaintiff and each Group Member to be extended so that the service and parts agreement would expire on 31 December 2025;
- (v) on 21 November 2022, the solicitors for the Defendant refused, and stated that '[a]s you have observed, our client has already declined your clients' request that it enter into an agreement with them on the same terms as it has done with the former Holden dealers with whom it is not in dispute'; and
- (vi) in or about November and December 2022, the Plaintiff and each Group Member entered into the 1 Year Extension with the exception of ERNBRO Pty Ltd which ~~has~~ signed the 1 Year Extension ~~on or about 20 December 2022 but is awaiting and~~ approval from and execution by General Motors Australia and New Zealand Pty Ltd ~~occurred in or about April 2023~~.

Particulars

Copies of the documents referred to above are available for inspection.

6. As to paragraph ~~40~~ 28 of the Defence, the Plaintiff says that:
- (a) in circumstances where the defendant:
 - (i) has entered into Dealer Agreements for a five-year term with obligations of supply of New Vehicles; and
 - (ii) failed to have in place supply and distribution agreements to ensure its security of supply of New Vehicles for the five-year term of the Dealer Agreements, ~~and/or~~
 - (iii) further or alternatively failed to enforce its supply and distribution agreements to ensure its supply of New Vehicles for their term;

- (b) the failure to have New Vehicles available for supply, and the non-supply of New Vehicles, to the Plaintiff and each Group Member is not an 'event beyond its reasonable control'.
 - (c) alternatively to sub-paragraph (a) and (b), an act or decision by the ultimate parent company of the Defendant is not an event beyond the Defendant's reasonable control for the purposes of cl 26.9 of the Dealer Agreements.
- 7. As to paragraph 27 and 29 of the Defence, if, which is denied, the supply of New Vehicles to the Plaintiff and Group Members would have been constrained due to COVID-19 related supply disruptions from 2020 to 2022, then:
 - (a) the Plaintiff and Group Members would have taken deposits and forward orders from customers during the Term in the numbers set out in table 1 in Schedule 2 to the Third Further Amended Statement of Claim;
 - (b) the Plaintiff and Group Members would have placed, and the Defendant would have processed, those forward orders as orders for special vehicles pursuant to the Dealer Agreement and the Manual during the Term; and
 - (c) insofar as the Defendant had not delivered to the Plaintiff and Group Members the new Holden vehicles referred to in paragraph 7(a) above before 31 December 2022, the Defendant would have delivered those new Holden vehicles to the Plaintiff and Group Members in 2023 in accordance with cl 19.5(b) of the Dealer Agreement.
- 8. The Plaintiff denies paragraph 27(e)(i) of the Defence and says further that for the purposes of the damages counterfactual that:
 - (a) the Defendant and General Motors Company would never have continued the manufacture and sale of Holden branded vehicles beyond 2020 without the Trailblazer and Colorado vehicle models;
 - (b) the GM assembly plant in Rayong, Thailand would not have been sold in 2020 or during the Term in circumstances where Holden branded vehicle supply to and by the Defendant would have continued beyond 2020;
 - (c) alternatively to sub-paragraph (b), were the Rayong plant to have been sold during the Term, the General Motors Company would have relocated the manufacture of Holden-branded Colorado and Trailblazer vehicles to

the GM Assembly plant in São José dos Campos, Brazil or to another manufacturing facility operated by the General Motors Company and would have continued supply of Holden-branded Colorado and Trailblazer vehicles to the Defendant for the Term;

(d) discontinuing the Colorado and Trailblazer models without any replacement model in those vehicle categories would have been a breach of the Defendant's obligation under cl 7.17.14.1 of the Manual to provide a 'broad range of world class products'.

9. The Plaintiff denies paragraph 27(e)(iii) of the Defence, repeats and refers to paragraph 5 above, and says further that Holden would have:

- (a) ensured supply of Holden vehicles to meet in store demand up to 31 December 2022; and
- (b) supplied and delivered all forward orders placed prior to July 2022 by dealers for customers;

as there would have been a significant number of forward orders for Holden vehicles and elevated demand for Holden vehicles, and the General Motors Company would have manufactured Holden branded vehicles into 2023 if necessary to fulfill forward orders placed by the Defendant's dealership network in 2020, 2021 and/or 2022 as part of an orderly wind-down and exit from Australia.

10. The Plaintiff denies paragraph 27(e)(iv) of the Defence and says further that for the purposes of the damages counterfactual:

- (a) the General Motors Company and/or the Defendant would not have decided to retire, or announced to the public the retirement of, the Holden brand in or about February 2020; and
- (b) the decision to retire the Holden brand, and/or the public announcement thereof, would have been made in or about June 2022.

Particulars

- i. *The Plaintiff refers to paragraph 4(2) of Annexure A to the Defendant's letter of instruction to Mr Owain Stone dated 28 April 2023.*
- ii. *The Plaintiff relies upon the un-commerciality and inherent improbability of a final decision to retire the Holden brand being made*

approximately 3 years before that decision would come into effect and where the performance of the Holden brand may have materially changed in that period.

- iii. *Under s 18 of the Franchising Code the Defendant would have been required to notify its dealership network (including the Plaintiff and each Group Member) at least 6 months before 31 December 2022 as whether the Defendant intended to extend the Dealer Agreements or intended to enter into new agreements for a further term.*

Dated: 14 August 2023 ~~28 April 2023~~ ~~20 March 2023~~ ~~28 July~~ 6 April 2022

HWL Ebsworth Lawyers

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HWL Ebsworth Lawyers
Solicitors for the Plaintiff