

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AVANTE AUTOMOBILE (2017)
CORPORATION and FRANCESCO
SERPA

Plaintiffs

-and-

BMW CANADA INC.

Defendant

)
)
) *Jonathan C. Lisus, Paul Fruitman and John*
) *Carlo Mastrangelo, Lawyers for the*
) Plaintiffs
)

)
)
) *Michael Schafler, Amer Pasalic, A.J.*
) *Freedmand, and Radha Lamba, Lawyers*
) for the Defendant
)
)

) **HEARD: September 9,10,11,12,16,18,**
) **19,20,24,25,26,27,October 1,2,4,7 and**
) **11,2024**
)

G. DOW.J.

REASONS FOR DECISION

[1] The plaintiffs, Avante Automobile (2017) Corporation (a successor corporation to Serpa Automotive (2012) Corporation) and its principal owner/director/officer, Francesco ("Frank") Serpa seek general, special and punitive damages from the defendant BMW Canada Inc. ("BMW Canada"). This claim arises from the BMW Automobile and Motorcycle ("Motorrad") Dealerships the plaintiffs purchased in late 2011 and early 2012 from Open Road BMW which was owned and operated by Michael Croxen.

[2] By mid 2017, Frank Serpa sold the BMW automobile dealership (having previously relinquished the Motorrad dealership) to a numbered Ontario Corporation owned and operated by Kapil Dilawri having been advised by BMW that the dealership would not be renewed.

[3] The plaintiffs allege that the defendant breached its statutory duties under the *Arthur Wishart Act (Financial Disclosure)*, 2000 S.O. 2000 c. 3, the contractual obligations under the Dealership agreement, and common law duties of good faith and fair dealings.

[4] This trial involved testimony from 4 witnesses on behalf of the plaintiffs and 8 witnesses for the defendant. The first of 49 exhibits was a ten volume, 604 tab, 5,742 page Joint Book of Documents pertaining to the relationship between the parties which they confirmed complied with the direction of the Court of Appeal in *Bruno v. DaCosta*, 2020 ONCA 602 at paragraph 52. Many of the subsequent exhibits extracted documents from Exhibit 1 relevant to the testimony of the witness giving evidence. Thus, while many documents are contained in multiple exhibits, I agree with counsel it increased efficiency and likely resulted in reducing valuable court time. Counsel are commended for their efforts in this regard.

[5] I required the parties provide written closing submissions which details the history of the dealings between the parties (greater than that set out below) given the focus on the plaintiffs allegation the defendant breached its contractual, statutory and/or common law duties and if so, what compensable loss occurred?

BACKGROUND

[6] The Open Road BMW dealership commenced operating in or about 2003 at 87 Mulock Drive, Newmarket with residential properties to the north and east. By 2011, as part of the standard form dealership agreements with BMW Canada, BMW Canada gave notice to Michael Croxon it required him to expand in order to meet the revised "Retailer Operating Standards" within the next few years and relocate to a larger location in seven or so years.

[7] Michael Croxon chose to sell instead. He reached an agreement with Frank Serpa dated October 11, 2011. In the Asset Purchase Agreement (Exhibit 1, tab 18), Frank Serpa purchased the contents of the dealership for \$5 million of which \$4.5 million was categorized as goodwill. The Agreement of Purchase and Sale bought the land and building for \$8 million, divided \$2.5 million for the land and \$5.5 million for the building. The deal required approval from BMW Canada. This required Frank Serpa to and he submitted a Retailer Application Package (Exhibit 1, tab 23). He also met with those in charge of such things at BMW Canada. This included Scott Winhold, Manager of Dealer Development, Michael Ferreira, Regional Manager, Central Region, Stephen Kuester, After Sales Director, Derek Tadros, Manager Dealer, Financial and (later), Ryan Puskas, Director Sales Channel Development and Customer Orientation. Other investigations were also completed.

[8] From Frank Serpa's perspective, as a Mazda Dealer from 1992, with his own dealership from 1995, he was a successful and a sophisticated car dealer. He had successfully built and moved his Mazda Dealership to a larger facility in or about 2004. He considered the purchase of a BMW dealership to be a "dream come true". As a luxury car brand, it potentially offered a higher profile and larger profits. His youngest son was keen to be in the business and this offered/raised the possibility of success on a generational basis.

[9] From BMW Canada's perspective, Frank Serpa appeared to have sufficient (but limited) resources (estimated net worth \$29 million - Exhibit 1, tab 25, page F396 - Case Center). Frank Serpa was made aware of the immediate need to spend \$2 to \$3 million renovating what he was purchasing with a subsequent relocation in five to seven years. He would be replacing an under performing dealer.

[10] As required, BMW Canada agreed to offer Frank Serpa the automobile and motorcycle dealer agreements. The conditions were detailed in a Letter of Intent ("LOI") dated January 26, 2012 and signed February 15, 2012 (Exhibit 1, tab 29). This Letter of Intent contained both standard and specific terms and conditions. These included:

- a) Serpa Auto acquiring full control over the operations of Open Road BMW;
- b) BMW Canada would offer Serpa Auto new BMW Automobile and BMW Motorcycle Retailer Agreements. Frank Serpa would maintain a minimum of 50.1% ownership and voting control with sufficient working capital in the operating company as prescribed by BMW Canada;
- c) Serpa Auto acknowledged the "Authorized Premises" did not meet BMW Canada's current facility standards and "this approval is conditional upon Serpa Auto completing BMW Group Canada's approved expansion plans", such expansion to be completed to the satisfaction of BMW Canada on or before February 1, 2014 and "this condition is a material term of this LOI";
- d) that the facility's deficiencies meant "significantly reduced Minimum Standards Program" payouts until the renovations were completed;
- e) Serpa Auto understood that BMW's Retailer agreements would be for a term of 24 months and then "extended to December 31, 2015 upon completion and BMW approval" of the renovation;
- t) based on BMW Canada's future sale projections for the Newmarket area, it was "highly likely" the expanded facility would fall below the Dealer Operating Standards and that Serpa Auto agreed to relocate and go to a new BMW facility that would exceed BMW's standards and that this "condition is a material term of this LOI"; and
- g) where Serpa Auto "has not satisfied the terms and conditions required by the LOI, then BMW Canada" could terminate the relationship on written notice to Serpa Auto which Serpa Auto had 15 days to cure "(if capable of being cured)".

[11] The Retailer Agreements (Exhibit 1, tabs 34 and 35) were noteworthy for their inclusion of:

- a) a preamble confirming a "climate of mutual fairness, good faith, trust, respect and shared information is fundamental to the joint pursuit of a shared vision";
- b) it was "of vital importance that BMW Products be sold and serviced by BMW Retail Centres" as part of upholding "the image of the BMW brand as well as promote the highest degree of customer satisfaction and loyalty";
- c) Article 13 detailing the term of the agreement and how the agreement could be terminated by either side;

- d) Article 14 which dealt with consequences of termination;
- e) Article 16.3 which did not permit amendments or modification unless same were agreed in writing between the parties;
- f) Article 16.10 which made the parties independent contractors and not agents, trustees or fiduciaries of the other; and
- g) the "Third Schedule" providing for the term of agreement to be between April 1, 2012 to April 1, 2014;

[12] As part of purchasing the land and building, Frank Serpa had the opportunity to search the title of the property. Had he done so or, what was described by his counsel in written closing submissions (at paragraph 32) as "lapse on his part", he would have discovered the premises were the subject of an agreement from an Ontario Municipal Board settlement and imposed a 35 metre set back from the property line to the building and the consent of four residential neighbours to the north and east to any significant change to the premises. This was not to be apparently discovered by Frank Serpa until September, 2013.

[13] With the change in ownership, it appears Frank Serpa concentrated on efforts to improve the performance of the dealership as opposed to moving forward to complete the required renovation within the two year time frame permitted. The design and steps involved in proceeding with the renovations required approval from BMW Canada. BMW Canada used only specific design companies, in this case, Weis & Associates. Frank Serpa signed a contract with them on May 14, 2012 (Exhibit 1, tab 36). It appears their initial Design Criteria Document or "DCD" did not circulate to the litigants until September 14, 2012. As the construction company that built the premises, Fluid Construction was also hired by Frank Serpa.

[14] Frank Serpa did not get off to a good start with his new vehicle manufacturer, apparently unaware of their custom to not display other brands of used vehicles in prominent or easily visible spots on the lot. This led to immediate friction with the BMW's then president, Eduardo Villaverde.

[15] By August, 2012, BMW Canada had begun to have concerns with the lack of progress and issued Frank Serpa a second LOI or Letter of Intent dated September 1, 2012 (Exhibit 1, tab 37). This addressed deadlines to:

- a) complete architectural drawings by October 31, 2012;
- b) obtain the necessary permits by April 31 (*sic*), 2013;
- c) begin construction by May 31, 2013; and
- d) complete construction by January 1, 2014

The same termination clause was included. On October 4, 2012 Frank Serpa signed the document after where it was typed "I agree and accept the terms and conditions as set out in this Letter of Intent".

[16] During the trial, there was evidence of Frank Serpa having no choice but to sign this and other documents. However, there was also evidence of two other BMW Dealers that took a different approach. One Dealer in Calgary became difficult for BMW Canada to reach or speak with. Another, Ontario Dealer, Sylvester Chuang simply refused to sign the Letter of intent.

[17] An email about poor sales performance on October 31, 2012 (Exhibit 1, tab 40) from the Regional Manager cited the dealership as "a colossal failure". This led to a head office meeting including one with Eduardo Villaverde.

[18] It should be noted I found Frank Serpa to be a difficult witness. He had to be reminded by his own counsel to focus on answering the question asked in examination-in-chief rather than expand on and tell his versions of events. He was sometimes evasive and/or had difficulty in providing direct responses to straight forward questions in cross-examination. This was unlike the witnesses on behalf of BMW Canada who generally were straightforward and, to my satisfaction, seemed genuine in their efforts to assist Serpa BMW/Motorrad in being successful, including completion of the required renovation. This included Scott Winhold, Michael Ferreira, Stephen Kuester, Derek Tadros and Ryan Puskas. I also note that only Ryan Puskas remained employed at BMW Canada as at the time of this trial. Thus, I find it reduced any motivation to slant their evidence in favour of the defendant.

[19] With regard to what occurred at the November 22, 2012 meeting with Eduardo Villaverde and others, I prefer the evidence of Stephen Kuester that "suddenly Frank Serpa got very emotional and have been very loud, and just say, I will resign my contract. I will resign my franchise. I will not continue like this. And then to this point in time then Eduardo Villaverde got up and said, then okay, then thank you very much for coming but then we have nothing to discuss now further because you made your point clear; and walk out.". (Rough draft transcript, September 25, 2024 at page 139).

[20] This led to an exchange of letters, first by Frank Serpa dated November 26, 2012 (Exhibit 1, tab 45) addressed to Eduardo Villaverde attempting to explain his conduct and not explicitly retracting his oral resignation of the dealership. Eduardo Villaverde's written response dated November 30, 2012 (Exhibit 1, tab 46) requested clarification of Frank Serpa's resignation of his dealership and the need to directly address his concerns over statements made with those individuals who made them. This is followed by a December 7, 2012 letter by Frank Serpa being "completely committed" and "continuing in my role as principal of Serpa BMW" (Exhibit 1, tab 47).

[21] Attention eventually returned to the renovation with a further written letter dated June 1, 2013 (Exhibit 1, tab 56) sent by courier and registered mail citing the termination clause in the September 1, 2012 LOI and invoking the 15 days to cure. This was responded to in writing by Frank Serpa on June 13, 2013 (Exhibit 1, tab 59) citing the need for consultation with the Town of Newmarket given requirements "unique to the premises due to the property's proximity to

residential areas". Despite same, Frank Serpa stated his "understanding is that the completion of the expansion facility is set to coincide with the expiration of the initial term of the dealership agreement and it is our intention to comply with this timeline".

[22] In response, **BMW** Canada sends another notice July 2, 2013 (Exhibit 1, tab 60), again by courier and registered mail citing the non-compliance and Serpa BMW's failure to adequately address the outstanding issues. However, "in the spirit of goodwill and co-operation" it agreed to amend the deadlines with permits issued no later than August 31, 2013 and construction completed seven months later, that is by April 1, 2014. It requested Frank Serpa sign and return the letter confirming his agreement to the conditions contained in it. Instead, on July 12, 2013, (Exhibit 1, tab 61) Frank Serpa wrote a response in writing suggesting he only be required to make "best efforts".

[23] This was unsatisfactory to BMW and as an agenda topic at their management meeting held September 24, 2013, the Minutes indicate the decision was made not to renew Frank Serpa's "retailer contract". The letter informing Frank Serpa of this was to be delivered during the week of September 30, 2013 (Exhibit 1, tab 69).

[24] That letter was never delivered as BMW Canada executives learned of the Ontario Municipal Board settlement issue complicating the renovation project. I accept Michael Ferreira's evidence in this regard.

[25] The discussions between Michael Ferreira and Frank Serpa are detailed in letters between them with the October 23, 2013 letter (Exhibit 1, tab 78) from Michael Ferreira (and Derek Tadros) to Frank Serpa confirming in writing:

- a) Frank Serpa's unwillingness to commit to a firm date for completion of the reunification which was unsatisfactory;
- b) BMW Canada was not prepared to continue its relationship with Frank Serpa without a definitive commitment to a completion date for the renovations; and
- c) to facilitate completion of the renovations, BMW would extend the current Retailer Agreements (and completion of the renovation) to June 1, 2014.

[26] Frank Serpa returns this letter with a handwritten update on his efforts to get the Town of Newmarket and neighbours' approval to the renovation along with having submitted an offer to buy land on which the next, larger, dealership could be built. This was responded to by email November 6, 2013 as inadequate and required return of the October 23, 2013 letter signed without commentary. In the alternative, the extension of the deadline to June 1, 2014 would be withdrawn. Frank Serpa returned a signed version and without the commentary (Exhibit 1, tabs 80 and 85) dated November 20, 2013.

[27] More delay ensued with Frank Serpa writing a four paged single spaced letter to Michael Ferreira dated April 24, 2014 (Exhibit 1, tab 109) requesting an extension of the June 1, 2014 deadline. Frank Serpa specifically asked for 10 months (see seventh last paragraph).

[28] I heard some evidence, admittedly not from construction experts, that it was expected the renovation work could or should take about seven months.

[29] That same month, Eduardo Villaverde is replaced as president of BMW Canada by Hans Blesse who is apprised of the Serpa BMW situation. Mr. Blesse agreed to meet with Frank Serpa over lunch which proceeded on May 28, 2014. The lunch was also attended to by Michael Ferreira who confirmed Hans Blesse agreed to Frank Serpa's request for a 10 month extension. That is, to April, 2015.

[30] It should be noted this timeframe was made after an April 2, 2014 document (Exhibit 1, tab 105) that has been signed by the four neighbours agreeing to the proposed renovation.

[31] Unlike the positions of the parties previously and as described above, the extension was not formally documented aside from emails acknowledging that it has been granted (Exhibit 1, tab 118). The work began in June, 2014. That is, before the building permit had been issued. I interpret that as Frank Serpa beginning to understand the necessity of completing the renovations without further delay and the completion of the renovation being very important to BMW Canada. It also becomes the subject of a stop work order issued June 24, 2014 (Exhibit 1, tab 119). The building permit was issued August 21, 2014 (Exhibit 1, tab 131). The renovation work does not proceed as quickly as required. In fact, it remains unfinished during the balance of Frank Serpa's ownership of the dealership. As of April, 2015, the renovation was ongoing and BMW Canada sought new assurances as to a completion date.

[32] Also during 2014, Frank Serpa switched his banking arrangements from one of the five major Canadian banks to BMW Financial Services.

[33] This involved executing multiple financial documents including loans, mortgages, guarantees and general security agreements by Frank Serpa, his wife Rosanna and corporations which he controlled (Exhibit 1, tabs 216-222). Also in the fall of 2014, Frank Serpa agreed to give up the Motorrad dealership on the understanding his dealership could begin the process of becoming an "M Certified" BMW dealership which involved being able to sell the high performance line of BMW vehicles. The press release issued by Serpa BMW in January 1, 2015 indicating that Serpa BMW had become a M Certified dealership led to friction and clarification about the process required to be followed and the direction by BMW that Serpa BMW was not to make further statements that it had achieved this status (Exhibit 1, tab 186).

[34] The delay in completing the renovation was attributable to various changes in the design, availability of material and complexities in completing the work while the dealership remained open for business. April, 2015 came and went without completion of the renovation.

[35] The renovation not being complete does not seem to cause any great concerns on either side until October, 2015 when written documentation as such as the email of October 23, 2015 (Exhibit 1, tab 225) from Derek Tadros to Ryan Pukas and Scott Winhold commented on same and speculated as to the reason. This is followed by the email of November 27, 2015 which detailed outstanding work (Exhibit 1, tab 241).

[36] As indicated in the email, the meeting referenced included Frank Serpa, Ryan Pukas and Scott Winhold. The new or extended Retailer Agreement confirming the extension effective January 1, 2016 was never formalized. Serpa BMW continued to operate. The evidence of Frank Serpa was the extension was to be for one year as part of keeping "a tight leash" on him. It would also align his dealership with existing Retailer Agreements for the other BMW dealers in Canada where four year agreements would be reviewed and renewed.

[37] The focus on completing the renovation culminates with the December 7, 2015 email requesting BMW be provided with the Tentative Completion Schedule or a Project Timeline (sometimes referred to as a GANTT Chart). This was provided in an email of December 11, 2015 (Exhibit 1, tabs 252-254).

[38] This initial version of the timeline extended into the beginning of 2016. It failed to include a Completion Schedule for the basement where the preowned showroom was to be moved. This more extensive timeline including the basement was requested and sent to BMW December 21, 2015. It set out work extending to April 10, 2016 (Exhibit 1, tab 260).

[39] During this time there was also other concerns about the operations of Serpa BMW. This included sales, payments, audits and following BMW protocols that will not be detailed in these reasons.

[40] On or about March 7, 2016, Ryan Puskas and Derek Tadros met with Frank Serpa at the Dealership and advised him of BMW's decision it would not be extending to him any further Retailer Agreements. I accept the evidence of Derek Tadros and Ryan Puskas as to what occurred. Frank Serpa's evidence was not significantly different about the purpose of the meeting and his being advised BMW was ending its relationship with him and BMW no longer wished to be in business with Serpa BMW. They would co-operate in his selling the dealership. This was to occur over the next number of months. The decision that the Retailer Agreement was not to be extended was to be kept confidential to assist Frank Serpa in obtaining the optimum price.

[41] Frank Serpa sought to have BMW change its decision. He requested and obtained a meeting with Hans Blesse which occurred in late March, 2016 and was unsuccessful. This included suggesting his son, Stefano who was working at the dealership as General Sales Manager (and gave evidence at the trial) take over. This was rejected. Frank Serpa's evidence was that he advised Mr. Blesse he did not want a "divorce from BMW" but that Mr. Blesse confirmed they wanted a divorce and that decision was final (see paragraph 90 of the plaintiffs written closing submissions).

[42] The first potential buyer of the dealership was a business, Olympic Auto Group operated by Thomas Glen. In a letter dated September 30, 2016 from Frank Serpa to BMW, the Offer to Purchase was attached (Exhibit 1, tab 307). It offered \$21 million, \$17.5 million for goodwill and \$3.5 million for fixed and leasehold improvements. In addition, Olympic Auto Group offered to buy the land and building for \$13.5 million.

[43] I find this led to Thomas Glen having contact with BMW's executives Ryan Puskas and Hans Blesse (Exhibit 1, tab 318) in or around the end of November, 2016. I find and accept the

evidence of Ryan Puskas providing Thomas Glen with BMW dealership standards and BMW expectations. I accept the evidence of Ryan Puskas that he answered questions about the renovation and future outlook for the dealership as well as volume planning (Rough Draft Transcript October 1, 2024 at pages 101-102). Further, Ryan Puskas advised Thomas Glen the existing dealership was landlocked and relocation to a larger site was anticipated to occur within five years. I find this was the same type of information available to Frank Serpa when he sought to purchase the dealership from Michael Croxon. This proposed deal was not completed.

[44] The second proposed sale was to Quantum Automotive Group operated by Ken Szekely. He owned other car dealerships and reached the signed Letter of Intent with Frank Serpa dated December 6, 2016 (Exhibit 1, tab 320). The proposed price was \$21.6 million for the business which consisted of \$18.175 million for good will and \$2.985 million for the fixed assets of leasehold improvements. The land and building was to be purchased for an additional of \$12.515 million (Exhibit 1, tab 320).

[45] As required, Quantum Automotive Group submitted its request for approval to BMW which was given on February 3, 2017. It was given with conditions, the first one of concern being closing was to occur by March 31, 2017.

[46] Quantum Automotive Group sought to use BMW Financial to borrow the necessary funds with the first meeting occurring on February 6, 2017. Much was made at the trial about the initial stated insistence of BMW Financial through its National Manager, Commercial Finance, Peter Jeffrey that any agreement would require a personal guarantee from Ken Szekely. This was met with Ken Szekely's initial clear indication through its executive vice president, Owen Tseng that, as noted in Peter Jeffrey's email of March 9, 2017 to be BMW Financial executive that "he never provides this" (Exhibit 1, tab 348, page F3362 - Case Center).

[47] I find this remained a negotiation point up to the end. I accept the evidence of Peter Jeffrey that he hoped to convince Ken Szekely to give a personal guarantee or convince his management committee to advance the loan without one. The approval of the loan by BMW Financial required approval, first at the local level and then the Global Committee based in Germany. As the negotiations between Quantum Automotive Group and BMW Financial were confidential, while it was of concern to Frank Serpa, I find there was no obligation on BMW to provide details to Frank Serpa.

[48] As part of the negotiations for financing between BMW Financial and Quantum Automotive Group, a \$4.1 million gap was tentatively resolved by Quantum Automotive Group whereby it increased its capital contribution by \$2.1 million and Frank Serpa dropped his price by \$2 million. While this directly involved Frank Serpa, it did not alter the decision ultimately made by BMW Financial that, without a personal guarantee by Ken Szekely, it would not make the loan being sought. As a result, the deal fell through.

[49] The deal with Quantum Automotive Group fell through after deposits totalling \$750,000 had been paid by Quantum Automotive Group to Frank Serpa and they had begun attending at the dealership in anticipation of the deal being completed. Frank Serpa ultimately retained \$600,000 of the deposits after litigation was initiated. BMW sought in submissions that this should be a credit against any damages awarded.

[50] Frank Serpa also made submissions that BMW caused this deal to fail. It relied, in part on disclosure to Quantum of BMW's requirement to Frank Serpa to sell the dealership as it was not going to be renewed. I reject that submission given the email of March 30, 2017 (Exhibit 1, tab 375) by Frank Serpa's lawyer, Lawrence Adelberg which attached the February 3, 2017 letter (Exhibit 1, tab 340) and was copied to Quantum's lawyer, Murhan Aycan.

[51] The sale of the dealership was completed with Kapil Dilawri based on a letter of intent dated July 17, 2017 (Exhibit 1, tab 42). This agreement allocated \$14.4 million for the dealership of which \$10 million was attributed to goodwill. The sum of \$1.4 million was allocated to Fixed Assets and \$3 million for the Leasehold Improvements (Exhibit 1, tab 484). This transaction did not include sale of the land or building. The agreement became more complicated as a result of Frank Serpa's desire to remain in the car dealership business.

[52] This involved Frank Serpa and Kapil Dilawri entering what was called an Asset Purchase Agreement and Side Agreement, both dated October 16, 2017 (Exhibit, 1, tabs 561 and 562). Frank Serpa was to become the owner of Dilawri's Bolton Toyota dealership. The Side Agreement expressly describes a Deferred Purchase Price totalling \$2.5 million of which \$2 million was part of the goodwill amount in the BMW Purchase Agreement. The intent was to first determine if Frank Serpa would be approved by Toyota as one of its dealers. Frank Serpa was not approved. In this instance, the Side Agreement provided for Kapil Dilawri to pay Frank Serpa the Deferred Purchase Price as well as an amount to be determined by obtaining an evaluation of the Bolton dealership in excess of \$2.4 million. •

[53] As a result, as provided for in the Side Agreement, the value of Bolton Toyota was referred to a Third Party Evaluator. The Evaluator, Jeff Pellarin, assessed the Bolton Toyota dealership as between \$3 to \$3.1 million. This added another \$1 million to what Frank Serpa was to receive from Kapil Dilawri for Serpa BMW.

[54] Frank Serpa did not agree with the evaluated assessment and commenced a claim for damages against Kapil Dilawri. In support of that claim, Frank Serpa retained Howard Johnson, PhD. as an expert in vehicle dealership valuation to critique the Jeff Pellarin assessment. He opined the Pellarin evaluation was \$6.214 to \$6.522 million below its actual value (Exhibit 1, tab 585).

[55] That litigation apparently remains unresolved. This is relevant as Howard Johnson, PhD. was also Frank Serpa's expert on damages and testified that, if his evidence was accepted in the action against Kapil Dilawri, it increased the money owed to Frank Serpa from Kapil Dilawri and decreased any shortfall in the actual value of the sale of Serpa BMW and amount owed to Frank Serpa from BMW Canada.

[56] During the 2017 timeframe up to the sale of Serpa BMW, Frank Serpa also alleged BMW Canada treated him unfairly in various other financial dealings. This included defaulting on curtailments or monies due on vehicles on its lot that had aged but not sold. There was evidence of withholding incentive payments and warranty credits against Frank Serpa's cash management accounts. BMW Canada called personal guarantees given by Frank Serpa and his spouse and their companies and made alternative borrowing by Frank Serpa more difficult and expensive as a result of charges placed on Serpa owned properties in excess of the total indebtedness.

LIABILITY

[57] Frank Serpa alleges that BMW Canada's decision to not renew his dealership agreement which forced him to sell was a breach of his contractual, statutory and/or common-law duty of fair dealings. I find, based on the factual circumstances tendered as evidence at trial and summarize above that BMW Canada is liable to Frank Serpa. It is because of the manner in which BMW Canada proceeded.

[58] I find the decision not to properly document the additional 10 months to complete the renovation granted by Hans Blesse at the lunch held May 28, 2014 was contrary to its legal obligation.

[59] BMW Canada acknowledged in its closing submissions that the *Arthur Wishart Act, (Franchise Disclosure)*, 2000, S.O. 2000 c.3 applies to this proceeding. As a result, under Section 3 of that statute, there is a statutory duty of fair dealing. As stated in *Trillium Motor World Ltd. v. General Motors of Canada Limited*, 2015 ONSC 3824 (at paragraph 144) the "statutory duty of fair dealing in S.3 codifies the common law duty of good faith". Here, the parties had entered into a comprehensive Retailer's Agreement which set out the obligations and requirements for each side including and the manner in which the agreement could be terminated (specifically Article 13). It also set out the term or length of the agreement, being April 1, 2012 to April 1, 2014 as contained in the "Third Schedule".

[60] The term of the agreement was extended in writing to June 1, 2014 (Exhibit 1, tabs 78 and 85), that is, the letter dated October 23, 2013. That deadline was extended orally by Hans Blesse at the May 28, 2014 lunch which provided Frank Serpa with the 10 month extension he was seeking to complete the renovation, that is, by April, 2015. Frank Serpa continued to operate and renovate the facility until BMW Canada lost confidence in him as of December, 2015. He was informed orally at the meeting of May 6, 2016, that no further retailer agreement was to be extended to him. Had the retailer agreement been extended, BMW Canada would have been obligated to follow its provisions. I agree with the plaintiffs submissions that would also have provided Frank Serpa with the opportunity to cure the reasons given for the termination. Aside from the renovation and delays in it, the parties continued to operate and deal with each other in the sale and maintenance of BMW Canada vehicles as if the Retailer Agreement remained in force between April 1, 2014 (or June 1, 2014) until March 7, 2016. No alternative agreement was entered into as between the parties.

[61] As a result, in these circumstances, I conclude BMW Canada was obligated to follow its Retailer Agreement with regard to terminating the dealership owned by Frank Serpa. It failed to do so.

[62] This is similar to the circumstances referenced by counsel for BMW Canada in *Coffee Time Donuts v. 2197938 Ontario Inc.*, 2021 ONSC 3109, affirmed 2022 ONCA 435. It is also in accord with the often cited principles relied on in commercial contracts as stated in *Bentas, Inc. et al v. Sunrise Senior Living Real Estate Investment Trust et al*, 2007 ONCA 205 (at paragraph 24).

DAMAGES

[63] Each party called an expert in business valuations with regard to privately held Canadian businesses to opine on the value of the Serpa BMW dealership. As referenced earlier, Frank Serpa utilized Howard Johnson, PhD. After review of his qualifications and without objections, Howard Johnson, PhD., was qualified to give opinion evidence. His approach included information and data provided to and from Frank Serpa and his counsel with a request he assess and provide his opinion as to the dealership's fair market value.

[64] Howard Johnson, PhD. was given details of the failed purchase attempts by Olympic Auto and Quantum Automotive. He concluded these third party offers, which did not close, to be the best indicator of fair market values as opposed to the completed sale to Kapil Dilawri. He did so on the basis they were recent and made by a willing buyer to a willing seller. This conclusion was based on Frank Serpa's belief he was forced to accept the terms of the Purchase Agreement offered by Kapil Dilawri.

[65] Howard Johnson, PhD. accepted that BMW Canada was entitled to a credit on any loss in the amount of the \$600,000 which was retained by Frank Serpa in deposits from Quantum Automotive. The net loss was thus in the range of \$7.15 to \$7.9 million.

[66] This contrasted the BMW Canada expert, Enzo Carlucci who was also qualified to give opinion evidence in the area of loss quantification and business valuations, without objection. Similar to Howard Johnson, PhD., Enzo Carlucci was given details and materials documenting the financial circumstances of Serpa BMW including the failed sales negotiation with Olympic Auto and Quantum Automotive as well as the completed sale to Kapil Dilawri.

[67] As part of his review and assessment of the value of Serpa BMW, Enzo Carlucci considered what was described as "Blue Sky" multiples being a widely recognized method of valuation with regard to the purchase and sale of automobile dealerships. In this regard, based on data of actual sales (admittedly in jurisdictions outside Ontario) the range was between 6.5 to 8.0. This does not compare favourably with the 14.7 to 15.6 multiple that the purposed sale to Olympic Auto and/or Quantum Automotive represented. The sale price to Kapil Dilawri was calculated to be within the range of the multiples other BMW dealerships sold for as contained in data collected by to American Automotive Industry advisors and detailed in Enzo Carlucci's evidence and report (Exhibit 19, tab 2).

[68] Simply stated, I prefer that opinion evidence because it relied on actual sales rather than sales not completed. It more accurately represented what a willing buyer will pay to a willing seller. I use the word "willing" cognizant of Frank Serpa's preference not to sell but faced with the impending end of his right to operate a BMW dealership. In this regard, as stated above, I do not find that actions by BMW caused either of the proposed deals to fail. BMW only provided

to those prospective buyers the same type and level of information that was made available to Frank Serpa when he was seeking to purchase the dealership. I was persuaded that evidence of an actual sale is preferable to that of sales which did not proceed to completion. That is, I find the sale to Kapil Dilawri more closely represented fair market value for Serpa BMW and the plaintiffs claim for damages in this regard fails.

[69] Having found BMW liable for its course of action in not having properly terminated the Dealership Agreement but also having preferred the evidence of BMW regarding the fair market value of the dealership, should any of the other damages claimed by Frank Serpa be awarded? And, if Frank Serpa is entitled to some of the damages claimed, what, if any credit should be given in addition to the \$600,000 received as part of the failed Quantum Automotive Group transaction. That is, should consideration be given for the ongoing payment of rent by Kapil Dilawri for its use of the land and building, calculated to be about \$4.6 million and the subsequent sale of the land in 2022 for \$15 million (as opposed to the \$13.5 million Olympic Auto Group was prepared to pay) or the \$12.15 million Quantum Automotive Group was prepared to pay).

[70] Frank Serpa sought recovery of emergency financing fees of \$1,923,358.28 on the basis BMW withheld warranty and insensitive payments from February, 2017 through to September of 2019 (Exhibit 1, tabs 593 and 594). BMW submitted this figure to be \$1,970,878.06.

[71] I have difficulty with accepting the totality of the claim because it extends beyond when the sale of the BMW dealership from Frank Serpa to Kapil Dilawri closed in late 2017. Further, the documentation of fees and interest paid cites a different loan number (60081 v. 60105) for the fees and interest paid as of January, 2018. Frank Serpa also gave evidence of the \$2 million loan being replaced by a larger, \$5 million loan or, as he stated "one big one" (Rough draft transcript, September 18, 2024 at page 145). This reduces the entitlement to, as submitted by BMW, to approximately \$148,000. I would award this lesser amount save the credit for the \$600,000 paid by Quantum Automotive Group.

[72] Regarding MSP Payments, Frank Serpa claimed \$845,422.94 based the renovations having been completed (except for the basement) by the end of 2015. However, the agreement between the parties by which Frank Serpa has successfully argued ought to have been abided by, clearly sets out that such payments were contingent on completion of the renovations. That did not occur before the sale to Kapil Dilawri was completed.

[73] The lack of completion of the renovations by Frank Serpa and the consistency of the position of BMW is re-enforced by the inclusion of that same arrangement in the Letter of Intent of August 14, 2017 provided to Kapil Dilawri (Exhibit 1, tab 515, at page 3, VI. Additional Terms, paragraph 3). As a result, this claim for damages is dismissed.

[74] Regarding M Status Incentive Program payments, Frank Serpa claimed entitlement to a sum of \$1,000 for each of 76 vehicles sold by him if calculated to the end of 2017. If calculated to the end of 2016, it was 58 vehicles. I prefer the evidence and documentation that M Certification was a process (Exhibit 1, tab 196) and not immediate. This is re-enforced by BMW's reaction to Frank Serpa's press release on January 1, 2015. As a result, this claim for damages is dismissed.

[75] Regarding non-refundable parts, Frank Serpa claimed \$234,693.43 of unsold parts representing the difference between the two years of parts both Olympic Auto Group and Quantum Automotive Group were prepared to purchase and the one year of parts agreed to between Kapil Dilawri and Frank Serpa in the purchase of the dealership. I find this represented a portion of the agreement reached between Frank Serpa, as the willing seller and Kapil Dilawri, as the willing buyer. It was negotiated between the parties. As a result, it is too remote and is dismissed.

[76] I have deliberately concluded not to address whether Frank Serpa (or through his various corporations) clearly received rent following the sale of the dealership of approximately \$4.6 million from Kapil Dilawri. There was no evidence of any debt or carrying costs on this asset tendered. Similarly, I have not addressed the difference in the sale of the land and building by Frank Serpa in 2022 for \$15 million. This was in excess of a \$13.5 million he was offered by Olympic Auto Group or the \$12.515 million he was offered by Quantum Automotive Group. If considered, it would likely be a further set off of any damages owed by BMW (assuming the sale at the higher price was more profitable to Frank Serpa and rent exceeded carrying costs).

[77] As noted, there is ongoing litigation between Frank Serpa and Kapil Dilawri with regard to the failed sale of the Bolton Toyota dealership. Howard Johnson, PhD has given opinion evidence as to the value of that claim if there is any liability.

PUNITIVE DAMAGES

[78] Frank Serpa maintained BMW's conduct met the high-handed, arbitrary and reprehensible conduct which entitled him to an award of \$1 million. His counsel cited the decision of *Baker v. Blue Cross Life Insurance Company of Canada*, 2023 ONCA 842, as a recent example of where the requisite conduct must have departed "to a marked degree from ordinary standards of decent behaviour" (at paragraph 23). That paragraph in that decision also returns to the statement of the law as found in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (at paragraph 94) where such damages are only to be awarded in "exceptional circumstances". I am guided by that statement of the law and the criteria set out.

[79] The award in *Baker v. Blue Cross Life Insurance Company of Canada*, *supra* arose from the defendant, a disability policy insurer, having terminated the plaintiffs long term disability after two plus years on the basis she no longer qualified under the "any occupation" test contained in the terms of the policy. This position was rejected by the jury who rendered a verdict that the plaintiff fell within the definition of being totally disabled which entitled her to ongoing benefits and payment" of owed benefits in excess of \$220,000. The punitive damages awarded by the jury was \$1.5 million and upheld on appeal.

[80] I summarize that decision to distinguish it from the factual matrix before me. Here, while BMW committed a legal wrong, it did so after numerous warnings to Frank Serpa that he was failing to abide by the terms of the Dealership Agreement to complete the required renovation, first by February 1, 2014. He was given extensions and eventually given a ten month reprieve by Hans Blesse to have the renovations completed by April, 2015. This was further extended to the end of 2015 by inaction on both sides.

[81] In addition, although I find BMW liable, it was successful in its defence with regard to damages. As result, I find this was not an appropriate situation to make any award of punitive damages and I decline to do so.

[82] The defendant was liable to the plaintiff. However, in the absence of any net recoverable damages indicates the plaintiff's action has failed. Subject to input from counsel and preferably with the agreement of counsel for the parties, the practical order would be dismissal of this action.

COSTS

[83] I required the parties to provide their Bill of Costs, if successful one week following the conclusion of the trial. The plaintiff's Bill of Costs sets out a claim ranging from \$1,016,051.14 (inclusive of HST) for partial indemnity fees to \$1,524,076.71 (inclusive of HST) for a substantial indemnity fees. The disbursements claimed are \$256,212.32 for a total ranging between \$1,272,263.46 to \$1,780,289.03.

[84] This compares with the defendant's Bill of Costs which sets out a claim ranging from \$1,844,876.31 for partial indemnity costs (inclusive of HST) to \$2,767,314.47 (inclusive of HST) for substantial indemnity fees. The disbursements claimed are \$272,307.89 for a total ranging between \$2,117,184.20 to \$3,039,622.36.

[85] I urge the parties to agree on costs. I would note there appears to be divided success which raises whether the parties ought to each bear their own costs.

[86] If the parties cannot agree on costs, the plaintiff shall forward its position to me in writing, on this issue as well as the substantive order to be made if not agreed upon, not to exceed 10 typewritten pages in compliance with Rule 4.01 on or before **May 23, 2025**. The page limit shall exclude any attachments such as an Offer to Settle being relied upon. The defendant shall have until **June 23, 2025** to respond, identically limited.

Mr. Justice G. Dow

Released: April 22, 2025

CITATION: Avante Automobile (2017) Corporation v. BMW Canada Inc., 2025 ONSC 87
COURT FILE NO.: CV-18-595011
DATE: 20250422

2025 ONSC 87 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

AVANTE AUTOMOBILE (2017) CORPORATION
and FRANCESCO SERPA

Plaintiffs

-and-

BMW CANADA INC.

Defendant

REASONS FOR DECISION

Mr. Justice G. Dow

Released: April 22, 2025