

Court File No.

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

GEORGE LEON, in his capacity as
Trustee of the **GEORGE LEON FAMILY TRUST**

Plaintiff (Appellant)

- and -

VOLKSWAGEN AKTIENGESELLSCHAFT

Defendant (Respondent)

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF APPEAL

THE PLAINTIFF (APPELLANT) APPEALS to the Court of Appeal from the order of the Honourable Justice Edward P. Belobaba dated August 15, 2018, made at Toronto, Ontario.

THE APPELLANT ASKS that the order be set aside and an order be granted as follows:

- a) Dismissing the Defendant's motion for a declaration that the Court has no jurisdiction to hear and dismissing the action on that basis, or in the alternative, permanently staying the action on the basis of *forum non conveniens*; and
- b) Granting the Plaintiff his costs of the motion and of this appeal, fixed and payable forthwith.

THE GROUNDS OF APPEAL are as follows:General

1. The motion judge erred in law in finding that the court did not have jurisdiction *simpliciter* over the Ontario Plaintiff's claim of fraudulent misrepresentation inducing his purchase of the foreign defendant's equity securities on a foreign stock exchange at an inflated price;
2. The motion judge erred in law in finding that the Defendant had not attorned to the jurisdiction of the Ontario courts when it engaged the Ontario court's process without raising a challenge to the court's jurisdiction;
3. The motion judge erred in law and made palpable and overriding errors in his findings of fact in concluding that Ontario is not the convenient forum for the adjudication of the Ontario Plaintiff's claim regarding fraudulent misrepresentations which he received and acted upon in Ontario;

Jurisdiction *Simpliciter*

4. The motion judge erred in law and made palpable and overriding errors of fact and law in concluding that there was no real and substantial connection to this jurisdiction in respect of the Plaintiff's claim for fraudulent misrepresentation asserted against the foreign Defendant;
5. The motion judge made palpable and overriding error of fact and errors of law in failing to find that the Defendant had attorned to the jurisdiction by:
 - a. Carrying on its own business in the jurisdiction by directly issuing securities to Canadian investors during the class period;

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- b. Carrying on its own business in the jurisdiction by exporting cars into the jurisdiction which were sold to its operating subsidiaries, and in the process thereof engaging with Federal and Provincial environmental authorities to (falsely) demonstrate the exported vehicles' compliance with Canadian environmental legislation;
 - c. Carrying on its own business in the jurisdiction by advertising its compliance with Federal and Provincial environmental legislation through sales information stickers touting the vehicles it manufactured for sale in Ontario were "clean diesel"; and,
 - d. Engaging the court's process in June 2017, and attorning to the jurisdiction of the Ontario courts by scheduling a motion with the court to (i) challenge the propriety of the originally named plaintiff, the George Leon Family Trust, (ii) dismiss the claim on the ground that it was an abuse of process, and (iii) stay the Plaintiff's claim on the grounds of *forum conveniens*, without also asserting a challenge to the court's jurisdiction simpliciter; then, settling that intended motion with the then plaintiff on terms requiring the then plaintiff to take positive actions, and approving the order pursuant to which a new plaintiff was substituted;
6. The motion judge erred in law and made palpable and overriding errors of fact in finding that the tort of fraudulent misrepresentation (deceit) was not committed in Ontario, when:
 - a. The Defendant purposefully exported its vehicles into Ontario labelled with misrepresentations in the "clean diesel" sales stickers affixed to the vehicles which falsely represented that the vehicles were complaint with Federal and Provincial environmental laws;

- b. The Defendant purposefully directed its public disclosure core and non-core documents containing the fraudulent misrepresentations to investors in Ontario and globally by posting those documents, in English, on its website, where the Defendant intended the documents to be read and relied upon by the Defendant's investors, including the Plaintiff and other Ontario investors, whom the Defendant knew were located in Ontario; and
 - c. The Plaintiff has alleged and gave evidence that he relied upon the fraudulent misrepresentations in making his decision to purchase the Defendant's securities during the Class Period;
7. The motion judge erred in law in applying a different test for determining whether the court has jurisdiction *simpliciter* over a fraudulent misrepresentation claim asserted on behalf of Ontario residents based upon public issuer securities misrepresentations, pursuant to which international comity was granted precedence over all other factors;
8. The motion judge erred in law and made palpable and overriding errors of fact in finding that the laws of Germany and the United States confer exclusive jurisdiction over common law tort claims against public issuers with respect to securities misrepresentations to, respectively, (a) the court in the district where the defendant company is headquartered, and (b) the US district court, to the exclusion of the court where the injured plaintiff received and relied upon the representation, e.g. Ontario courts;
9. The motion judge erred in law in finding that the Ontario court should not take jurisdiction over a claim asserting fraudulent misrepresentations made to Ontario

residents through internet-based documents on the ground that it would lead to “universal jurisdiction” when the fraudulent misrepresentations were directed to Ontarians, caused Ontarians to act, and the consequences of the deceit were manifested in Ontario, i.e. the fraudulent misrepresentations were received and relied upon in Ontario;

10. The motion judge erred in law and made a palpable and overriding error of fact in finding that there was insufficient evidence to pierce the corporate veil between the Defendant and its wholly owned Canadian subsidiary, or to find that the wholly owned subsidiary was acting as the Defendant’s agent, when the Defendant issued billions of dollars worth of debt securities in Canada, and controlled how that capital would be spent on corporate purposes, which demonstrates that the Defendant was operating in Ontario through its wholly owned Canadian subsidiary;

Forum Non Conveniens

11. The motion judge erred in law by reversing the onus of proof to require the Plaintiff responding party prove that Ontario was the more convenient forum, rather than applying the universally accepted test which requires the moving party to demonstrate that another forum is *clearly more appropriate* than the Plaintiff’s chosen forum;
12. The motion judge erred in law by failing to include in his analysis of international comity the fact that the Defendant has admitted to criminal conduct, has settled consumer class action claims brought against it in Ontario, and is being prosecuted for violations of Canadian environmental laws, all with respect to the very same misconduct at issue in this action;

13. The motion judge erred in law in concluding that the Ontario courts do not have a genuine interest and concern in protecting Ontarians from the fraudulent conduct of foreign defendants that is directed at Ontarians and causes them harm;
14. The motion judge erred in law in failing to address the fact that under German law the Plaintiff's choice of forum takes precedence over German procedural laws which dictate in which venue a securities misrepresentation claim is to be heard when the claim is brought in Germany under German legislation;
15. The motion judge erred in law in finding that the applicable law for a claim of fraudulent misrepresentation brought by Ontario investors who purchased the Defendant's ADR securities is the law of the United States, and the law of Germany applies for those Ontario investors who purchased the Defendants shares;
16. The motion judge erred in law in finding that there is a different test for determining whether an Ontario court is the convenient forum for a claim by Ontario residents based upon public issuer misrepresentations, in which international comity takes precedence over all other factors;
17. The motion judge made a palpable and overriding error of mixed fact and law in finding that requiring the putative class member who purchased the Defendants' shares (other than its ADRs) to litigate in Germany would avoid a multiplicity of actions, when the undisputed facts are that each person must commence their own action in Germany, and there is no class proceeding in that jurisdiction;

18. The motion judge erred in law and made palpable and overriding errors of fact in failing to acknowledge that putative class members would be prevented from having their claims heard on the merits for purely procedural and cost reasons because (a) the claim was time-barred under the foreign law (e.g., the first 20 months of the putative Class Period); and (b) the prohibitive cost on putative class members with nominal claims for damages to advancing claims in foreign jurisdictions;
19. The motion judge made a palpable and overriding error of mixed fact and law in finding that the expiry of both US and German limitation periods was irrelevant in the *forum conveniens* analysis, and that deference to the legal system in Germany and the United States through the application of comity takes precedence over providing any access to justice for those putative class members who are excluded from the US ADR proceeding, or who have not already commenced their own actions in Germany;
20. The motion judge made a palpable and overriding error of mixed fact and law in failing to take into consideration the claims of “retail” as opposed to “institutional” investors and the evidence that for the retail investors Germany is not *forum conveniens*, and asserting individual claims in a foreign country would be a genuine and insurmountable barrier to access to justice; and,
21. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- a) This is an appeal from a final order of a judge of the Superior Court of Justice; and
- b) Leave to appeal is not required.

September 14, 2018

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