UMBRELLA PURCHASERS: THE PLAINTIFFS' PERSPECTIVE

By: Linda Visser and Bridget Moran[1]

Introduction

This paper responds to "How Should Umbrella Pricing Claims be Dealt with in Canada" (the "Originating Paper"). In the Originating Paper, the authors – who primarily represent defendants in class action cases – discuss the current treatment of umbrella purchasers claims in Canadian law. The authors also describe a "trend" in the American courts towards prohibiting umbrella purchaser claims. The authors conclude that it "may be prudent for the Canadian courts to adopt a more restrictive approach the certification of such claims." We disagree with this conclusion. Permitting umbrella purchaser claims is supported by the plain language of s. 36(1) of the *Competition Act* and furthers the compensatory and deterrence objectives of the *Competition Act*.

In this paper, we do not attempt to canvass all of the relevant case law, much of which has already been summarized in the Originating Paper. Instead, we attempt to revisit the cases through a plaintiff's lens and with a view to the purposes of the *Competition Act*.

Canadian Cases

Three cases – *Shah*, *Godfrey* and *Fanshawe* – have grappled with the issue of whether umbrella purchasers have a cause of action at Canadian law.[2] While these decisions are summarized in the Originating Paper, it is worth highlighting several points about these cases.

First, all three decisions are under appeal or leave to appeal has been sought. The *Shah* appeal was heard in March. The *Godfrey* appeal is scheduled for June. The *Fanshawe* leave to appeal is proceeding in writing.

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[2] *Shah v LG Chem, Ltd*, 2015 ONSC 6148, leave to appeal granted (Plaintiffs), leave to appeal refused (Defendants) 2016 ONSC 4670 (Div Ct); *Godfrey v Sony Corp*., 2016 BCSC 844; *Fanshawe College v Hitachi Ltd*., 2016 ONSC 5118.

Second, Perell J's decision in *Shah* stands alone in Canada in refusing to certify umbrella purchaser claims. Following *Shah,* two experienced class actions judges (Masuhara J. in *Godfrey* and Grace J. in *Fanshawe*) considered the reasoning of Perell J. with respect to umbrella purchasers and expressly rejected it. Moreover, *Shah* conflicts with numerous prior price-fixing decisions that have been certified under this theory, including two cases that have expressly addressed the issue of umbrella purchaser claims.[3]

The Quebec DRAM litigation is the first case to expressly consider the issue. The arguments on umbrella purchasers arose in the context of whether the motion for authorization adequately pleaded causation. The Quebec Court of Appeal observed that establishing causation at trial of umbrella claims "will be no mean feat" and that, at trial, the appellant would have to produce a convincing method to show that the conduct of the named manufacturers impacted the prices of all DRAM sold in Quebec, whether or not that DRAM originated with them. The court held that "the evidentiary task will be a heavy one, but the facts alleged on causation, taken as true, seem to justify the conclusion sought as required by law at this stage of the proceedings." The decision was upheld by the Supreme Court.[4]

Crosslink considered umbrella purchasers in the context of identifiable class. The case was certified in the face of arguments that the class was overly broad on the basis that it included purchases from non-defendants.[5]

Third, the analysis in *Shah* was flawed. The motion judge framed the statutory analysis around the proper interpretation of s. 45 of the *Competition Act*. Section 45 prohibits

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3 For example: *Fanshawe College of Applied Arts & Technology v LG Philips LCD Co*, 2011 ONSC 2484, leave to appeal granted 2011 ONSC 6645 [unreported], aff'd 2015 ONSC 7211 (Div Ct); *Irving Paper Ltd v Atofina Chemicals Inc*, [2009] OJ No 4021 (Sup Ct); *Crosslink Technology Inc v BASF Canada*, 2014 ONSC 1682 at para 98, leave to appeal refused 2014 ONSC 4529; *Fairhurst v Anglo American PLC*, 2014 BCSC 2270; *Godfrey v Sony Corporation,* 2016 BCSC 844 at para 79, appeal pending; *Pro-Sys Consultants Ltd v Infineon Technologies AG*, [2009] BCJ no 2239 (CA), leave to appeal refused, [2010] SCCA no 32; and *Option Consommateurs c Infineon Technologies AG*, 2011 QCCA 2116 at paras 123-124, aff'd 2013 SCC 59;

4 *Option Consommateurs c Infineon Technologies AG*, 2011 QCCA 2116 at paras 123-124, aff'd 2013 SCC 59.

5 *Crosslink Technology Inc v BASF Canada*, 2014 ONSC 1682 at para 89, leave to appeal refused 2014 ONSC 4529.

conspiracies. As recognized by the Supreme Court, it is section 36(1) that governs who can claim under the *Act*.[6]

Further, Perell J's application of restitutionary principles is inconsistent with the ordinary language of s. 36. Section 36 makes clear that "any person who suffered loss or damage" as a result of conduct contrary to Part VI (which includes s. 45) can sue and recover from the wrongdoer an amount equal to the loss or damage proved to have been suffered. Section 36 focuses on compensating victims for the "loss or damage" they suffered. It does not require a claimant to show a corresponding gain to the wrongdoer. The provision is therefore based on compensatory principles, not restitutionary principles.

Perell J. failed to consider the objectives of the *Competition Act*, which include "deterrence and compensation" and promoting "vigorous and fair competition throughout Canada." [7] Under Perell J's interpretation, defendants are not required to account for the full harm caused by their wrongful conduct and persons with causally-related injuries are left uncompensated. This interpretation undermines the objectives of the *Competition Act*.

Finally, Perell J. erred by importing negligence principles in the context of intentional torts. Perell J. rejected umbrella purchaser claims in part because of concerns regarding indeterminate liability and remoteness. Those principles developed in the context of negligence and do not apply in the context of intentional torts. Intentional tortfeasors are properly held accountable for all damages causally related to their conduct and concerns of indeterminate liability have no application. Importing negligence concepts into intentional torts ignores the "essential difference between the intentional infliction of harm and the unintentional infliction of harm resulting from a failure to adhere to a reasonable standard of care."[8] The intention to injure the plaintiff "negatives all excuses and disposes of any question of remoteness of damage".[9] Defendants are liable for all harm caused, however remote it may be.[10]

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6 *Sun-Rype Products Ltd v Archer Daniels Midland Co*, 2013 SCC 58 at paras 42-43.

7 *Competition Act*, RSC 1985, c C-34, s 36, s 1.1; *Infineon Technologies AG v Option Consommateurs*, 2013 SCC 59 at para 111; *R v Wholesale Travel Group Inc*., [1991] 3 SCR 154 at para 239.

8 *Bettel v Yim* (1978), 20 OR (2d) 617 at para 34 (Co Ct).

9 *Gershman v Manitoba (Vegetable Producers' Marketing Board)* (1976), 69 DLR (3d) 114 at paras 22, 24-25 (CA).

10 *Predovich v Armstrong* (1997), 71 ACWS (3d) 1184 at para 55-56 (Gen Div).

Godfrey and *Fanshawe* properly determined the issue by reference to the language of s. 36 and objectives of the *Competition Act*. They did not allow negligence concepts to overtake the analysis.

U.S. Cases

As noted in the Originating Paper, in the United States, the law about umbrella claims is mixed. As the Second Circuit described the legal landscape just last year, "[t]he antitrust standing of umbrella purchasers under such circumstances has produced a split in authority among our sister circuits."[11] The U.S. law on this issue was not influential in any of the Canadian decisions on this issue.[12]

In instances where U.S. courts have denied umbrella purchaser claims, they have generally done so based on two principles that have no application in Canada: (1) the impact of treble damages under the *Clayton Act,* and (2) the result of *Illinois Brick Co. v Illinois*, 431 U.S. 720 (1977), which precludes indirect purchaser claims.

Pursuant the *Clayton Act,* a party may claim for triple damages when they have been harmed by conduct that violates the *Sherman Act*. Given the risk of treble damages, some American courts have been apprehensive about the magnitude of damage awards that could flow from umbrella purchaser claims. In *Mid-West Paper Products Co. v Continental Group, Inc.,* one of the foundational cases denying umbrella purchaser claims, the majority found that to permit umbrella purchasers to sue for treble damages would be economically "ruinous" for the violators. In the majority's view, such an award would be "overkill" and might drive the violators out of business, which would be incompatible with the antitrust goal of maintaining a competitive economy. [13] The concept of treble damages does not apply in Canada.

In *Illinois Brick,* the U.S. Supreme Court rejected indirect purchaser claims, in part because of concerns about the complexity of measuring damages to indirect purchasers. The court voiced concern about the "massive evidence and complicated theories" that would be

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11 *Gelboim v Bank of America Corp*., 823 F.3d 759, 778 (2d Cir 2016).

12 *Godfrey v Sony Corp*., 2016 BCSC 844 at para 69.

13 *Mid-West Paper Products Co. v Continental Group, Inc*., 596 F.2d 573 at 583, 586-587 (1979). See also *Associated General Contractors of California, Inc. v California State Council of Carpenters*, 459 U.S. 519 at 529-535, 544-545 (1983) ("it is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to recover threefold damages.")

required to trace the effect of the overcharge through each step in the distribution chain. This line of reasoning has been adopted by many of the U.S. courts that reject umbrella purchaser claims.[14]

Relevant case law in Canada has developed differently. In the 2013 Trilogy,[15] the Supreme Court of Canada ruled that indirect purchasers have a cause of action in a conspiracy case. The Supreme Court rejected the argument the inherent complexities in determining indirect purchaser damages should be a bar to certification. In *Microsoft,* the court recognized that "Indirect purchaser actions, especially in the antitrust context, will often involve large amounts of evidence, complex economic theories and multiple parties in a chain of distribution, making the tracing of the overcharges to their ultimate end an unenviable task." However, this was not a reason to prohibit indirect purchaser claims.

In instances where U.S. courts have accepted umbrella purchaser claims, U.S. courts have ruled that they are no more complex than ordinary price-fixing cases and are consistent with deterrence and compensation objectives. These principles are equally applicable in the Canadian context.

For example, in *In Re Uranium Antitrust Litigation*, the court held that determining the prices that non-conspirators would have charged, absent the conspiracy is "no more problematic than determining damages in any price-fixing case." The court also noted that, if umbrella purchasers were denied standing, "a serious gap in antitrust enforcement would be created, in that antitrust defendants would not be accountable for an entire category of damages they

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[14] For example: *Mid-West Paper Products Co. v Continental Group, Inc.,* 596 F.2d 573 at 584-585 (1979) ("any attempt to determine the effect of defendants' overcharges upon their competitors' prices would transform this antitrust litigation into the sort of complex economic proceeding that the *Illinois Brick* Court was desirous of avoiding if at all possible"); *Associated General Contractors of California, Inc. v California State Council of Carpenters*, 459 U.S. 519 at 544-545 (1983) ("As the Court wrote in *Illinois Brick*, massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits"); *In re Petroleum Products Antitrust Litigation*., 691 F.2d 1335 at 1339-1342 (9th Cir.1982) ("we have little hesitancy in concluding that the limitations recognized in *Illinois Brick* bar umbrella claims in the context of the multi-tiered distribution chain alleged here"); and *In re Processed Egg Products Antitrust Litigation*, 2016 WL 4670983 at 4 (ED Penn 2016) ("…recovering overcharges when the Plaintiffs have not presented evidence that the Defendants, and not the non-conspirators, pocketed those overcharges creates a situation in which Plaintiffs are seeking recovery of pass-through overcharges, something prohibited by *Illinois Brick*").

[15] *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57, *Sun-Rype Products Ltd. v Archer Daniels Midland Company*, 2013 SCC 58, and *Infineon Technologies AG v Option Consommateurs*, 2013 SCC 59.

caused." Such a gap would undermine the compensatory and deterrent objectives of antitrust law. Where defendants are not penalized the full extent of the overcharge caused by their conduct, "defendants will not internalize the full social costs of their actions."[16]

Similarly, in *County of San Mateo v CSL Limited*, the court recently ruled that the "overcharge damages flowing from purchases from non-conspiring rivals are based on the same calculation that must be made for damages flowing from purchases from defendants; that is, the amount over the price that would have occurred in the absence of the anticompetitive conduct". The court went on to note that "while calculating the amount of plaintiff's umbrella damages may be inherently difficult, it does not follow that it will be impossible for plaintiff to make a non-speculative estimation of such damages."[17] The court reasoned that, since California had rejected *Illinois Brick*, it was not bound by cases that applied *Illinois Brick*'s rationale to umbrella purchaser claims. In particular, the court was unpersuaded by *Petroleum Products Antitrust Litigation,* which held that the plaintiffs' umbrella damages were barred under *Illinois Brick* because they were "unacceptably speculative and complex." The court held that since umbrella damages are calculated in the same way as indirect purchaser non-umbrella damages, they could not be "categorically barred" under California antitrust law for "failing to meet *Illinois Brick*'s benchmark for speculation and complexity."[18]

Pricing decisions: not truly independent

A common refrain from defendants is that non-cartel members are not obliged to follow the prices set by the cartel. The Originating Paper argues that a non-cartel member's ability to make an independent decision (a) represents a break in the chain of causation and (b) will necessarily involve individualized factual assessments that make class-wide claims unfeasible. We will deal with each of these criticisms in turn.

To respond to the causation argument, the theory underlying umbrella purchaser claims must be revisited. Umbrella purchaser claims are grounded in s. 36 of the *Competition Act*, which contemplates that "any person" who suffered "loss or damage as a result of … conduct

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16 *In re Uranium Antitrust Litigation*, 552 F Supp 518 at 523, 525-526 (ND Ill 1982).

17 *County of San Mateo v. CSL Limited*, 2014 WL 4100602 at 3 (ND Cal).

18 *County of San Mateo v. CSL Limited*, 2014 WL 4100602 at 4-5 (ND Cal), citing *Petroleum Products Antitrust Litigation,* 691 F.2d 1335 at 1340-41 (9th Cir 1982).

that is contrary to any provision of Part VI" can bring a claim. The alleged "conduct" contrary to Part VI is the defendants' participation in the cartel, which had the effect of raising market prices and enabling non-cartel members to raise their prices. In other words, *but for* the cartel, non-cartel members would not have been able to charge their customers supra-competitive prices. This is the causal link between the alleged fault committed by cartel members and the damage suffered by the umbrella purchasers.

While it is true that non-cartel members may choose to raise their prices without knowledge of the cartel, the economic theory underlying the umbrella purchaser analysis holds that such pricing decisions are not truly independent. Recall from the Originating Paper, the European *Kone* decision which was endorsed by Masuhara J. in *Godfrey.* In that case, the court explains that even where a non-cartel member makes an autonomous decision to raise its price to a level higher than what is possible in a competitive market, "such a decision has been able to be taken by reference to a market price distorted by that cartel and, as a result, contrary to the competition rules."[19]

Further, the "umbrella effect" is a foreseeable result of the cartel. In *Kone*, the Court of Justice of the European Union held that umbrella pricing is one of the "possible effects of the cartel, that the members thereof cannot disregard." In that case, the parties did not dispute possible umbrella effects.[20]

In *Fanshawe,* the plaintiff's certification economic expert explained that since "non-conspirators likely were profit-maximizing firms, they would have sought to set prices as high as possible without losing market share, meaning that their pricing would have been limited only by the artificially inflated prices of the defendants and their co-conspirators." As a result, non-conspirators' prices would have been lower but for the alleged conspiracy. Notably, the defendants' economic expert agreed that non-cartel manufacturers would increase their prices in response to the conspiracy.[21]

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19 *Godfrey v Sony Corp*., 2016 BCSC 844 at para 77 [emphasis removed], citing Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG*, ECLI:EU:C:2014:1317.

20 Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG*, ECLI:EU:C:2014:1317 at para 28-30.

21 Reply Affidavit of Dr. Martin Asher, sworn May 6, 2015, Exhibit "B" - CDT Reply Report at para 10 and Exhibit "C" - CPT Reply Report at para 10.

Economic literature also supports a causal relationship between cartels and umbrella pricing. In "Umbrella Effects" – an article cited by Masuhara J. in *Godfrey* – the authors argue that umbrella effects are "directly attributable to the cartel (in the sense of causality) and no convincing argument has been presented so far as to why they should not be legitimate actionable claims for damages."[22]

With respect to the "individualized factual assessments", care must be taken when discussing the necessity for individual assessments in the class action context. Often such arguments refer to a need to examine the circumstances of individual class member – which would be a barrier to certification. That is not an issue in respect of umbrella purchaser claims. The circumstances of individual class members have no bearing on the pricing decisions of non-cartel firms. A plaintiff's expert will necessarily have to consider the role of non-conspirators in his/her analysis, but that analysis applies on a class-wide basis and does not preclude certification.

Further, questions of whether non-cartel members actually raised prices, and to what extent, are factual issues to be determined at trial. They are not issues that should preclude a finding that the cause of action requirement is satisfied. As part of the common issues trial, plaintiffs will have to prove the umbrella effects occurred. This task could be difficult and will require expert evidence. However – pursuant to the Supreme Court's guidance in *Microsoft* – this should not preclude a plaintiff from attempting to establish umbrella claims at a common issues trial.

As a matter of public policy, and in order to maximize the deterrence and compensation objectives of the *Competition Act*, cartel participants should be required to account for all harm suffered as a result of their wrongdoing and victims of cartel conduct should be permitted to recover for any losses that are causally related. As a matter of public policy, the cartel members who created the risk of umbrella effects should bear the resulting losses, not the innocent

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[22] Roman Inderst, Frank P. Maier-Rigaud & Ulrich Schwalbe, "Umbrella Effects" (2014) 10:3 Journal of Competition Law and Economics 739 at 2, online http://awa2014.concurrences.com/academic-articles-awards/article/umbrella-effects (accessed 15 September 2016).

purchaser. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."[23]

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[23] *In re Uranium Antitrust Litigation*, 552 F Supp 518 at 525 (ND Ill 1982).