HOT TOPICS IN COMPETITION CLASS ACTIONS

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Overview:

In several recent decisions, the Ontario and British Columbia courts have grappled with significant issues affecting the scope and viability of price-fixing class actions. These issues include whether the limitation period in the *Competition Act* is subject to discoverability; whether the *Competition Act* is a "complete code" such that a claim for unlawful means conspiracy cannot be premised on a breach of the Act; whether persons who purchased a relevant product from a non-conspirator ("umbrella purchasers") have a cause of action in a price-fixing conspiracy case; and whether the Ontario court has jurisdiction over absent foreign class members.

Discoverability and Complete Code:

Fanshawe College v AU Optronics relates to an alleged price-fixing conspiracy in the market for LCD panels. Recently, the Ontario Court of Appeal issued a decision in *AU Optronics,* addressing two matters that have been the subject of conflicting case law in Canada.[2]

The first issue was whether the limitation period set out in section 36(4) of the *Competition Act* is subject to discoverability. Section 36(4) provides that no action may be brought "after two years from … a day on which the conduct was engaged in…" A finding that discoverability applied would mean that the limitation period would not begin running until the plaintiff, through a reasonable exercise of diligence, discovered or ought to have discovered the wrongful conduct.

In the court below, the defendant brought a summary judgment motion, claiming that the action was commenced beyond the limitation period set out in section 36(4). The defendants took the position that the limitation period ran from the date of the conduct, and that discoverability did not apply. The motion judge rejected this argument, and the defendant appealed. The Court of Appeal upheld the motion judge's findings. In doing so, the court relied on comments from the Supreme Court of Canada that "the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration." The Court of Appeal noted that this consideration is particularly applicable in the context of secretive and deceptive anti-competitive agreements and concluded that any other interpretation of section 36(4) had the potential to deprive victims of the chance to make a claim.[3]

The second issue in *AU Optronics* was whether the plaintiff was entitled to rely on the tort of unlawful conspiracy in their pleadings. The defendant asserted that the inclusion of the remedy in section 36 of the *Competition Act* meant that the *Competition Ac*t was a complete code, such that the plaintiff could not rely on a breach of the *Competition Act* to provide the unlawful act

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2 *Fanshawe College v AU Optronics Corporation*, 2016 ONCA 621.

3 *Fanshawe College v AU Optronics Corporation*, 2016 ONCA 621 at paras 46-49.

that would form the basis of the tort claim in unlawful conspiracy. The Court of Appeal rejected this assertion, holding that it would be incongruous with the purpose of the *Competition Act* to eliminate a tort claim that serves to punish anti-competitive behaviour.[4]

The Court of Appeal's decision in *AU Optronics* is significant for plaintiffs. Had the defendant's arguments on discoverability and the complete code been accepted, the cumulative effect would have allowed wrongdoers who successfully concealed their conduct for two years to escape civil liability.

The defendant is seeking leave to the Supreme Court.

Umbrella Purchasers:

Shah v LG Chem, Ltd. alleges price-fixing in the market for lithium-ion batteries. The action was certified by the Ontario court in October 2015 and both parties sought leave to appeal.[5] The defendants were denied leave to appeal based on the analysis of the expert evidence. The plaintiffs were granted leave to appeal on whether the motion judge erred in refusing to certify the claims of umbrella purchasers.[6]

Umbrella purchasers are persons who purchased the relevant product from a non-conspirator. The theory behind the inclusion of umbrella purchasers in price-fixing cases is that because the conspiracy participants dominated the market, they were able to drive market prices up and non-conspirators followed by charging higher prices. Accordingly, even purchasers from non-conspirators would have been harmed by the unlawful activities of the conspirators. The motion judge excluded umbrella purchasers from the certified class on the basis that: (a) the umbrella purchasers' claims were inconsistent with restitutionary law because the defendants did not receive any gain from the umbrella purchasers; (b) umbrella purchaser claims would impose indeterminate liability on the defendants; and (c) the inclusion of umbrella purchasers in the class would raise difficult issues about the commonality of the proposed common issues and would make the class proceeding unmanageable.[7]

Godfrey v Sony Corp., alleges price-fixing in the market for optical disk drives. The action was certified by the British Columbia court in May 2016.[8] On the umbrella purchaser issue, the motion judge considered the *Shah* decision, and rejected its analysis. The motion judge disagreed with *Shah* for the following reasons: (a) restitutionary law does not determine the scope of *Competition Act* claims. Section 36 focuses on compensating for losses, not restoring wrongful gains; (b) the possibility of indeterminate liability does not militate against umbrella purchasers claims. Section 45 prohibits intentional conspiracies. The policy rationales for limiting a duty of care in negligence "are not compelling here;" (b) while allowing umbrella claims could make defendants liable for the pricing decisions of non-defendants, under the umbrella theory, these pricing decisions are not truly "independent;" and (d) allowing umbrella purchaser claims

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4 *Fanshawe College v AU Optronics Corporation*, 2016 ONCA 621 at paras 85 and 92.

5 *Shah v LG Chem, Ltd*, 2015 ONSC 6148, leave to appeal granted (Plaintiffs), leave to appeal denied (Defendants) 2016 ONSC 4670 (Div Ct).

6 *Shah v LG Chem, Ltd*., 2016 ONSC 4670 (Div Ct). Plaintiffs were also granted leave to appeal on the complete code issue.

7 *Shah v LG Chem, Ltd*., 2015 ONSC 6148 at paras 164-177.

8 *Godfrey v Sony Corp*., 2016 BCSC 844.

furthers the goals of the *Competition Act*.[9] The defendants are appealing to the British Columbia Court of Appeal.

Fanshawe College v Hitachi Ltd. alleges price-fixing in the market for CRT (an older technology used in televisions and computer monitors). The action was certified by the Ontario court in August 2016.[10] The motion judge held that umbrella purchasers have a cause of action in a price-fixing conspiracy case. In coming to this conclusion, the motion judge had the benefit of the competing decisions in *Shah* and *Godfrey.* The motion judge preferred the reasoning of the court in *Godfrey,* though questioned whether issues like indeterminate liability, causation, behaviour modification and deterrence should be assessed at the pleadings stage of the analysis. In the motion judge's view, these types of issues may go beyond what a statement of claim reveals.[11] The defendants have sought leave to appeal to the Divisional Court.[12]

This issue is of considerable importance to both plaintiffs and defendants because it affects who can bring a claim and the scope of the defendants' potential liability.

Jurisdiction:

Airia Brands v Air Canada relates to allegations that the defendants unlawfully engaged in a worldwide conspiracy to fix prices of air cargo shipping services. The action was certified in August 2015, but the certified class excluded certain foreign claimants in accordance with a parallel ruling on jurisdiction.[13] The defendants sought leave to appeal the certification decision on the same issues raised in *Shah*. The Divisional Court denied leave to appeal on the basis that the same issues were already before the court in *Shah*.[14]

In the jurisdiction motion, the defendants sought an order staying the action as it related to certain class members located outside Canada (defined as "absent foreign claimants"). The defendants argued that the real and substantial connection test, as formulated by the SCC in *Van Breda*, is a radical departure from the jurisdictional norms of other countries, meaning that any judgment reached on this basis would not be enforced abroad. Accordingly, the defendants argued that the court should only assert jurisdiction over claimants that meet the traditional (presence or consent-based) grounds for jurisdiction. They argued that this approach is consistent with the principles of order and fairness and with the territorial limits in s. 92 of the *Constitution Act*, *1867*.[15]

The motion judge accepted the defendants' arguments. The motion judge gave great weight to the defendants' expert evidence on foreign law and concluded that if the Ontario court accepted jurisdiction over absent foreign claimants based on the real and substantial connection test, the resulting judgment would not be recognized or enforced abroad, leaving the defendants exposed

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9 *Godfrey v Sony Corp*., 2016 BCSC 844 at paras 72-78. The court also came to the opposite conclusion as *Shah* on the complete code issue (see *Godfrey* at paras 101-103).

10 *Fanshawe College v Hitachi Ltd*., 2016 ONSC 5118.

11 *Fanshawe College v Hitachi Ltd*., 2016 ONSC 5118 at paras 30-39.

12 The court also certified a claim in unlawful means conspiracy premised on a breach of the *Competition Act*. The defendants have sought leave to appeal on this point as well.

13 *Airia Brands v Air Canada*, 2015 ONSC 5352, leave to appeal denied 2016 ONSC 4929.

14 *Airia Brands v Air Canada*, 2016 ONSC 4929 at para 12.

15 *Airia Brands v Air Canada*, 2015 ONSC 5332 at paras 62 and 65.

to the potential for double recovery on behalf of absent foreign claimants.[16] The motion judge also reasoned that the Ontario court would offend the principle of comity if it asserted jurisdiction in a circumstance where it did not reasonably expect its judgement to be recognized in foreign countries. Accordingly, the motion judge ruled that the real and substantial connection test should not apply. Instead, jurisdiction over class members could not be established unless they were present in Ontario (which by definition did not apply) or consented to the jurisdiction of the Ontario court.[17]

In the alternative, the motion judge held that even if the real and substantial connection test applied, it was not satisfied (it is not clear whether the motion judge found that no presumptive connection was established or whether a connection was established, but successfully rebutted by the defendants). The motion judge held that absent foreign claimants would not expect their claims to be adjudicated by the Ontario Court. The motion judge refused to apply the new presumptive connective factor described in *Meeking v Cash Store Inc.*[18] on the grounds that *Meeking* was a national, rather than a global, class action.[19]

In the further alternative, the motion judge indicated that even if the court had jurisdiction *simpliciter* over the claims of absent foreign claimants, Ontario was *forum non conveniens* as exercising its jurisdiction over these claims would offend the principle of comity and risk exposing the defendants to the potential for double recovery.[20]

By adopting an approach based on presence and consent, the motion judge raised questions about whether real and substantial connection, particularly as part of the *Currie* test, remains the correct test for the assumption of jurisdiction by Ontario courts in global class actions. The motion judge's reasons also raise questions about whether *Meeking* applies in an international context, how the court should consider the reasonable expectations of class members, and the relevance of possible non-enforcement of a judgement.

The plaintiffs have appealed the jurisdiction decision to the Court of Appeal.

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16 *Airia Brands v Air Canada*, 2015 ONSC 5332 at paras 111-115.

17 *Airia Brands v Air Canada*, 2015 ONSC 5332 at paras 190 and 202.

18 *Meeking v Cash Store Inc*., 2013 MBCA 81 at para 93. In *Meeking,* the Manitoba Court of Appeal held that where a court has jurisdiction over the representative plaintiff and the defendants, the sharing of common issues between the representative plaintiff and the non-resident class members gives that court presumptive jurisdiction over non-resident class members.

19 *Airia Brands v Air Canada*, 2015 ONSC 5332 at paras 206-214.

20 *Airia Brands v Air Canada*, 2015 ONSC 5332 at paras 223-225.