Divisional Court nixes umbrella purchaser claim

BY ALEX ROBINSON
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The Divisional Court has weighed in on an ongoing battle over the scope of class action lawsuits in price-fixing claims.

In *Shah v. LG Chem, Ltd., 2017*, the court refused to certify part of a class action lawsuit concerning an alleged global price-fixing conspiracy on lithium-ion batteries that would extend the claim to umbrella purchasers — claimants who never purchased batteries directly from the defendants but claimed they were affected by an increase in market prices.

"If the decision is upheld, it allows defendants to go forward knowing that their liability is where one would expect it to be," says Rob Kwinter of Blake Cassels & Graydon LLP, one of the lawyers representing one of the defendants, Samsung SDI Co., Ltd.

"They would be liable for proven conduct that they were engaged in and a harm that flowed from that if any."

The Divisional Court also ruled that part of the claim based on unlawful means conspiracy should be certified.

The plaintiffs sought to bring their claim for damages under a section of the Competition Act, which says that anyone who suffers a loss as a result of price fixing gets to claim their damages.

The Divisional Court found that the umbrella purchasers had no cause of action because extending liability to them would expose the defendants to indeterminate liability.

"First and foremost, they had no control over whether the non-defendant manufacturers chose to match prices," Justice Ian Nordheimer said in the decision.

"Second, they had no control over the volume of LIBs or LIB products, that the non-defendant manufacturers chose to produce and sell."

If left to stand, the decision will limit the scope of liability for price-fixing claims to those who are directly impacted to the alleged price fixing, lawyers say, and it will affect who can claim under the Competition Act.

Kwinter says that the problem with "opening up the umbrella" in such actions is that it makes it very hard for defendants to understand the extent and nature of their liability, as it could leave them liable for the independent decisions of third parties.

Linda Visser says that extending a class action lawsuit to umbrella purchasers in a case related to lithium-ion batteries would make the liability large but not indeterminate.

Linda Visser of Siskinds LLP, one of the lawyers representing the plaintiffs, says she intends to seek leave to appeal this part of the decision.

She says that extending the class to umbrella purchasers would make the liability large but not indeterminate.

"The defendants know the size of the market and it's really dealing with the non-defendant market share," Visser says.

"So it is a finite number."

In response to the argument that the defendants do not have control of third-party decisions, she says that by entering into the alleged conspiracy they would have intended to move the market prices generally.

If they were successful in moving those prices, there is a measure of control they were exercising over the market, she says.

Visser also argues that indeterminate liability has generally arisen in the negligence context, but that the issue at hand is an intentional tort, where there is a greater level of wrongdoing.

"Principles of indeterminate liability have no application in the realm of intentional torts," she says.

In the Divisional Court's decision, Nordheimer said that it is not clear that "the principles surrounding intentional torts are applicable to such a cause of action, even where the cause of action arises from the intentional tort conspiracy."

He continued to say that there was no reason to exempt the claim from the application of indeterminate liability.

Visser says that allowing umbrella purchasers to be class members will also make defendants accountable for the full damages that were caused by their conduct and will serve as a deterrent in the future.

Michael Osborne, a partner with Affleck Greene McMurtry LLP, who was not involved in the case, says there are strong policy arguments on both sides of the question but that it makes sense that the court drew the line at umbrella purchasers.

"What we see here in this case is there is a recognition that somewhere the chain of liability has to stop," he says.

"Somewhere, we get into a situation where it just doesn't make sense to — notwithstanding you might be able to trace your loss to the conspiracy — somewhere there has to be an end to it."

The decision also narrowed the reasons for concluding that umbrella purchasers may not have a cause of action.

The certification judge had accepted four reasons that the defendants put forward as to why the umbrella purchasers did not have a cause of action, but the Divisional Court whittled those reasons down to the arguments concerning indeterminate liability.

While the defendants were successful in the umbrella purchaser claim, they were less pleased with the Divisional Court's conclusion that the claim based on unlawful means conspiracy could be certified.

This issue concerned whether the Competition Act is a complete code or if plaintiffs can bring a tort claim based on a breach of the act. Lawyers say this has an impact on the remedies available to class members.

Defendants have argued that the act is a complete code and that civil actions cannot be founded on a breach of the act.

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>
> Michael Osborne

The plaintiffs argued that an alleged breach of a section of the act was an unlawful element, but the certifying judge, Ontario Superior Court Justice Paul Perell, found that it was a complete code and that a breach "cannot be used as the 'unlawful' element in advancing the claim."

The Divisional Court spent little time on unlawful means conspiracy the issue, as the Court of Appeal had already ruled on the issue in *Fanshawe College of Applied Arts and Technology v. AU Optronics Corporation*.

The court overturned Perell's decision on this part of the claim, finding it must proceed to certification, as there has been no change in circumstances since the Court of Appeal ruled in *Fanshawe*.

"There is no 'change in circumstances' because a party in one case wants to argue authorities that a party in another case did not argue," Nordheimer said.

"To conclude otherwise would make the threshold for avoiding binding precedent a much too easy one to cross."

John Rook of Bennett Jones LLP, one of the lawyers representing another defendant, Panasonic Corporation of North America, says the defendants intend to seek leave to appeal this part of the decision.

Visser says she hopes that the Divisional Court's refusal to consider the issue will preclude it from being re-argued going forward.

Lawyers say the umbrella purchaser issue could eventually make its way to the Supreme Court of Canada, as a B.C. court has issued the opposite decision in *Godfrey v. Sony Corporation*.

In that case, a certifying judge rejected the argument that including umbrella purchasers in the class would expose defendants to indeterminate liability, certifying their claim.

The B.C. Court of Appeal is set to hear that case in June. LT