CITATION: Fanshawe College v. LG Phillips LCD Co., Ltd., 2015 ONSC 7211
DIVISIONAL COURT FILE NO.: 1960/11
Date: 2015-12-24

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Heeney R.S.J., H. Sachs and J. Henderson JJ.

BETWEEN:	
The Fanshawe College of Applied Arts and Technology Plaintiff/ Respondent	*C. Wright* and *L. Visser*, for the Plaintiff/ (Respondent)
– and –	*K. Kay* and *M. Walli*, for the Defendants , LG Philips LCD Co., Ltd. and L.G. Philips LCD America, Inc. (Appellants)
LG Philips LCD Co., Ltd., L.G. Philips LCD America, Inc., Samsung Electronics Co. Ltd., Samsung Electronics Canada Inc., Hitachi Ltd., Hitachi Displays, Ltd., Hitachi Canada, Ltd., Hitachi America Ltd., Hitachi Electronics Devices (USA) Inc., Sharp Corporation, Sharp Electronics Corporation, Sharp Electronics of Canada Ltd., Toshiba Corporation, Toshiba Matsushita Display Technology Co., Ltd., Toshiba America Corporation, Toshiba of Canada Ltd., AU Optronics Corporation America, Chi Mei Optoelectronics USA, Inc., Chi Mei Optoelectronics Japan Co., Ltd., and Chunghwa Picture Tubes, Ltd. Defendants/ Appellants	*M. Brown* and *A. McCoomb*, for the Defendants, Sharp Corporation, Sharp Electronics Corporation and Sharp Electronics of Canada Ltd. (Appellants) *E. Patel*, for the Defendant, AU Optronics Corporation America (Appellant)
	HEARD at London: November 18, 2015

THE COURT:

Introduction

[1] This is an appeal by the Defendants from the decision of Tausendfreund J., dated May 26, 2011, in which he certified a class action pursuant to the *Class Proceedings Act, 1992*, S. O. 1992 c. C-6 (the "*Act*"), with Fanshawe College of Applied Arts and Technology as the representative plaintiff.

[2] The Plaintiff alleges that the Defendants engaged in a single unlawful conspiracy to fix prices for LCD panels and LCD products. In this action, the Plaintiff, on behalf of the class members, seeks to recover from the Defendants the amount by which the Defendants unlawfully increased the price of LCD panels and LCD products.

[3] In his decision, the certification motion judge accepted the Plaintiff's proposed class definition, stated as follows:

> All persons in Canada (excluding defendants and their respective parents, employees, subsidiaries, affiliates, officers and directors) who purchased LCD Panels or LCD Products directly from a defendant or any entity affiliated with a defendant, an Original Equipment Manufacturer or a Distributor in Canada between January 1, 1998 and December 11, 2006.

[4] Further, the certification motion judge defined the Original Equipment Manufacturers ("OEMs") and Distributors by using the list of OEMs and Distributors submitted by the Plaintiff. By defining the class in this manner, the certification motion judge accepted the Plaintiff's submission that the class should include direct purchasers and indirect purchasers of both LCD panels and LCD products.

[5] In the present appeal, the Defendants submit that the certification motion judge erred by finding that the Plaintiff's action had the "core" of commonality necessary for a class proceeding. It is accepted that in order to establish the Defendants' liability to the Class on the conspiracy claim, the Plaintiff will have to prove both that the Defendants engaged in unlawful price-fixing conduct and that the conduct caused harm to the Class. According to the Defendants, with the majority of Class members being indirect purchasers and what they allege is the unworkable construct of the Class, the certification motion judge erred when he found that the liability issues were suitable for certification as common issues.

[6] For the reasons that follow, we would dismiss the appeal.

Issues Raised on this Appeal

[7] The Defendants make two main arguments on this appeal. They are:

(1) The certification motion judge erred in finding that the Plaintiff had met its burden of demonstrating "some basis in fact" that the issue of a single overarching conspiracy to fix the prices of LCD Panels and LCD Products was common to the Class. The Defendants also allege that the certification motion

judge reversed the burden of proof when he dealt with this issue (the "Single Conspiracy Issue").

(2) The certification motion judge erred in finding that the Plaintiff had met its burden of demonstrating "some basis in fact" that the issue of the harm caused by, or the impact of, the conspiracy was common to the Class (the "Impact Issue").

[8] In their factum, the Defendants question the certification motion judge's analysis on the preferable procedure criterion. However, in oral submissions, counsel for the Defendants conceded that their arguments on this issue rise and fall with their arguments on the Single Conspiracy and Impact Issues. In other words, the crux of their position with respect to the preferable procedure criterion is that no common issues exist and, therefore, a class action is not the preferable procedure.

Standard of Review

[9] The standard of review is governed by the test set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Under *Housen*, at para. 10, a finding of fact cannot be reversed unless there is palpable and overriding error. The same standard applies for any issue of mixed fact and law where there is no extricable legal question that can be separated from the factual question. Questions of law and principle are reviewable on a standard of correctness (*Housen*, at paras. 36-37). A certification motion judge's determinations with respect to certification criteria are questions of mixed fact and law.

[10] Numerous cases have established that substantial deference is owed to a motion judge on an appeal of a certification motion: see *Turner v. York University*, 2012 ONSC 4272, 298 O.A.C. 174 (Div. Ct.), at para. 15; *Cassano v. The Toronto Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.), at para. 12; and, *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 33.

[11] The Defendants rely on *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A.), at para. 44, for the proposition that where there has been a significant shift in the legal landscape as a result of post-certification decisions, less deference may be shown to the certification decision. They submit that the "new trilogy" of cases from the Supreme Court of Canada, namely, *Pro-Sys Consultants Ltd. v. Microsoft Corp*., 2013 SCC 57, [2013] 3 S.C.R. 477 ("*Microsoft*"), *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58, [2013] 3 S.C.R. 545; and, *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, have changed the legal landscape.

[12] In our view, *Microsoft* has largely confirmed existing jurisprudence. To the extent that it has changed the legal landscape, it has done so in a way that favours the Plaintiff, not the Defendants. The two grounds upon which leave to appeal the decision in question was granted by Rady J. related to whether the passing-on defence was available to the defendants, and whether an indirect purchaser has a cause of action. The Supreme Court in *Microsoft* has now clearly rejected the passing-on defence and confirmed that indirect purchasers do have a cause of action.

[13] We conclude, therefore, that in the present appeal substantial deference is owed to the decision of the certification motion judge.

The Single Conspiracy Issue

[14] The Plaintiff's claim is a claim for damages under s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34. Section 36 provides that "any person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI…may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct…an amount equal to the loss or damage proved to have been suffered by him…".

[15] The provision of Part VI that the Plaintiff alleges the Defendants violated is the conspiracy section at s. 45 of the *Competition Act*. At the relevant time, it provided as follows:

> (1) Everyone who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, manufacturing, supplying, storing or dealing in any product,
>
> (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
>
> (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
>
> (d) to otherwise restrain or injure competition unduly,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

[16] According to the Defendants, the offence set out at s. 45 of the *Competition Act* is a "technical" one. Thus, the question of whether the Defendants have engaged in conduct that falls within the parameters of that offence is one that must be examined very carefully.

[17] As the Supreme Court of Canada stated in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 ("*P.A.N.S.*"), at paras. 95-96, where a conspiracy to unduly lessen competition is alleged, the court must inquire into two key elements: the structure of the market, including both the "geographical and product services aspect" of that market, and the behaviour of the parties to the alleged agreement.

[18] The aim of the market structure inquiry is to ascertain the level of market power that the parties to the alleged conspiracy enjoyed. The kind of market power that s. 45 of the *Competition Act* seeks to prevent is the ability to behave independently of the market so that free competition is undermined. Some of the factors that are relevant to assessing the degree of market power in addition to market share are set out, as follows, in *P.A.N.S.*, at para. 100:

> (1) the number of competitors and the concentration of competition,
>
> (2) barriers to entry,
>
> (3) geographical distribution of buyers and sellers,
>
> (4) the differences in degree of integration among competitors,
>
> (5) product differentiation,
>
> (6) countervailing power and
>
> (7) cross-elasticity of demand.

[19] With respect to the second part of the inquiry, namely, the behaviour of the parties, this involves establishing both the nature of the agreement (*i.e.*, was it one to undermine competition in terms of price, quality, services or something else?) and "whether that agreement, if carried into effect, would prejudice the public interest in free competition to a degree that in fact would be undue" (*P.A.N.S.*, at para. 108, quoting *R. v. Northern Electric Co.*, [1955] O.R. 431, [1955] 3 D.L.R. 449 (Ont. S.C.), at p. 469 [D.L.R.]).

[20] According to the Defendants, they are not in the same market and do not make the same products. Only six of the Defendants manufactured LCD Panels at any point during the Class Period. Six Defendants sold LCD panels in Canada at some point during the Class Period, although some on a *de minimus* basis. Thus, the Defendants submit that most of them were not competitors in the manufacture of LCD panels during the Class Period, and most had no sales of LCD panels in Canada during that period.

[21] With respect to LCD products, according to the Defendants, only two of them manufactured any LCD products at any time during the Class Period. Some Defendants neither made nor sold any LCD products. No Defendant sold all three types of LCD products in Canada throughout the Class Period.

[22] In regards to both LCD panels and products, the Defendants allege that their pricing practices and strategies varied depending on the customers they were dealing with and the nature of their contracts with those customers. For example, high-volume purchasers with long-term contracts might receive volume rebates from some Defendants, while other purchasers would not.

[23] The Defendants also argue that the distribution chains for LCD panels and products were complex and varied from Defendant to Defendant over time.

[24] The Defendants submit that the certification motion judge failed to deal with or analyze this evidence when he reached his decision. The Defendants allege that, given this evidence, the certification motion judge committed a palpable or overriding error in finding, as a matter of fact, that the Plaintiff provided "some basis in fact" to support a finding that there was a single overarching conspiracy, and that the existence of such a conspiracy was an issue common to the class.

[25] We disagree. The certification motion judge was aware of and acknowledged the Defendants' evidence and arguments, which were directed at establishing that if there was a conspiracy, it was not common to the Class. However, in considering this evidence and arguments, he recognized that his task at the certification stage was not to resolve conflicting facts and evidence, an approach that was later confirmed by the Supreme Court of Canada in *Microsoft*, at para. 102. Rather, he was to examine the evidence with a view to ascertaining whether the Plaintiff had shown some basis in fact that there was a common issue regarding its allegation of a single overarching conspiracy to sell both LCD products and panels.

[26] In reviewing the evidence before him, the certification motion judge considered the fact that, in the United States, eight companies, including six of the Defendants, pleaded guilty to price-fixing in the LCD industry. Fines of US$892 million were imposed. AU Optronics went to trial, was convicted of price-fixing, and was fined US$500 million. This conviction was affirmed by the Court of Appeal and the petition to appeal to the U.S. Supreme Court was denied. The European Commission levied fines against six LCD panel producers in the amount of €648 million relating to the same conduct, while Samsung received a discount of 100% in return for its cooperation.

[27] At para. 33 of his reasons, the certification motion judge reviewed the expert reports by economists, Dr. Russell Lamb for the Plaintiff, and Margaret Sanderson for the Defendants. Relevant points from the Lamb report include the following:

> * Suppliers for production of LCD Panels are geographically concentrated, principally in Asia and are few in numbers, contracting with most LCD manufacturers, some of whom are vertically integrated into components production.
>
> * On average, LCD Panels account for more than 70% of the cost of computer monitors, 25% of notebook PCs and more than 70% of televisions. After assembly, the final products are sold by manufacturers (to include defendants and primary purchaser OEMs) to purchasers of LCD Products, including distributors, retailers and end-users.
>
> * Nearly all defendants produce both large and small LCD Panels; however, large LCD Panels dominate in terms of revenue.

* The global market for LCD Panels is large, with revenues of U.S. $90.7 billion in 2007. Canada accounted for approximately 2.3% and 1.8% of global LCD Panels used in notebook PCs and computer monitors, respectively, in 2006.

* The production of LCD Panels is characterized by a significant degree of concentration. The defendants, in fact, control a large share of the market. The vast majority of the LCD Panels contained in products and sold in Canada are manufactured by the defendants.

* The markets for both LCD Panels and LCD Products are characterized by high barriers to entry, which make it difficult for new firms to enter the market quickly in response to higher prices.

* The technological barriers and the prolonged development periods necessary to qualify panel products mean that the LCD TV Panel business concentrates in the hands of just a few suppliers.

* Notebook PC and LCD monitor brands are well-established with just a handful of players accounting for a large percentage of the world's market.

* Because there are high barriers to entry in both the production of LCD Panels and in the market for LCD Products, a conspiracy, such as the one alleged, would have been able to operate without the threat of entry by new competitors acting to limit price increases.

* The pricing structure for LCD Products means that a factor such as this alleged conspiracy would have resulted in higher prices for all class members.

* Secondary purchasers are those who purchased LCD panels or LCD products from primary purchasers such as non-defendant OEMs or Distributors. Injury to these secondary purchaser class members arises if the higher prices paid by primary purchasers are passed through, at least in part, in the prices they charged their customers for these products.

* At least some of the higher prices paid by non-defendant OEMs and Distributors would be passed on to class members who purchased from them.

[28] At para. 38, the motion judge made reference to the fact that some of the Defendants were vertically integrated, which meant that the price-fixing conspiracy would only have

been tenable if there was an agreement to fix prices for both panels and products, as follows:

> The plaintiff asserts that there was a single, overarching conspiracy to fix prices of LCD Panels and Products. The plaintiff further asserts that this conspiracy would necessarily have operated in the markets for both LCD Panels and LCD Products, as some defendants were vertically integrated and utilized a large portion of the LCD Panels they produced in the manufacture of LCD Products. Dr. Lamb concluded in his report that a price-fixing conspiracy in the LCD market, which contained several vertically integrated defendants, would only have been tenable if prices were inflated for both Panels and Products.

[29] In our view, the evidence that the certification motion judge considered is directed at the inquiries that are relevant to establishing a conspiracy to unduly lessen competition and is sufficient to meet the threshold for certifying the Single Conspiracy Issue as a common issue. It may be that once the case is tried, the Defendants will prevail. However, at the certification stage, a judge is not meant to be testing the merits of the action (see *Microsoft*, at para. 99).

[30] At paragraph 42 of the certification motion judge's decision, he states as follows:

> Although the defendants urge against the finding of a single overarching conspiracy, they have not provided any evidence that would be inconsistent with or would foreclose the possibility of such a conclusion.

[31] The Defendants submit that this statement is a clear indication that the certification motion judge erred in law by reversing the onus on the issue before him. We disagree. The certification motion judge's comments at para. 42 of his decision must be read in context. When they are, it is clear that having found that the Plaintiff had established some basis in fact to support its allegation of a single overarching conspiracy with respect to both panels and products, he then looked to the Defendants' evidence with a view to deciding whether that evidence rose to the level of foreclosing any possibility that the Plaintiff's position would succeed at trial.

The Impact Issue

[32] The Defendants submit that the certification motion judge erred by finding that the evidence filed on the motion before him provided some basis in fact to conclude that there exists a methodology for proving the existence of harm that was common to all members of the Class.

[33] In making this submission, the Defendants rely on the *Microsoft* decision in which Rothstein J. confirmed that proof of harm was an essential element of liability in a price-fixing claim. At para. 114 of that decision, he notes as follows: "One area in which

difficulty is encountered in indirect purchaser actions is in assessing the commonality of the harm or loss-related issues". Further, he held that "some assurance is required that the questions are capable of resolution on a common basis."

[34] In *Microsoft*, the Supreme Court also recognized, at para. 114, that plaintiffs generally seek "to satisfy this requirement through the use of expert evidence in the form of economic models and methodologies" and provided guidance on the purpose and role of such evidence on certification motions in indirect purchaser actions at para. 115, as follows:

> The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole. The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove 'common impact'…That is, plaintiffs must demonstrate that 'sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class.' It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain. [Citations omitted.]

[35] The Supreme Court went on to say, at para. 118, that, at the certification stage:

> …the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[36] According to the Defendants, the expert evidence put forward by the Plaintiff did not meet this threshold.

[37] As the certification motion judge sets out, at para. 33 of his decision, the Plaintiff's expert, Dr. Lamb, filed evidence of the following on the Impact Issue:

* A method exists to determine class-wide injury using evidence common to all class members.

* To calculate overcharge, [Dr. Lamb] proposes to use a method known as "benchmark analysis", in which the overcharge is calculated by comparing the prices that arose as a result of the alleged conspiracy with the prices that prevailed for the product in question in some market in which there was non-conspiratorial pricing. This methodology is an accepted method for calculating injury that arises from collusive pricing of the type alleged here.

* To achieve control for changes and other variables which affect prices for LCD Panels and LCD Products in his benchmark comparison, [Dr. Lamb] proposes to use a statistical technique known as "multiple regression analysis," commonly used in economics to explain the effect of a number of variables upon some other variable.

* Using economic analysis, it will be feasible to determine the extent to which higher LCD Panel prices were passed through to secondary purchasers by OEMs and distributors.

* The type of multiple regression analysis employed in estimating the pass-through of higher input costs into final product prices is not meaningfully different than the regression analysis which could be used to determine damages. This type of multiple regression analysis to measure pass-through has been widely used in economic research for many years.

* Multiple regression analysis can be used to reliably calculate both damages and the extent of the pass-through.

* In a market which is not perfectly, but nevertheless highly competitive, such as the LCD market, firms pass-through a significant amount of the overcharge to the next level of distribution, but not the extent of 100%.

* A benchmark analysis with multiple regression models of prices for LCD Panels and LCD Products during and after the alleged conspiracy can determine the extent by which prices paid by the primary purchasers were higher. The extent to which these higher prices were passed through by certain OEMs and Distributors to secondary purchasers can be measured using multiple regression analysis.

[38] At paragraphs 54 to 55 of his decision, the certification motion judge makes it clear that he accepts that the evidence of Dr. Lamb rose to the level of a "credible or plausible

methodology" for establishing loss on a class-wide basis. In doing so, he notes, at para. 36, that Dr. Lamb's evidence was challenged by the Defendants' expert, but finds that it is not his role to resolve the conflicts in the experts' evidence at the certification stage. As put by the Supreme Court of Canada in *Microsoft*, at para. 126:

> It is indeed possible that at trial the expert evidence presented by Microsoft will prove to be stronger and more credible than the evidence of Dr. Netz and Professor Brander. However, resolving conflicts between experts is an issue for the trial judge and not one that should be engaged in at certification.

[39] In assessing the Defendants' submission that the Plaintiff's evidence did not meet the required threshold for certification, it is important to note, as the Defendants admitted, that the plaintiff's expert evidence in *Microsoft* on the impact issue was of exactly the same type as Dr. Lamb's evidence on the Impact Issue. In rejecting Microsoft's submissions that the evidence did not go far enough in demonstrating actual harm, the Supreme Court stated that it is important not to set the bar too high as in Canada, unlike the United States, there is no right to discovery at the certification stage. Thus, the Plaintiff in this case would not yet have had the opportunity to obtain data (including pricing data) from the Defendants that would allow them to actually conduct the necessary analysis.

[40] It is also important to note that while the Defendants argue that Dr. Lamb's analysis is hypothetical and purely theoretical and that the data does not exist to undertake his proposed analysis, in the U.S., a class action involving an allegation of a global price-fixing conspiracy involving LCD panels was certified after the court reviewed the plaintiff's expert evidence on harm (see: *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583 (N.D.Cal., 2010), leave to appeal denied No. 10-80088 (9th Cir 14 Jun 2010). In that case, the court noted that the plaintiff's expert had "conducted 53 pass-through studies" including 48 partial studies and 5 complete studies that measured pass-through from the manufacturers down the distribution channels to the end user. To do so, he used "transaction data produced by some defendants, as well as (separately) price data from DisplaySearch, a third-party market research firm" (at pp. 602-603). As the certification motion judge noted in the case at bar, Dr. Lamb's methodology is similar to the one used by the expert in the U.S. action. In the U.S., the standard for certification is much higher.

[41] The Defendants also submit that, in this case, the evidence of harm does not meet the threshold for certification because the Plaintiff has chosen a class definition that does not include all indirect purchasers, only those that bought from the listed OEMs and certain high-volume distributors and retailers.

[42] We see no merit to this submission. The Class definition does not undermine the proposed methodology for calculating harm; it just limits the claimants to whom any damages calculated under this methodology would apply.

[43] For all of these reasons, we find that the certification motion judge committed no palpable and overriding error when he found that there was some basis in fact to conclude that there was a methodology for proving the existence of harm that was common to all members of the Class.

Conclusion

[44] The appeal is dismissed. As agreed by the parties, the Plaintiff is entitled to its costs for the motion for leave to appeal and the appeal, fixed in the agreed upon amount of $42,500.00, all inclusive.

"Sachs J."

H. Sachs J.

"Heeney R.S.J."

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"J. Henderson J."

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Released: December 24, 2015.

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The Fanshawe College of Applied Arts and Technology

Plaintiff/ Respondent

– and –

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Defendants/ Appellants

REASONS FOR JUDGMENT

THE COURT

Released: December 24, 2015.