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Let it Rain: Supreme Court Green Lights Umbrella Purchaser Class Actions

On September 20, 2019, the Supreme Court released its long-awaited decision in *Pioneer Corp v Godfrey*. *Godfrey* is the Supreme Court's latest decision involving price-fixing class actions, and expands on and clarifies the basic approach to these cases that the Court laid out six years ago in *Pro-Sys Consultants Limited v Microsoft Corporation*.

Background and Issues

The plaintiffs allege that the defendants conspired to fix the price of optical disc drives and related products. They commenced an action for damages arising from the alleged conspiracy and moved to certify the action as a class proceeding.

The case raised four discrete issues.

First, the plaintiffs sought to include as part of the class not only direct purchasers of the drives, but also indirect purchasers (who purchased the drives from the direct purchasers) and so-called umbrella purchasers (who purchased drives made by companies who were not alleged to have participated in the conspiracy on the theory that the conspiracy still led those manufacturers to set higher prices as well). Prior to *Godfrey*, there had been significant controversy in the jurisprudence as to whether umbrella purchasers had a cause of action and could be included in a proposed class.

Second, the case raised an issue as to whether the two-year limitation period in the *Competition Act* is subject to the principle of discoverability. The plaintiffs in *Godfrey* commenced the action against some of the defendants more than two years after the allegedly conspiratorial conduct had occurred. Those defendants argued that the applicable two year limitation period in the *Competition Act* had expired prior to the plaintiffs' attempt to add them to the action and that the claims were statute-barred. Again, the jurisprudence on this issue had been mixed.

Third, the case raised a question as to whether s 36(1) of the *Competition Act*, which creates a statutory cause of action for breaches of the *Act*, ousted the availability of common law claims (such as civil conspiracy) against individuals who engage

in price-fixing.

Finally, there was a question regarding the appropriate standard for certification of a class action involving indirect purchasers, namely whether a plaintiff must be able to show (through expert evidence) that all indirect purchasers at that level were impacted by the conspiracy, or only that the impact of the conspiracy reached the indirect purchaser level in some way. The latter is obviously much easier to show than the former.

The Supreme Court of Canada's Decision

The case was argued before the Supreme Court of Canada in December 2018, and the decision was released on September 20, 2019. In a decision authored by Justice Brown, the majority of the Court adopted the plaintiff's position on each of the four issues described above.

First, with respect to umbrella purchasers, the majority held that umbrella purchasers do have a cause of action under s 36(1)(a) of the *Competition Act*. In so holding, the majority relied on the broad language of s 36(1)(a), which provides a cause of action to "*any person* who has suffered loss or damage as a result of" conduct contrary to s 45 of the *Competition Act*. It also held that extending a cause of action to umbrella purchasers was consistent with the purposes of the *Competition Act* to deter anti-competitive behaviour and compensate victims. The majority rejected the notion that recognizing a cause of action for umbrella purchasers exposes defendants to indeterminate liability because liability would be limited by the class period, the specific products whose prices are alleged to have been fixed, and the requirement that plaintiffs prove that they actually suffered a loss or damage as a result of the conspiratorial conduct.

Second, with respect to the discoverability issue, the majority held that a discoverability principle was implied by s 36(4)(a)(i) of the *Competition Act*. While the majority acknowledged that the discoverability principle is not a universally applicable rule of limitation periods, it held that discoverability can only be displaced by clear legislative language. In this case, the majority held that the discoverability principle was implicit in s 36(4)(a)(i) of the *Competition Act*, such that the limitation period only began to run when the material facts on which the cause of action were or ought to have been discovered by the plaintiffs by the exercise of reasonable diligence. The majority also held that the doctrine of fraudulent concealment can delay the running of the limitation period under the *Competition Act*.

Third, the majority held that s 36(1) of the *Competition Act* does not preclude plaintiffs from simultaneously advancing common

law or equitable claims relating to anti-competitive behaviour such as claims for civil conspiracy. Section 36(1) does not provide an exclusive code regarding claims for anti-competitive conduct. Consequently, the majority held that it is tenable for a plaintiff to advance a claim for unlawful means conspiracy where a breach of s 45(1) of the *Competition Act* constitutes the alleged unlawful means.

Finally, the majority held that in order for loss-related questions pertaining to indirect purchasers to be certified as common issues, a plaintiff's expert methodology need only show that loss reach the record of purchaser level. It is not necessary that the expert establish that every member of the class at that level suffered a loss, nor must the methodology be able to identify those class members who suffered no loss and distinguish them from those who did suffer loss.

According to the majority, showing that loss reaches the indirect purchaser level satisfies the criteria for certifying a common issue since it significantly advances the litigation. Importantly, however, the Court also recognized that showing that loss reaches the indirect purchaser level would not automatically lead to aggregate damages. In order for any individual class member to be awarded damages, the trial judge must still be satisfied they each suffered a loss. However, the majority in *Godfrey* held that that is a more appropriate decision for the trial judge rather than the motions judge on certification. At certification, it is sufficient for the motions judge to be satisfied that loss reached the indirect purchaser level.

Justice Côté wrote a separate decision, dissenting in part. She agreed with the majority that the existence of the statutory cause of action in s 36(1) of the *Competition Act* does not preclude a plaintiff from advancing claims in common law or equity and that the doctrine of fraudulent concealment may apply to toll a limitation period.

However, she broke with the majority on the remaining issues, holding that it was plain and obvious that umbrella purchasers do not have a cause of action, that the limitation period in the *Competition Act* is not subject to discoverability, and that evidence showing that a loss was suffered at the indirect purchaser level is not sufficient to certify a class; rather, the plaintiff's experts must be capable of establishing at trial that some identifiable indirect purchasers actually suffered a loss.

The Implications of the Court's Decision: What Next?

This decision is, in our view, unfortunate in a number of respects. We have previously commented on the concerns with extending liability to umbrella purchasers here, and we have

raised concerns about the application of the discoverability principle to *Competition Act* claims here. We will not repeat those concerns here, which were picked up on in Justice Côté's dissenting reasons.

Going forward, the Supreme Court's decision raises a number of questions that parties and courts will have to grapple with.

First, what will be the outer bounds of umbrella liability? Certainly, the majority's decision contemplates that purchasers of a homogeneous commodity-like product who purchased that product from a non-conspirator can advance claims as umbrella purchases. Would that extend to similar but not identical products? What about circumstances where the conspiracy has an impact on the prices of other products, such as complementary products? Now that the door to umbrella liability has been opened, it may be difficult to set a principled limit.

Second, what will cases with umbrella purchasers look like going forward? Will non-conspirator manufacturers be dragged into those cases, as parties seek documentary discovery from them? Given that so many of these cases settle either before or shortly after certification, that may not be a practical concern in many cases. However, if more cases go to a merits trial – a natural trend given the low bar for certification of such cases laid down in *Pro-Sys* and affirmed in *Godfrey* – the litigation landscape will no doubt become increasingly complicated.

Third, can certification motions still play a meaningful screening role in ensuring that only cases that should properly go to trial as class actions are certified? In *Godfrey*, the Supreme Court explicitly recognized that class actions involving indirect purchasers can be certified without even a shred of evidence that all indirect purchasers suffered harm or that there is a methodology to show that any particular set of identifiable indirect purchasers suffered harm. Without such a requirement, parties and courts have no assurances that a common issues trial will actually be able to provide an affirmative answer as to whether any identifiable set of class members actually suffered harm. If there is no confidence that a common issues trial can provide that answer, then the massive efforts (and resources) that parties will have to expend post-certification may be entirely futile.

In all likelihood, these questions will require further guidance from the Supreme Court in the coming years.