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Diamonds are a Class Counsel's Best Friend: *Fairhurst v. Anglo American PLC*

The British Columbia Supreme Court certified a class action for a class of indirect purchasers of diamonds in a recent development in the suit against the De Beers group of diamond producers. The case involves allegations of price-fixing and bid-rigging conspiracies, in what has been characterized as historic and global proportions.[1]

Background

The class plaintiff alleged that the defendants conspired to and benefited from illegally inflating the prices of diamonds, and that the inflated price was passed on through the various levels of purchasers, which ultimately caused class members to pay more for the diamonds than they otherwise would have. In considering the key issue of whether the class plaintiff had properly framed claims against De Beers, the Court contemplated the apparent inconsistencies between recent cases from the B.C. Court of Appeal and the Supreme Court of Canada dealing with torts of unlawful means and unlawful means conspiracy, with "unlawful means" predicated on breaches of the *Competition Act*.

On the one hand, in *Wakelam v. Wyeth Consumer Healthcare*, the B.C. Court of Appeal held that the Competition Act is an exhaustive code such that breaches of the statute cannot form the basis for claims in equity.[2] The Court of Appeal also suggested that such breaches would be incapable of supporting claims based in tort. The

[1] *Fairhurst v De Beers Canada Inc,* 2012 BCCA 257.

[2] 2014 BCCA 36 at para 90 [*Wakelam*].

B.C. Supreme Court followed the *Wakelam* decision in *Watson v. Bank of America Corporation*, holding that it was plain and obvious that claims under the Competition Act cannot constitute the foundation for other causes of action.[3] *Watson* is presently under appeal.

On the other hand, the decisions in *Wakelam* and *Watson* seemed to be in conflict with the Supreme Court of Canada's decisions in *Pro-Sys Consultation Ltd. v. Microsoft Corporation*[4] and *A.I. Enterprises v. Bram*.[5] In *Microsoft*, the Supreme Court of Canada certified claims for restitution even though, like *Fairhurst*, these claims were predicated on breaches of the *Competition Act*. In *Bram*, the Supreme Court of Canada considered the type of wrong that could find a claim for tort of unlawful means, noting that while criminal offences and statutory breach would not typically be actionable under unlawful means tort, the tort would be available "if, under common law principles, those acts also give rise to a civil action by the third party and interfered with the plaintiff's economic activities".[6] *Bram* was released only one day after *Wakelam*.

Decision

The Court considered that in light of the apparent inconsistencies between these decisions, it was bound by the higher authority of the Supreme Court of Canada. As such, the Court held that while claims for restitution, to the extent that they are based on breaches of the *Competition Act*, were not viable, it was not plain and obvious that other tort claims based on these breaches were bound to fail. The Court further found that limitations arguments advanced by De Beers were premature, and a lack of specificity in the pleadings would not be fatal at the certification stage. Such questions were best left to trial.

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[3] 2014 BCSC 532 [*Watson*].

[4] 2013 SCC 57 [*Microsoft*].

[5] 2014 SCC 12 [*Bram*]

[6] *Bram* at para 45.

On the question of whether the claims of the class members raise common issues, the test as set out in *Microsoft* required the plaintiff to show that the standard of proof has "some basis in fact." The Court here held that factual evidence required at this stage need only go towards establishing whether there are common questions between all class members. The standard of proof is a lower threshold than the balance of probability. The plaintiff need only show a "credible or plausible methodology", and the Court at this stage is not required to engage in a weighing of conflicting expert evidence.

Conclusion

The debate over whether class action claims using the *Competition Act* as the foundation for other causes of action remains at issue in British Columbia. The *Fairhurst* decision has been appealed, but likely the legal issue will be determined before that appeal is heard, as the British Columbia Court of Appeal is expected to render its decision on the appeal in *Watson* in 2015 where this issue will be addressed head on. Whether another trip to the Supreme Court of Canada on this issue will be required to sort out the law in British Columbia remains to be seen.

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[1] *Fairhurst v De Beers Canada Inc*, 2012 BCCA 257.

[2] 2014 BCCA 36 at para 90 [*Wakelam*].

[3] 2014 BCSC 532 [*Watson*].

[4] 2013 SCC 57 [*Microsoft*].

[5] 2014 SCC 12 [*Bram*]

[6] *Bram* at para 45.

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

For more on CASL and compliance tips, see previous guidance *here* and *here*. Ryan J. Black is also the co-author of *Internet Law Essentials: Canada's Anti-Spam Law*, available from Specialty Technical Publishers.

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a cautionary note