CERTIFICATION DENIED: AN IMPORTANT WIN FOR COMPETITION CLASS ACTION DEFENDANTS

Posted on November 10, 2021

Categories: Insights, Publications

Class actions, like Hollywood movies, popular music and cheeseburgers, are an American export that, somewhat surprisingly, have taken the world by storm. So much so that, at least in respect of competition or antitrust claims, it has proven much easier to certify a class action in Canada than in the United States itself. Over the last decade or so, Canadian courts have lowered the bar for competition law conspiracy class actions. Such cases have generally been certified in Canada, even when parallel claims have failed in the United States. So, the very recent failure of the high profile Federal Court DRAM case to achieve certification is a matter of note.

DRAM is a memory chip used ubiquitously in electronics. A proposed class proceeding was commenced in the Federal Court of Canada[1] against the three manufacturers said to account for virtually all of the worldwide supply of DRAM. The allegations were, in their essence, that these manufacturers conspired to limit the supply of DRAM, by reducing their capacity increases, in order to cause increased prices for DRAM. The plaintiffs alleged that the defendants used public statements to signal supply decisions and reaffirm a commitment to conspire.

The Federal Court, in a decision released November 5, denied certification and gave useful guidance with respect to aspects of conspiracy law and the certification of conspiracy class actions (outside Quebec).[2] First, as to the law, the Court clearly reaffirmed that an agreement is an essential element to a conspiracy under s. 45 of the Act. Parallel conduct without an underlying agreement is not a conspiracy. An agreement requires a meeting of the minds, and therefore two-way communication is an essential aspect of a conspiracy.

As a corollary, the Court reconfirmed that “conscious parallelism” is not unlawful. In highly oligopolistic markets, competitors may adopt a comparable pricing policy without an agreement to do so. Unilateral, parallel conduct without collusion does not constitute an illegal conspiracy, as there is no meeting of the minds or agreement. A market participant “signalling” information about their own conduct or interpretation of the market in a public statement, such as earnings calls or at conferences, is not in itself an unlawful agreement; it is merely a unilateral communication.

Second, as to certification itself, what was notable was the Court's willingness to carefully and critically analyze the plaintiffs' materials and to take seriously its gatekeeper role. Certification cannot be "reduced to … a narrow scope and stripped down to … an empty and trivial exercise".

The Court concluded both that the plaintiffs had not alleged a valid claim, on the face of their pleading, and also that they had failed to demonstrate a sufficient "basis in fact" for the existence of the alleged conspiracy.

The Court noted that the plaintiffs must plead material facts in sufficient detail to support the claim and the relief sought. A conspiracy claim must provide material facts including the parties to the conspiracy, their relationship, the agreement, the purpose of the conspiracy, any overt acts done in furtherance of the conspiracy and any injury to the plaintiff. While a court must accept as true the material facts as pleaded, it need not accept bold conclusory legal statements. Mere allegations of 'enticing a conspiracy' are vague, general and not sufficient. Indeed, the Court found the Statement of Claim was a 'fishing expedition' with respect to the alleged conspiracy.

Likewise, the plaintiffs failed to provide evidence of a basis in fact for a conspiracy – it must be grounded in "some" evidence, not bare assertions or speculation. While an agreement may be inferred from circumstantial evidence, the Court confirmed that there must be at least some evidence of communication between the parties in order to infer an agreement. There must be an offer or invitation and some conduct from which acceptance may be inferred.

The decision recapitulated the court's duty to carefully consider the evidence. The matter of broadest significance in the decision is likely the affirmation that certification is not a pro-forma rubber stamping exercise:

> A competition law class action based on an alleged conspiracy under section 45 of the Act cannot be allowed on the basis of a pure speculation or wishful thinking about the existence of an agreement, on a lack of some minimal evidence of unlawful conduct. […]
>
> In my view, to allow the Plaintiffs' proposed class action to go forward on the basis of the record before me regarding the alleged agreement would set a dangerous precedent that would open the door to file section 36 claims on the sole basis of apparent anti-competitive effects accompanied with unfounded allegations and speculation regarding the collusive conduct of the alleged conspirators. […]
>
> [t]he certification stage nonetheless remains an important gate-keeping mechanism which must operate as a "meaningful screening device" and which shall not be treated as a "mere formality" […]
>
> When, as is the case here, there is a dearth of material facts and an absence of minimal evidentiary basis required to support the alleged illegal conduct at the very heart of a proposed class proceeding, it is the

> Court's role, even at the procedural stage of certification, to filter out such untenable, unfounded and speculative claim.

The Federal Court in the DRAM case has restated, clearly, the need for a careful review of the record to ensure that the plaintiff has met the necessary burden. This is a promising development.

[1] *Jensen v Samsung Electronics et al* 2021 FC 1185. McMillan served as counsel to Micron defendants in both cases.
[2] The Quebec Superior Court similarly rejected an attempt to authorize a parallel class proceeding in June 2021: *Hazan v Micron Technology Inc.* 2021 QCCS 2710.

by David Kent, Samantha Gordon and James Musgrove

A Cautionary Note