COURT OF APPEAL FOR ONTARIO

CITATION: Lilleyman v. Bumble Bee Foods LLC, 2024 ONCA 606
DATE: 20240809
DOCKET: COA-23-CV-0950 and COA-23-CV-0951

Huscroft, Coroza and Monahan JJ.A.

BETWEEN

COA-23-CV-0950

Vanessa Lilleyman

Plaintiff

(Appellant)

and

Bumble Bee Foods LLC, Clover Leaf Holdings Company, Connors Bros. Clover Leaf Seafoods Company, Tri-Union Seafoods LLC o/a Chicken of The Sea International Inc., Thai Union Group Public Company Limited, Starkist Company, Dongwon Industries Company Limited and Del Monte Corporation n/k/a Big Heart Pet Brands Inc.

Defendants

(Respondents)

AND BETWEEN

COA-23-CV-0951

Vanessa Lilleyman

Plaintiff

(Appellant)

and

Lion Capital LLP, Lion Capital (Americas) Inc. and Lion/Big Catch Cayman LP

Defendants

(Respondents)

Kyle R. Taylor, Alexandra Allison and Alexander T. Mulligan, for the appellant

Eliot N. Kolers, Sinziana R. Henning and Eric Turner, for Lion Capital LLP, Lion Capital (Americas) Inc., and Lion/Big Catch Cayman LP

Sandra A. Forbes, Chantelle Cseh and Henry Machum, for Starkist Co. and Dongwon Industries Co., Ltd.

Albert Formosa, MacDonald Allen, for Tri-Union Seafoods LLC c/o Chicken of the Sea International Inc. and Thai Union Group Public Company Limited

Christopher Hubbard, Nikiforos Iatrou and Will Rooney, for Del Monte Corporation n/k/a/ Big Heart Pet Brands Inc.

Heard: May 28, 2024

On appeal from the order of Justice Paul Perell of the Superior Court of Justice, dated August 1, 2023, with reasons reported at 2023 ONSC 4408.

Monahan J.A.:

OVERVIEW

[1] The appellant appeals the dismissal of her motion to certify a class proceeding arising out of an alleged price-fixing conspiracy in the market for canned tuna in Canada. The motion judge refused to certify the proceeding on the basis that it failed to satisfy three of the five criteria for certification under s. 5(1) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (the "*CPA*").

[2] The motion judge found that the appellant had failed to plead material facts sufficient to disclose a reasonable cause of action against the defendants. He also found that, while three of the 11 defendants had participated in a conspiracy to fix the prices of canned tuna in the United States, there was no basis in fact for the

claim that the alleged conspiracy could or might have affected Canadian consumers.

[3] The appellant argues that the motion judge erred by:

(i) misconstruing the conspiracy that was pled and failing to accept the facts pleaded as true, thus erroneously concluding that the pleadings did not disclose a reasonable cause of action pursuant to s. 5(1)(a) of the *CPA*;

(ii) applying the incorrect test in determining whether there is "some basis in fact" for the common issues arising from the alleged conspiracy, and thus erroneously concluding that the claim did not raise common issues in accordance with s. 5(1)(c) of the *CPA*; and

(iii) erroneously concluding that a class proceeding would not be the preferable procedure to resolve the common issues raised by the claim, in accordance with s. 5(1)(d) of the *CPA*.

[4] The respondent argues, first, that the appeal should be quashed because appeal lies to the Divisional Court rather than this court. In the alternative, the appeal should be dismissed since the motion judge made no reversible error in concluding that the appellant failed to plead a cause of action and that there was no basis in fact for the appellant's proposed common issues.

[5] As I explain in more detail below, in substance the motion judge's order goes beyond simply refusing to certify the action and effectively brings it to an end. It is therefore a final order and is appealable to this court pursuant to s. 6(1)(b) of the *Courts of Justice Act*.

[6] I would nevertheless dismiss the appeal for two reasons, either of which is independently sufficient to dispose of the appeal.

[7] First, the motion judge applied the correct test in determining whether the pleadings satisfied the “cause of action” criterion, did not misapprehend the conspiracy that was pleaded, and made no palpable or overriding error in concluding that the pleadings failed to disclose a cause of action.

[8] Second, the motion judge applied the correct test in determining whether there was “some basis in fact” for the existence of common issues involving the claims of class members, and made no palpable or overriding error in concluding that there was an insufficient evidentiary foundation to support the allegation that the alleged conspiracy could or might have occurred in Canada.

THE CLAIM

[9] The appellant alleges that since 2004, the defendants conspired together to fix the price of canned tuna sold in Canada, in breach of ss. 45 and 46 of the *Competition Act*, RSC 1985, c. C-34 and common law (the “Claim”).

[10] The Claim builds on the findings of anti-trust proceedings in the United States, that for a three-year period from 2011 to 2013, three entities that dominated the U.S. marketplace for consumer tuna conspired to unlawfully fix the price of tuna sold there. These entities were Bumble Bee Foods LLC (“Bumble Bee Foods”), Tri-Union Seafoods LLC operating as Chicken of the Sea International

Inc. (“COSI”) and the StarKist Company (“StarKist Co.”) (collectively, the “US Conspirators”).

[11] The Claim alleges that there was a related or similar conspiracy to fix prices of tuna sold in Canada beginning in 2004 (the “Canadian conspiracy”). However, none of the U.S. Conspirators sold their brands of canned tuna in Canada. The Claim addresses this issue by alleging that the Canadian conspiracy involved the U.S. conspirators, acting together with eight other related or affiliated entities, some of whom sold canned tuna in Canada.

[12] The Claim treats the 11 defendants as falling into three groups, with each group consisting of one of the three U.S. Conspirators grouped together with other defendants who were subsidiaries or affiliates of the relevant U.S. Conspirator.

[13] The first defendant group, which the Claim identifies as “Bumble Bee”, consisted of the following six entities: (i) Bumble Bee Foods LLC (“Bumble Bee Foods”); (ii) two Nova Scotia corporations that were indirect affiliates of Bumble Bee Foods (Clover Leaf Holdings Company and Connors Bros Clover Leaf Seafoods Company) (“collectively, the “Clover Leaf Entities”); and (iii) Lion Capital LLP, Lion Capital (Americas) Inc., and Lion/Big Catch Cayman LP (collectively, the “Lion Entities”), with the Lion Entities alleged to have directly or indirectly owned Bumble Bee Foods and the Clover Leaf Entities.

[14] It is alleged that canned tuna sold under the Clover Leaf brand constituted approximately 45% of the retail Canadian market during the class period. None of the other entities in the first defendant group is alleged to have sold tuna in Canada. What is alleged in relation to the first defendant group is that Bumble Bee Foods "completed dominated" the Clover Leaf Entities, expressly directed them to participate in the Canadian Conspiracy, and "used them as a shield for its illegal conduct in Canada." At the same time, it is alleged that the Lion Entities "completely dominated" the Clover Leaf Entities and Bumble Bee Foods, expressly directed all of them to participate in the Canadian Conspiracy, and "used them as a shield for their illegal conduct."

[15] The second defendant group, which the Claim identifies as "Thai Union", consisted of two entities, COSI and Thai Union Group Public Company Limited ("Thai Union"), the owner of COSI. The Claim states that COSI did not sell tuna in Canada, while Thai Union is described as a supplier of tuna to other unaffiliated entities who were not participants in the conspiracy and who sold tuna in Canada under different brand names. In respect of the second defendant group, the Claim alleges that Thai Union "completely dominated" COSI, expressly directed COSI to participate in the Canadian Conspiracy, and "used it as a shield for its illegal conduct in Canada".

[16] The third defendant group, which the Claim identifies as "StarKist", consisted of three entities: (i) StarKist Co.; (ii) Del Monte Corporation ("Del Monte"), which

owned the StarKist brand prior to 2008; and (iii) Dongwon Industries Co. Ltd. ("DWI"), which owned StarKist Co. from 2008 onward. Neither Del Monte nor DWI are alleged to have sold tuna in Canada, while StarKist Co. is said to have mostly abandoned the Canadian market in 1985 as a result of a "tainted tuna scandal" but "returned to the Canadian market" sometime after 2004. In respect of the third defendant group, it is alleged that first Del Monte and then DWI "completely dominated" StarKist Co., expressly directed it to participate in the Canadian Conspiracy, and "used it as a shield for their illegal conduct in Canada."

[17] The Canadian Conspiracy is alleged to have consisted of an unlawful agreement to, amongst other conduct, co-ordinate price increases and pricing terms, allocate sales, territories, customers or markets, and collectively reduce quantity and output in the consumer market for tuna in Canada. It was aimed at impacting the price of tuna sold in Canada under the defendants' own brands, as well as through brands owned by other grocery chains, which purchased tuna from the defendants' facilities at inflated prices for sale in Canada.

THE CERTIFICATION DECISION

(1) Overview

[18] The motion judge noted that the test for certification is to be applied in a purposive and generous manner to give effect to the goals of class actions, including to provide access to justice for litigants, to encourage behaviour

modification and to promote the efficient use of judicial resources. That said, the certification test is meant to be a meaningful screening device, to ensure that the plaintiff's claims can appropriately be prosecuted as a class proceeding.

[19] The motion judge dismissed the motion for certification on three independent grounds:

> (i) the Claim failed to plead material facts sufficient to disclose a cause of action as required under s. 5(1)(a) of the *CPA*;
>
> (ii) the appellant failed to adduce sufficient evidence to satisfy the modest requirement in s. 5(1)(c) of the *CPA* that there be "some basis in fact" for the existence of common issues involving class members, and
>
> (iii) the appellant failed to show that a class proceeding would be the preferable procedure for resolving the issues raised by the Claim, as required by s. 5(1)(d) of the *CPA*.

(2) The cause of action criterion

[20] The motion judge identified the applicable legal test on this issue as whether, assuming the facts pleaded to be true, there is a reasonable prospect that the claim will succeed. The claim must be read generously, and it will be unsatisfactory only if it is plain, obvious and beyond a reasonable doubt that the plaintiff cannot succeed: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158, at para. 25. He acknowledged that pleading a civil conspiracy claim may be particularly challenging "given the clandestine nature of conspiracies."

[21] The motion judge noted, however, that bare allegations and conclusory statements based on assumptions or speculation, or which are incapable of proof, are not material facts and are not assumed to be true for the purposes of a motion determining whether a legally viable cause of action is pleaded. He also observed that the requirement to plead material facts, including identifying the acts alleged against each defendant, is particularly important in pleading a civil conspiracy so that each can know what he or she is alleged to have done as part of the conspiracy.

[22] The motion judge undertook a comprehensive and detailed analysis of the Claim, setting out over a dozen fundamental defects in the pleading. I will not reproduce that analysis here but merely observe that, in general terms, the fundamental problem he identified was that the Claim assumed that a proven price-fixing conspiracy involving the sale of tuna in the United States could simply be extended to Canada, even though the Canadian and U.S. markets for tuna were entirely separate.

[23] For example, the motion judge pointed out that of the 11 defendants, only the Clover Leaf Entities and Thai Union Group are alleged to have sold or produced any significant amounts of canned tuna for the Canadian market. Moreover, Thai Union was an upstream supplier of tuna sold in Canada by various unaffiliated retailers (none of whom was alleged to be a participant in the alleged conspiracy), whereas the Clover Leaf Entities were tuna retailers. The motion judge therefore

concluded that Thai Union and the Clover Leaf Entities were not competitors of each other, which was a necessary precondition to find that they had engaged in an unlawful conspiracy contrary to ss. 45 or 46 of the *Competition Act*.[1]

[24] What was equally unclear to the motion judge was the allegation that COSI had "shielded" Thai Union's illegal conduct in Canada, given that COSI is not alleged to have sold tuna in Canada, nor to have had any other role in the Canadian retail tuna market. Nor does the Claim identify any illegal conduct by Thai Union that required shielding by COSI, since selling tuna to other unaffiliated retailers who are not participants in the conspiracy is not illegal, even if, *arguendo*, Thai Union is charging those retailers inflated prices. As for Starkist Co., the Claim states that it had "largely abandoned the Canadian market in 1985…but returned to the Canadian market during the Class Period", but no material facts are pleaded as to when or how this occurred, or what actions were taken by StarKist Co. in furtherance of the alleged conspiracy.

[25] The motion judge further pointed out that none of the other defendants was alleged to have sold tuna in Canada, or to have had any role in the sale of tuna to Canadian consumers. (The only actions alleged in relation to these other

[1] Section 45 of the *Competition Act* makes it an offence to conspire with "a competitor" to fix prices for a product, with a "competitor" being defined as a person who it is "reasonable to believe would be likely to compete with respect to a product in the absence of the conspiracy…" This version of section 45 was enacted in 2010. Prior to that time section 45 made it an offence to conspire with "another person" to "unduly lessen" competition in relation to a product.

defendants involved the sale of tuna in the U.S.) Apart from conclusory and boilerplate statements to the effect that certain of these entities “completely dominated” other members of the conspiracy and used those others to “shield their illegal conduct,” the motion judge found that the Claim failed to plead material facts explaining how or when the alleged participants came to a meeting of the minds, or what they did to further the alleged conspiracy. He found that the non-U.S. defendants were implicated in the conspiracy solely on the basis of their ownership of or affiliation with the U.S. defendants, but without pleading facts that could support piercing the corporate veil between them.

[26] In short, the motion judge found that the Claim proceeded on the basis of bare allegations and conclusory statements, rather than material facts that could possibly support the conclusion that there was a conspiracy involving the defendants to unlawfully inflate the price of canned tuna in Canada.

[27] The motion judge therefore concluded that the Claim as pleaded failed to satisfy the “cause of action” criterion. He further found that the evidentiary record on the motion revealed that no purpose would be served by granting the plaintiff leave to amend her already amended Claim.

(3) The some-basis-in-fact criterion for the proposed common issues

[28] The motion judge explained that one of the key requirements on a certification motion is that the claims of the class members raise common issues,

as required by s. 5(1)(c) of the *CPA*. In particular, the plaintiff must show that there is "some basis in fact" that the proposed common issues exist, and that the issues extend across the members of the class.

[29] The motion judge noted that the some-basis-in-fact standard does not require evidence on a balance of probabilities, nor should the court attempt to resolve conflicts in the evidence at the certification stage. The certification analysis does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action. Rather, the difficult task on a certification motion is to "walk a tight rope of determining that there is some basis in fact for the certification criteria while not making any determination of the merits of the proposed representative plaintiff's case."

[30] The motion judge found that the Claim failed to satisfy even this low evidentiary standard. The fundamental problem was that the evidence relied upon by the plaintiff had nothing to do with Canada and concerned conduct that occurred only with respect to the U.S., which had an entirely separate market for tuna.

[31] The motion judge supported this conclusion with a detailed analysis of the evidence put forward by the parties. Amongst his findings were the following: (i) most of the defendants did not sell packaged tuna in Canada or anywhere else in the world; (ii) the only defendants that sold packaged tuna directly in Canada were the Clover Leaf Entities, but they did not sell products manufactured by Bumble

Bee Foods in the U.S.; (iii) Thai Union was a cannery at a different level of the supply chain and, while it supplied unbranded canned tuna to various unaffiliated Canadian companies, neither it nor COSI sold tuna to consumers in Canada and did not compete with any of the other defendants in the supply of canned tuna to Canadian consumers; (iv) neither StarKist Co. nor Del Monte sold packaged tuna in Canada during the proposed class period; and (v) the Lion Entities did not sell tuna anywhere in the world, nor was there any evidence showing that the Lion Entities were involved in the U.S. conspiracy or that they had any involvement in the sale of canned tuna in Canada.

[32] In short, the motion judge found that there was no basis in fact for the allegation that the defendants conspired with each other to sell canned tuna to Canadian consumers at inflated prices. The factual circumstances of the canned tuna marketplace in Canada are quite different from those in the U.S., and thus the proven conspiracy in the U.S. could not simply be transposed to Canada.

[33] The motion judge also found that the appellant had failed to show that there was a common issue regarding the class members' damages. In particular, the appellant had failed to provide a methodology that was sufficiently credible or plausible to establish loss on a class-wide basis.

(4) Preferable procedure criterion

[34] The motion judge found that if there was no basis in fact for common issues, then it was axiomatic that a class proceeding could not be the preferable procedure to resolve the issues raised by the Claim.

STANDARD OF REVIEW

[35] The standard of review on appeal from a certification motion depends on the nature of the issue. In general terms, decisions on questions of law are reviewable on a standard of correctness whereas determinations of fact or of mixed fact and law are reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 26.

[36] Thus, the identification of the necessary elements of the pleaded cause of action is a question of law reviewable on a standard of correctness, whereas the assessment of whether the pleaded material facts actually support those causes of action is a question of mixed fact and law reviewable on a standard of palpable and overriding error: *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, 473 D.L.R. (4th) 136, at para. 29; *Jensen v. Samsung Electronics Co. Ltd.*, 2023 FCA 89, 482 D.L.R. (4th) 504, at para. 43.

[37] Similarly, the identification of the correct legal test for determining whether there is “some basis in fact” for the proposed common issues is subject to review on a correctness standard, while the determination of whether the evidence

adduced satisfies that test is a question of mixed fact and law that should not be disturbed absent a palpable and overriding error: *Jensen*, para. 43; *Palmer v. Teva*, 2024 ONCA 220, at para. 103; *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, at para. 94.

ANALYSIS

(1) The appeal should not be quashed on jurisdictional grounds

[38] As noted above, the respondents argue that the appeal should be quashed because s. 30(1) of the *CPA* as it read on October 23, 2018 (the date the Claim was commenced) provided for an appeal from an order denying certification to the Divisional Court. The respondents argue that the motion judge's dismissal of the motion to certify the actions as class proceedings is a procedural and interlocutory order that does not finally dispose of the Claim and is thus not directly appealable to this court.

[39] The appellant argues that this court has jurisdiction over the appeal since, in substance, the motion judge's order went beyond merely refusing to certify the action and effectively brought it to an end. The practical effect of the motion judge's order is that there is no cause of action that survives for the plaintiff to pursue, either individually or by way of a class proceeding.

[40] As Doherty J.A. emphasized in *Obodo v. Trans-Union of Canada*, Inc., 2022 ONCA 814, 164 O.R. (3d) 520, at paras. 18-19, the appropriate appellate forum

should be determined by reference to the substance of the challenged order and not necessarily the label placed on the motion giving rise to the order. Where the practical effect of an order on a certification motion is to bring a proceeding to an end, that order is directly appealable to this court.

[41] I agree with the appellant that although the motion judge's order in terms merely dismissed the motion for certification, its practical effect was to bring the Claim to an end. The motion judge found that not only had the appellant failed to plead the necessary elements of a cause of action, but it would also not be possible for her to do so given the fundamental factual differences between the Canadian and U.S. markets for tuna.

[42] In short, if the order below stands, the proceedings commenced by the plaintiff are effectively over, even if she were to pursue the Claim individually rather than as a class proceeding. Accordingly, the appeal is properly before this court.

(2) The motion judge made no reversible error in concluding that the Claim did not disclose a cause of action

[43] As noted above, the motion judge found that the Claim was fundamentally flawed because, although it pleaded material facts showing that the U.S. Conspirators had engaged in a conspiracy in the U.S. between 2011 and 2013, no material facts were pleaded to support the alleged 20-year conspiracy in Canada involving the named defendants.

[44] The appellant argues that the motion judge erred by: (i) failing to appreciate that the Claim alleged a conspiracy between packaged tuna producers, erroneously assuming, instead, that the Claim alleged a conspiracy among Canadian retail labels; (ii) failing to assume the facts pleaded were true and, in fact, making findings that contradicted the pleadings; (iii) erroneously deciding the merits of the claim; and (iv) incorrectly assuming that the conspiracy had to have occurred "in Canada" in order to involve a breach of the *Competition Act*.

[45] I note that the appellant does not allege that the motion judge incorrectly identified the applicable legal test but, rather, that he erred in the application of that test. As explained above, the motion judge's findings in this regard involve questions of mixed fact and law and are therefore reviewable on a standard of palpable and overriding error.

(i) The motion judge did not consider the wrong conspiracy

[46] The motion judge did not incorrectly consider a conspiracy between retail labels rather than between tuna producers. Instead, he correctly analysed the Claim as an attempt to extend a conspiracy between U.S. tuna producers to Canada without pleading the necessary facts to do so.

[47] As explained above, the fundamental defect identified by the motion judge was that of the 11 defendants, only the Clover Leaf Entities directly sold canned tuna in Canada under its own label, while Thai Union Group was an upstream

supplier of canned tuna to various unaffiliated retailers, and Starkist Co. largely abandoned the Canadian market in 1985 (although allegedly returned to the Canadian market sometime after 2004).

[48] Other than these three defendants, the Claim does not allege conduct by any of the other eight defendants affecting the sale of tuna in Canada, apart from the bald and conclusory boilerplate statements identified above (i.e., certain entities “completely dominated” others, or used those others to “shield their illegal conduct”).

[49] There is no doubt that the motion judge correctly understood the nature of the alleged conspiracy as one involving tuna producers, rather than merely retailers. The motion judge simply found that there were no material facts pleaded to support the existence of such a conspiracy during the time frame alleged, beyond the three-year conspiracy found in the U.S., or how the U.S. conspiracy could have impacted the Canadian market. In short, the motion judge acknowledged that some of the defendants were involved in a proven conspiracy in the U.S. for three years, and he accepted as true that other defendants sold tuna in Canada for the duration of the class period; however, he could not find any link between these groups of defendants, aside from bald allegations of domination and control, sufficient to make out a claim for conspiracy in the Canadian market.

[50] Because he could not find a link between the defendants that were involved in the proven U.S. conspiracy and those that sold tuna in Canada, he further considered whether the Claim made out a conspiracy among only the defendants that sold tuna in Canada. Since the Clover Leaf Entities and Thai Union were not competitors of one another, and no other defendants sold tuna in Canada, he concluded that the Claim did not make out an allegation for that narrower conspiracy either. In asking that question, he did not misdirect himself as to the nature of the class's broader claim regarding producers.

[51] I see no error in the motion judge's analysis of this issue, much less a palpable and overriding one.

(ii) The motion judge did not fail to accept the pleaded facts as true

[52] The appellant argues that the motion judge failed to accept as true two of the allegations in the Claim: (i) that the defendants "would be competitors of one another if they were not in a conspiracy"; and (ii) that StarKist Co.'s packaged tuna was sold in Canada during the class period.

[53] While the motion judge did not accept either of the above allegations as true, in my view he did not err in so doing.

[54] As the motion judge correctly pointed out, the court is not obliged to assume as true bare allegations and conclusory statements based on assumptions or speculation, or which are otherwise incapable of proof: *Das v. George Weston*

Limited, 2018 ONCA 1053, at para. 74. This was precisely the difficulty with the allegation that the defendants "would have been competitors" had it not been for the existence of the conspiracy.

[55] As the motion judge explained in some detail, the participants in the alleged conspiracy who are claimed to have sold tuna in Canada operated at different levels of the supply chain: while Thai Union was an upstream supplier of tuna to various unaffiliated entities (who were not participants in the alleged conspiracy), the Clover Leaf Entities were retailers. Thus, they were not and could not in law be competitors with each other by virtue of their different roles in the Canadian marketplace. As for the other participants in the alleged conspiracy, they were not competitors with each other in the Canadian retail market for tuna for the simple reason that, on the facts as pleaded, they had no involvement in the sale of tuna to Canadian consumers. In short, the motion judge did not err in refusing to accept what was in substance a bare allegation that the defendants "would have been competitors of one another if they had not been engaged in a conspiracy."

[56] As for whether StarKist Co. sold tuna in Canada during the class period, the Claim states that StarKist Co. had "largely abandoned the Canadian market in 1985", but that it "returned to the market" sometime after 2004. However, there were no pleaded facts as to when this return to Canada took place, nor whether, or to what extent, it involved the sale of tuna to Canadian consumers. This lack of clarity was compounded by the appellant's written submissions to the motion

judge, in which the appellant argued that StarKist Co. “would have returned to Canada” (as opposed to StarKist Co. having actually returned to the market) had it not been for the alleged conspiracy.

[57] Given this ambiguous record, it was open to the motion judge to find that the claim that StarKist Co. sold tuna in Canada was a bare allegation unsupported by material facts. I see no palpable and overriding error in his finding.

(iii) The motion judge did not decide the merits

[58] The appellant argues that the motion judge went beyond a consideration of whether the pleadings disclosed a cause of action and erroneously decided the merits. The appellant objects, first, to the motion judge’s statement that his finding that the pleadings did not disclose a cause of action was “confirmed” by the some-basis-in-fact analysis of the common issues criterion that “actually reveals that the price-fixing conspiracy in Canada did not exist.” Secondly, the appellant takes issue with the motion judge’s statement elsewhere in his reasons that the allegations in the Claim “assume but do not demonstrate… an illegal meeting of the minds and an illegal agreement to agree to fix prices as distinct from conscious parallelism.”

[59] When these impugned statements are considered in context, they do not support the appellant’s claim that the motion judge improperly decided the merits in his “cause of action” analysis.

[60] Turning to the first impugned statement, the appellant has omitted the key opening words in the relevant sentence: “[a]s it happens, this conclusion, *which is not a merits determination*, is confirmed by the the-some-basis-in-fact analysis…” (my emphasis). This context makes clear that the motion judge correctly understood that his “cause of action” analysis did not involve a consideration of the underlying merits of the proceeding. Rather, he was observing that his conclusion that the pleadings failed to disclose a cause of action was confirmed by his findings on the some-basis-in-fact criterion. As this court recently noted in *Teva*, at paras. 34-35, a certification motion judge who considers evidence on a certification motion is quite capable of disabusing himself of that evidence in connection with the “cause of action” criterion under s. 5(1)(a). In my view, this is what occurred here and, accordingly, I see no error in this first impugned statement.

[61] As for the second impugned statement, it comes at the end of the paragraph that in its entirety reads as follows:

> “…[T]he material facts that are pleaded do not indicate how and when and to what purpose each alleged conspirator came to a meeting of the minds with regard to the commission of the alleged conspiracy and the material facts pleaded do not set out any particular overt acts undertaken by each defendant in furtherance of the alleged conspiracy. The pleaded material facts assume but do not demonstrate multilateral action that would constitute an illegal meeting of the minds and an illegal agreement to agree to fix prices as distinct from conscious parallelism, which is not illegal.”

[62] When read in context, the use of the word “demonstrate” in the second impugned statement is highlighting the failure of the Claim to plead any actions taken by the alleged conspirators, either individually or collectively, that would show that the conspiracy actually existed. This is not a merits determination but merely a reflection of the failure of the Claim to plead the material facts necessary to support the alleged conspiracy.

[63] Accordingly, the impugned statements do not support the conclusion that the motion judge improperly considered the substantive merits of the proceeding in his findings on the “cause of action criterion”.

(iv) The motion judge did not erroneously assume that the conspiracy had to occur “in Canada” to be actionable under the *Competition Act*

[64] The appellant argues that the motion judge wrongly assumed that only retail labels located “in Canada” could be liable for the price-fixing conspiracy.

[65] I see no substance to this objection. The motion judge clearly understood that if the alleged conspiracy had inflated the price of tuna sold to Canadian consumers, it would have been actionable under the *Competition Act* even if some of the actions undertaken by the participants had occurred outside of Canada. The difficulty with the Claim was not that a number of the defendants were located in the United States but, rather, that there was no connection between their actions as pleaded and the sale of tuna in Canada. The tuna produced by the U.S.

Conspirators was sold only in the U.S., and the Claim failed to plead any chain of distribution whereby the U.S. producers' tuna had reached Canadian class members. This, rather than the location of the alleged conspirators, was one of the central and insurmountable defects in the Claim as pleaded.

(v) Conclusion on "cause of action" criterion

[66] The motion judge applied the correct legal test and conducted a comprehensive, detailed and careful analysis of the pleadings, identifying over a dozen separate substantial defects in the Claim as pleaded. The appellant has failed to demonstrate any error in his analysis, much less a palpable and overriding one. I would therefore reject this ground of appeal.

(3) The motion judge properly held that the Claim did not raise common issues

[67] The appellant argues that the motion judge erroneously applied a bifurcated "two-step" test in his analysis of the some-basis-in-fact criterion by requiring evidence both that: (i) the proposed common issues actually exist; and (ii) they can be answered in common across the entire class.

[68] In the appellant's view, on a certification motion the plaintiff is not required to provide evidence that the proposed common issues actually exist. The appellant relies in particular upon the following statement by Rothstein J. in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 110, to the effect that at the certification stage, "evidence that the acts alleged

actually occurred is not required." Rothstein J. further stated that on a certification motion, "factual evidence… goes only to establish whether these questions are common to all the class members."

[69] The appellants further argue that, because the motion judge incorrectly required evidence that the proposed common issues actually exist, he improperly decided the ultimate merits rather than merely deciding whether the Claim should be certified as a class proceeding.

[70] I do not agree.

[71] The motion judge was well aware that requiring some basis in the evidence that the proposed common issues actually exist is quite different from determining the merits of the proposed action. He described this requirement as a "low evidentiary standard" that merely required "some evidentiary foundation to conclude that the alleged conspiracy with attendant harm to the Class Members could or might have occurred in Canada." But the some-basis-in-fact standard did not require evidence on a balance of probabilities and did not require the court to resolve conflicting facts and evidence at the certification stage. This reflected the fact that at the certification stage, the court is ill-equipped to resolve conflicts in the evidence or to engage in an assessment of the viability or strength of the action.

[72] The fact that a plaintiff on a certification motion must provide some basis in the evidence that an alleged conspiracy could or might have occurred is a minimal

but necessary requirement. As a matter of logic and common sense, if there is no basis in fact to suppose that a conspiracy with attendant harm actually occurred, it necessarily follows that there is no basis to suppose that such a nonexistent conspiracy could have caused harm across members of the proposed class. Justice de Montigny made this point in *Jensen*, at para. 77: “I fail to see how it can seriously be argued that a judge could determine whether the claims of the class members raise common questions of fact or law without first deciding whether there is some basis in fact for the very existence of each common issue.”

[73] Whether the necessary analysis is described as involving one or two steps is beside the point. A key rationale and purpose of the certification process is to root out frivolous and unfounded claims. If a claim of conspiracy with no factual underpinning whatsoever could proceed as a class action merely by alleging that the purported conspiracy caused harm to a group of individuals, virtually any such conspiracy claim would have to be certified.

[74] Requiring a plaintiff to satisfy this minimal evidentiary standard is entirely different from requiring proof of the claim, whether on a balance of probabilities or otherwise. The standard requires some basis in fact, not proof of fact. It does not involve weighing the merits of the claim or the resolution of conflicts in the evidence, but merely asks whether there is some minimal evidence in support of it. Certification of a claim that is unable to satisfy such a minimal evidentiary

standard would undermine judicial economy, and in the process indirectly impair access to justice for other arguably meritorious claims.

[75] Contrary to the appellant's submissions, this is not a novel requirement nor is it a departure from existing jurisprudence of Ontario courts on this issue. As Miller J.A. recently observed in *Teva*, at para. 104, "[w]hile the 'some basis in fact' test is a low evidentiary standard, and a court should not resolve conflicting facts and evidence, the court retains a gatekeeping function and certification will be denied if there is an insufficient evidentiary basis for the facts to establish the existence of common issues." Thus, in *Teva* this court upheld a dismissal of a certification motion on the grounds, *inter alia*, that there was no basis in the evidence in support of certain of the claims made by the plaintiffs. A similar approach is routinely applied in the review of certification decisions by the Divisional Court, as demonstrated by recent decisions such as: *Simpson v. Facebook*, 2022 ONSC 1284, 160 O.R. 3(d) 629 (Div. Ct.), at paras. 25-26; *Kuiper v. Cook*, 2020 ONSC 128, 149 O.R. (3d) 521 (Div. Ct.), at paras. 27-33; *Frayce v. BMO*, 2024 ONSC 533 (Div. Ct.), at paras. 12-16 & 21-25.

[76] Nor is this approach inconsistent with the above-noted comments by Rothstein J. in *Pro-Sys Consultants* to the effect that on a certification motion "evidence that the acts alleged actually occurred is not required." As de Montigny J.A. pointed out in *Jensen*, at para. 83, Rothstein J.'s comments were made in response to the argument that the plaintiff was required to prove that it had met

the some-basis-in-fact standard on a balance of probabilities. Thus, when read in context, Rothstein J.'s comments merely reaffirmed that the some-basis-in-fact standard does not equate with a balance of probabilities test, as opposed to suggesting that a conspiracy claim lacking any evidentiary foundation should nevertheless be certified as a class proceeding.

[77] I therefore conclude that the motion judge did not err in requiring the appellant to provide some minimal evidence in support of the existence of the alleged conspiracy as part of his consideration of whether the plaintiff had satisfied the some-basis-in-fact criterion.

[78] Turning to the motion judge's application of that test, I will not repeat my earlier description of the reasons why the motion judge found that the appellant had failed to satisfy this minimal evidentiary standard. As explained above, the nub of the difficulty identified by the motion judge was that, although the appellant had tendered a huge volume of evidence concerning conduct in the U.S. regarding the U.S. retail tuna market, there was no evidence to support the claim that this conduct affected the Canadian market. As for the opinion of the plaintiff's expert claiming that the market conditions for a price-fixing cartel in Canada existed, the motion judge found that her evidence contradicted itself since she totally misunderstood the true state of market conditions in Canada. Applying her expertise to the correct factual underpinnings revealed that the market conditions

in Canada were not conducive to the existence of a price-fixing conspiracy for the sale of tuna.

[79] The motion judge properly applied the some-basis-in-fact standard in making these findings and they are entitled to deference. The appellant has identified no palpable and overriding error in his findings, but merely asks this court to substitute our own analysis of the evidence for that of the motion judge. I would therefore reject this ground of appeal.

DISPOSITION

[80] The motion judge did not commit a reversible error in dismissing the certification motion on the basis that it failed to satisfy both the cause of action criterion as well as the common issues criterion, as required by s. 5 of the *CPA.* Either of the above findings is sufficient to dispose of the appeal.

[81] Accordingly, I would dismiss the appeal. In accordance with the agreement of the parties, the respondents collectively are entitled to their costs in the amount of $80,000 on an all-inclusive basis.

Released: August 9, 2024 “G.H.”

“P.J. Monahan J.A.”
“I agree. Grant Huscroft J.A.”
“I agree. Coroza J.A.”