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Thursday, February 7, 2019 - Issue 412

HIGHLIGHTS

* A Justice of the Ontario Superior Court of Justice has struck out a proposed class action commenced by an Ontario corn farmer against Syngenta Canada Inc. and Syngenta AG for damages sustained by the plaintiff and other Canadian corn producers for depressed corn prices in 2013 and 2014 which allegedly resulted from China's rejection of North American corn containing genetically modified traits developed by Syngenta which had been approved for use in Canada and the United States in 2010 and 2011. It was alleged that the corn was commercialized prematurely because China had not yet approved it; that Syngenta owed a duty of care to prevent the genetically modified corn from being co-mingled with other corn, and that Syngenta had misled North American producers with respect to the timing and substance of its import approval in China. Although a similar application to strike an action commenced in the United States had been dismissed, the Court struck the Canadian class action as it did not meet the criteria for a claim to recover pure economic loss. (Darmar Farms Inc. v. Syngenta Canada Inc., CALN/2019-003, [2018] O.J. No. 6254, Ontario Superior Court of Justice)

NEW CASE LAW

Darmar Farms Inc. v. Syngenta Canada Inc.;

Ontario SuperiorCourt of Justice,

H.A. Rady J.,

November 28,2018.

CALN/2019-003

Full Text: [2018] O.J. No. 6254 | 2018 ONSC 7129

Class Action for Damages Sustained by Producers as a Result of Co-Mingling of Genetically Modified Products — Pure Economic Loss.

Darmar Farms Inc. ("Darmar Farms") commenced a proposed class action against Syngenta Canada and Syngenta AG ("Syngenta").

Darmar Farms is an Ontario corporation which had planted corn in 2013, 2014 and 2015.

Syngenta is a global agri-business headquartered in Switzerland with a subsidiary in Ontario. Syngenta developed two genetically modified corn seeds containing a genetic trait known as MIR 162 and marketed as "Agrisure Viptera" and "Agrisure Duracade".

Agrisure Viptera was approved for use in Canada and the United States in 2010. Agrisure Duracade was released in 2013, 2014 and 2015. North American corn prices fell when China rejected shipments of North American corn in 2013 and 2014 after it discovered some shipments contained Agrisure.

Darmar Farms (which had never planted Agrisure) alleged that a glut in the domestic corn supply resulted from China's rejection of North American corn and that Syngenta was responsible for depressed prices which resulted from this glut, and the economic loss which sustained as a result.

The Plaintiff's claim was based in negligence and for breach of the Competition Act.

A parallel action was commenced in the United States which survived a motion for summary dismissal. The U.S. action had apparently been settled however Syngenta alleged there was no evidence of any settlement in the materials filed with the Court.

Three essential negligence claims were advanced:

> (a) That Syngenta owed and breached a duty to not commercialize Agrisure in the North American market prior to receiving import approval from China (the "Premature Commercialization Plan");
>
> (b) That Syngenta owed and breached a duty to prevent the co-mingling of Agrisure corn with the corn grown by other farmers and and industry stakeholds (the "Co-Mingling Claim");
>
> (c) That Syngenta owed and breached the duty not to mislead the Plaintiff and other farmers about the timing and substance of its application for import approval to China in order to prevent the co-mingling of Agrisure with other North American corn bound for export to China (the "Negligence Misrepresentation Claim").

Syngenta applied under Ontario Rule 21 for an Order striking out the claim on the ground that it disclosed no reasonable cause of action or defence.

Decision: Rady, J granted Syngenta's application and struck Darmer Farms' claim at para. 88.

Rady, J summarized the law with respect to applications to strike claims under Rule 21 as follows [at para. 16]:

> 1. a claim will not be struck unless it is plan and obvious it cannot succeed: Hunt v. Carey Canada Inc., 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959;
>
> 2. the facts pleaded are to be assumed to be true unless they are patently ridiculous or incapable of proof: Prete v. Ontario (1993), 1993 CanLII 3386 (ON CA), 16 O.R. (3d) 161 (C.A.); Nash v. Ontario (1995), 1995 CanLII 2934 (ON CA), 27 O.R. (3d) 1 (C.A.);

3. a claim must be read with a forgiving eye for drafting deficiencies: Doe v. Metropolitan Toronto (Municipality) (1990), 1990 CanLII 6611 (ON SC), 74 O.R. (2d) 225 (C.A.);

4. the novelty of a cause of action is not determinative: Hunt, supra; Doe, supra; R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42 (CanLII);

5. the court is not precluded from striking a negligence claim simply because it asserts a novel duty of care. Whether such a duty of care exists is a question of law that is appropriately resolved on a Rule 21 motion: Syl Apps Secure Treatment Center v. B.D., 2007 SCC 38 (CanLII), [2007] 3 S.C.R. 83; and

6. a critical analysis is required in order to prevent untenable claims from proceeding, particularly given scarce judicial resources and the challenges of systemic delay: Rayner v. McManus, 2017 ONSC 3044 (Div. Ct.) (CanLII).

Rady, J observed that the parties agreed that the claim is correctly characterized as one of pure economic loss and that [at para. 21] five distinct categories of pure economic loss claims have been recognized in Canada:

1. negligent misrepresentation;

2. negligence performance of a service;

3. negligent supply of shoddy goods or structures;

4. relational economic loss; and

5. the independent liability of statutory public authorities.

Rady, J also observed that the existence of a duty of care in negligence causing economic loss turns on the two stage Anns/Cooper test which has been expressed as follows [at para. 24]:

1. Is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plainitff?

2. If the answer is yes, are there any reasons that should limit or negate:

   (i) the scope of the duty; and

   (ii) the class of persons to whom the duty is owed; or

   (iii) the damages that might arise?

Rady, J then reviewed the recent decision of the Supreme Court of Canada in Deloitte and Touche v. Livent Inc. (Receiver of), 2017 SCC 63 (CanLII) ("Livent") and summarized the Livent analysis at para. 39 as follows:

(i) proximity is to be evaluated before the reasonable forseeability of harm (Livent, para. 24);

(ii) the defendant's undertaking and the plaintiff's reasonable reliance drive the proximity analysis (Livent, para. 30);

(iii) the extent of the duty of care is informed by the purpose for which the defendant assumed responsibility (Livent, para. 31); and

(iv) the relationship of proximity is central to foreseeability (Livent, para. 34).

After considering the arguments of Darmar Farms and Syngenta, Rady, J concluded [at para. 71 to 74 and at para. 86 to 89] as follows:

> [71] It is helpful here to set out in brief the essential facts pleaded in the statement of claim that are assumed true for the purposes of this motion:
>
> - the North American agricultural industry is interdependent and connected;
>
> - there is a shared responsibility among industry participants to exercise reasonable care respecting the commercialization of new biotechnology products;
>
> - co-mingling is inevitable;
>
> - approval by prospective buyers is necessary before co-mingled crops can be sold;
>
> - the plaintiff and class members are vulnerable if the defendants fail to obtain adequate approvals;
>
> - the defendants were warned by the industry not to introduce another MIR genetic triat without export market approvals;
>
> - the defendants undertook (or made a promissory representation) not to cause damage by introducing its product without necessary global approvals;
>
> - the defendants brought Agrisure to the North American market in 2011 knowing China would not approve Agrisure until later;
>
> - Agrisure contaminated the North American market and the defendants failed to take measures to prevent it; and
>
> - the defendants misled farmers about the importance of the Chinese market and the status of its approval of Agrisure for import and the plaintiff and class members relied upon their representations.
>
> [72] I have concluded that it is plain and obvious that the claim for relational damages cannot succeed. There is no economic loss that is consequent to physical damage to a third party, which is the foundation of the duty of care.
>
> [73] In my view, the claim - read generously - is framed in only one previously recognized category of compensable economic loss, namely misrepresentation. The claim for premature commercialization is somewhat misleading or a misnomer in the sense that the plaintiff does not assert that the defendants could not market its product domestically as they saw fit. Rather, the allegation is that the defendants undertook not to do so unreasonably. The plaintiff emphasizes that the important point is that the regulatory process did not confer immunity if the defendants acted wrongfully. By failing to take reasonable steps to prevent it, Agrisure contaminated the plaintiff's non-Agrisure crop. This led to China's rejection of all Canadian corn, leading to economic losses in the domestic corn market.
>
> [74] Although the claim is characterized as a misrepresentation claim and therefore, it falls within a recognized category of economic loss, it is necessary, by virtue of Livent, to carefully examine the basis of which a duty of care arises in the circumstances of these facts. As a result, the defendants' misrepresentation, undertaking, and the reasonableness of the plaintiff's reliance must be evaluated.

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[86] If the plaintiff's argument is taken to its logical conclusion, Syngenta would necessarily be prevented from selling Agrisure in the domestic market, notwithstanding Canadian and American approvals. The only way to ensure that co-mingling and contamination did not occur would be to withhold the release of Agrisure to the North American market, a position the plaintiff explicitly disavows - as it must, given the outcome in Hoffman.

[87] Furthermore, if the plaintiff's position prevailed, I agree with the defendants that the importance of foreign import approvals would be elevated to a level of precedence over domestic approvals. The question would arise whether any foreign importer of a Canadian product must approve imports before the product could be marketed domestically. The answer must surely be no. If only large foreign markets are relevant, one must ask how that would be determined and by what decision maker. The potential for arbitrariness is self-evident.

[88] It is for this reason that I have concluded that it is plain and obvious that the claim cannot succeed. Amendments will not remedy the defects identified in these reasons. The motion is granted and the claim is dismissed.

[89] These conclusions are equally dispositive of the Competition Act claim.

CREDITS

This NetLetter is prepared by Brian P. Kaliel, Q.C. of Miller Thomson LLP, Edmonton, Alberta.