

Federal Court



Cour fédérale

**Date: 20101006**

**Docket: T-1270-08**

**Citation: 2010 FC 996**

**Ottawa, Ontario, October 6, 2010**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**GARFORD PTY LTD.**

**Plaintiff**

**and**

**DYWIDAG SYSTEMS INTERNATIONAL,  
CANADA, LTD., MR. BOB BISHOP  
AND MR. KENNETH SOSTEK**

**Defendants**

**AND BETWEEN:**

**DYWIDAG SYSTEMS INTERNATIONAL, CANADA, LTD.**

**Plaintiff by Counterclaim**

**and**

**GARFORD PTY LTD.**

**Defendant by Counterclaim**

## **REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is a motion by the Defendant, Dywidag Systems International, Canada, Ltd. for summary judgment dismissing that part of the Plaintiff's claim for damages and losses and compensation pursuant to sections 36(1) and 45(1) of the *Competition Act* (R.S., 1985, c. C-34) because the action was commenced on August 15, 2008, well after the expiry of the limitation period in section 36(4) of the *Competition Act*.

### **Summary Judgment Principles**

[2] There is no dispute between the parties about the basic principles to be applied in a summary judgment motion. A helpful summary was provided by Justice Tremblay-Lamer in *Granville Shipping Co. v. Pegasus Lines Ltd. S.A.* (1996), 111 F.T.R. 189, [1996] F.C.J. No. 481 (*Granville Shipping*):

I have considered all of the case law pertaining to summary judgment and I summarize the general principles accordingly:

1. the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried (*Old Fish Market Restaurants v. 1000357 Ontario Inc. et al*, [1994] F.C.J. No. 1631, 58 C.P.R. (3d) 221 (T.D.));
2. there is no determinative test (*Feoso Oil Limited v. Sarla*) but Stone J. A. seems to have adopted the reasons of Henry J. in *Pizza Pizza Ltd. v. Gillespie* (Pizza Pizza). It is not whether a party

cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;

3. each case should be interpreted in reference to its own contextual framework (*Blyth* and *Feoso*);

4. provincial practice rules (especially Rule 20 of the Ontario Rules) can aid in interpretation (*Feoso* and *Collie*);

5. this Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court (this is broader than Rule 20 of the Ontario Rules of Civil Procedure) (*Patrick*);

6. on the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so (*Pallman* and *Sears*);

7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge (*Forde* and *Sears*). The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved (*Stokes*).

[3] Similarly, in *Pizza Pizza Ltd. v. Gillespie*, [1990] O.J. No. 2011 (O.C.G.D.) (*Pizza Pizza*) at paragraph 42, the Court considered a parallel rule (Rule 20) in the Ontario *Rules of Civil Procedure* and concluded that the purpose of a summary judgment motion “is to screen out claims that in the opinion of the court, based on evidence furnished as directed by the rule, ought not to proceed to trial because they cannot survive the ‘good hard look’” test.

[4] The Federal Court of Appeal affirmed the *Granville Shipping* and the *Pizza Pizza* standards in *ITV Technologies Inc. v. WIC Television Ltd.*, [2001] F.C.J. No. 400 (F.C.A.) and in *Feoso Oil Ltd. v. The Sarla*, [1995] F.C.J. No. 866 (F.C.A.).

[5] The summary judgment provisions ought to be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding. Justice Evans said in *F. Von Langsdorff Licensing Ltd. v. S.F. Concrete Technology, Inc.*, [1999] F.C.J. No. 526 (F.C.T.D.):

It seems to me that the dominant trend in the jurisprudence of this Court has been to interpret liberally the rules governing summary judgment, so that a motions judge must subject the evidence to a "hard look" in order to determine whether there are factual issues that really do require the kind of assessment and weighing of evidence that should properly be done by the trier of fact. In addition to cases cited above, see also *Collie Woollen Mills Ltd. v. The Queen* 96 D.T.C. 6146 (F.C.T.D.).

[6] It is also well established that, while both parties are expected to “put their best foot forward,” the moving party has the legal onus of establishing all of the facts necessary to obtain summary judgment. A party responding to a summary judgment motion does not have to prove all of the facts of its case: rather, its burden is to set out specific facts and adduce evidence showing that there is a genuine issue for trial.

[7] Each case must be interpreted in its own context and, if the necessary facts cannot be found, or if there are serious issues of credibility, the matter should go to trial.

[8] As the Plaintiff points out, there are fundamental differences between preliminary motions and trials. One effect of summary judgment is that a party will be precluded from presenting any evidence to the trial judge in respect of the issue that is the subject of a successful motion for summary judgment. In effect, one party will lose its “day in court.” This means that courts must be mindful that the effect of a summary judgment motion can deprive a party of that right.

[9] A motion for summary judgment is not intended, and should not be treated, as a substitute for a trial. In determining whether a trial is unnecessary and would serve no purpose, the motions judge must guard against assuming the role of a trial judge and deciding the issues.

[10] I also agree with the Plaintiff that summary judgment should be given only in the clearest cases where the Court is entirely satisfied that a trial is unnecessary. It should not be granted where, on the whole of the evidence, the judge cannot find the necessary facts or it would be unjust to do so. If there are serious factual or legal issues that must be resolved, the case is not appropriate for summary judgment.

### **The Limitations Issue**

[11] Where these parties do significantly differ is over the law of limitations and its applicability to the record that is before me.

[12] The present motion pertains to the Plaintiff's claim for damages under section 36(1) of the *Competition Act*:

36 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

36 (1) Toute personne qui a subi une perte ou des dommages par suite :

a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;

b) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi, peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

[13] A claim under section 36(1) is subject to the limitation period set down in section 36(4) of the *Competition Act*:

(4) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is

(4) Les actions visées au paragraphe (1) se prescrivent :

a) dans le cas de celles qui sont fondées sur un

contrary to any provision of Part VI, after two years from	comportement qui va à l'encontre d'une disposition de la partie VI, dans les deux ans qui suivent la dernière des dates suivantes :
(i) a day on which the conduct was engaged in, or	(i) soit la date du comportement en question,
(ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the later; and	(ii) soit la date où il est statué de façon définitive sur la poursuite;
(b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from	b) dans le cas de celles qui sont fondées sur le défaut d'une personne d'obtempérer à une ordonnance du Tribunal ou d'un autre tribunal, dans les deux ans qui suivent la dernière des dates suivantes :
(i) a day on which the order of the Tribunal or court was contravened, or	(i) soit la date où a eu lieu la contravention à l'ordonnance du Tribunal ou de l'autre tribunal,
(ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the later.	(ii) soit la date où il est statué de façon définitive sur la poursuite.

[14] The applicable limitation period in this case is the one established in subsection 36(4)(a)(i) i.e. two years from a “day on which the conduct was engaged in ... .”

[15] The conduct in question is that referred to in section 45(1) of the *Competition Act*:

45(1) Every person commits an offence who, with	45(1) Commet une infraction quiconque, avec une
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a competitor of that person with respect to a product, conspires, agrees or arranges	personne qui est son concurrent à l'égard d'un produit, conclut ou conclut un accord ou un arrangement :
(a) to fix, maintain, increase or control the price for the supply of the product;	a) soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;
(b) to allocate sales, territories, customers or markets for the production or supply of the product; or	b) soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;
(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.	c) soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

[16] The Plaintiff has made clear in providing particulars to the pleadings what it regards as the “conduct” that gives rise to a right to claim damages under section 36(1) of the Act. First of all, in its response of October 1, 2008, the Plaintiff provided the following particulars:

1. The overt acts, mentioned in request for Particulars #9, 16, 23 and 30 of your letter, refer to the acts of DSI entering into purchasing agreements with various parties with which DSI knew or ought to have known would unduly restrain or injure competition, and the negotiations and discussions leading up to such purchase agreements.

...

4. The dates when DSI, Thiessen, Ground Control and SMP agreed or arranged, mentioned in request for Particulars #5, 12, 19 and 26, were the dates that DSI entered into purchase agreements with each of Thiessen, Ground Control and SMP, and conducted the negotiations and discussions leading up to such purchase agreements.  
[Emphasis added.]



[17] The Plaintiff also provided the following response on October 14, 2008:

1. The specific parties to the conspiracy, combination, agreement or arrangement referred to in paragraphs 47(a) – (c) of the Statement of Claim, were:

- (a) DSI and Thiessen in one instance;
- (b) DSI and Ground Control, in the second instance; and
- (c) DSI and Stewart in the third instance.

2. The alleged agreement or arrangement between the parties referred to in paragraphs 1(a) – (c) above in each instance was the purchase agreement (and related transactional documents, corporate resolutions, officers certificates, indemnities, legal opinions and other related materials and documents, and related handshake or verbal agreements) produced or provided in relation to the purchase transaction and negotiations and discussions leading up to such transaction:

- (a) Regarding DSI and Thiessen in the first instance;
- (b) Regarding DSI and Ground Control, in the second instance;
- (c) Regarding DSI and Stewart in the third instance.

[Emphasis added.]

[18] Hence, the pleaded claims involve the events leading up to, and the agreements that concluded, what the materials refer to as the Thiessen Acquisition in November, 2003; the Stewart Acquisition in February, 2005; and the Ground Control Acquisition in March, 2006.

[19] It seems clear then that, for the purposes of subsection 36(4)(a)(i) of the *Competition Act* and the relevant limitation period, the conduct “engaged in” is the negotiations and discussions leading up to and including the three purchase agreements and related transactional documents recorded in those agreements.

[20] The Thiessen Acquisition was concluded in November, 2003. The Stewart Acquisition was concluded in February, 2005. And the Ground Control Acquisition was concluded in March, 2006. This suggests that, taking into account the Plaintiff's pleadings and particulars, the limitation period for each transaction (i.e. the "conduct" for the purposes of subsection 36(4)(a)(i)) complained of expired as follows:

- a. Thiessen Acquisition – November, 2005;
- b. Stewart Acquisition – February, 2007;
- c. Ground Control Acquisition – March, 2008.

[21] So even if the agreement or arrangement referred to by the Plaintiff is the sum total of the three separate agreements, then a plain reading of subsection 36(4)(a)(i) suggests that the limitation period expired in March 2008 at the latest.

[22] This action was commenced on August 15, 2008. Clearly, then, if subsection 36(4)(a)(i) is given its plain and obvious meaning and application, the Plaintiff's claim based upon sections 36(1) and 45(1) of the *Competition Act* is time-barred and so discloses no reasonable cause of action.

[23] The Plaintiff seeks to avoid this result in various ways. Before I address in turn each of the Plaintiff's points, I think it is worth bearing in mind that section 36(4) of the *Competition Act* has already been extensively considered and applied by this Court.

[24] First of all, in *Laboratoires Servier v. Apotex Inc.*, 2008 FC 825, [2008] F.C.J. No. 1094

(F.C.) 9, Justice Snider made an alternative finding on point:

**479** In the event that I am wrong in my conclusion that ADIR was exercising its rights under the *Patent Act* in a manner that precludes Apotex from claiming damages under the *Competition Act*, I will consider the next issue -- the application of the limitation period in s. 36(4) of the *Competition Act*. As noted above, s. 36(4)(i) precludes a party from bringing an action under s. 36 "based on conduct that is contrary to any provision of Part VI, after two years from a day on which the conduct was engaged in".

**480** Servier submits that Apotex is statute-barred from bringing the counterclaim under the *Competition Act* by virtue of s. 36(4) of the *Competition Act* for two reasons: (a) the "conduct", being the entering into the Settlement Agreement, occurred some six years prior to the commencement of the counterclaim; and (b) Apotex has known of the Settlement Agreement since April 2003. Apotex, in turn, argues that the conduct of ADIR occurred, not only on the date that ADIR entered into the Settlement Agreement but has occurred on every day thereafter so long as the patents that issued from the Settlement Agreement are in effect. Further, it argues, an interpretation of s. 36(4) as proposed by Servier would preclude Apotex from ever bringing an action under the *Competition Act*. This is because Apotex could only bring an action under s. 36 of the *Competition Act* where it has "suffered loss or damage"; its loss or damage only flows from a successful claim by Servier of infringement of the '196 Patent by Apotex.

**481** In spite of the capable arguments of counsel for Apotex on this point, I am of the view that the conduct in this case is most likely the entering into of the Settlement Agreement. At the latest, the conduct is the issuance of the '196 Patent (and the patents to Schering and Hoechst that also resulted from the Nadon Order). The undue lessening of competition (if it exists) is the effect of the alleged conspiracy and not the "conduct".

**482** This view is supported by the words of the statutory offence. Specifically, s. 45 provides that "Every one who conspires, combines, agrees or arranges with another person [to unduly lessen competition] ... is guilty of an offence ..." The offence is the conspiracy or agreement. The effect of the conspiracy or agreement is undue lessening of competition. While the undue lessening of

competition may continue, the act of the conspiracy will, in most cases, occur at an identifiable time. Thus, when we come to the limitation set out in s. 36(4), the provision refers to the day on which the agreement or conspiracy was entered into. The conduct, for purposes of this action, was the date of the Settlement Agreement among ADIR, Schering and Aventis -- in or around December 2000. Thus, the two-year limitation set out in s. 36(4) has been exceeded.

**483** My conclusion may have been different if I had evidence of continuing collusion or agreement among the parties to the Settlement Agreement. I do not. In fact, the evidence is that the parties to the agreement actively compete (for example, as explained by Mr. Sumpter, through the use of visual aides comparing the utility of the various 'prils used by Servier's sales force team). The situation in *351694 Ontario Ltd. v. Paccar of Canada Ltd.*, 2004 FC 1565 [*Paccar*], a case relied upon by Apotex, was quite different.

**484** In *Paccar*, the plaintiffs had been selling truck parts at a deep discount. In response the defendants instituted a rule (referred to as the Palings rule) under which parts were provided to dealers. The operation of the Palings rule "reduces the dealer's possibility for profit and likely will diminish sale. An inference can be drawn that under these circumstances it amounts to act of discrimination in the supply of goods [contrary to s. 61(1)(b) of the *Competition Act*]" (*Paccar*, above at para. 26). Justice Von Finkenstein concluded, at paragraph 27 that:

This Palings rule was an ongoing rule which remained in place with respect to both dealerships right until the date of termination; i.e. well into the limitation period.

**485** At paragraph 30, the learned judge stated:

Given my finding above regarding possible violations of s. 61(1)(b) based on the Palings rules, and given that this rule was applied to both dealerships any allegations in respect of parts based on proven violation of s. 61(1)(b) would not be barred by s. 36(4)(a)(1).

**486** The facts of *Paccar* are distinguishable from the case before me. In *Paccar*, there was continuing co-operation between the plaintiffs, presumably under some on-going agreement. The Palings

rule continued to be applied by the plaintiffs. In effect, the agreement did not terminate. The act of conspiracy occurred every time a transaction occurred under the Palings rule. In the case before me, there is no such evidence. Upon the Nadon Order or, at the latest, the issuance of the patents, the Settlement Agreement had no continuing effect; it was fully executed. This is a significant distinction.

**487** I conclude that the limitation period runs from the date of the Settlement Agreement or, at the latest, the date of the issuance of the '196 Patent.

**488** The discoverability principle can, in some circumstances, operate to extend a limitation period. This principle operates where a party could not reasonably have known about the existence of an event. In this case, Servier asserts that, since the statutory limitation period in s. 36(4) expressly runs from a specific date independent of knowledge, the discoverability principle cannot apply. I think that this is likely a correct view of the law (see *Fehr v. Jacob* (1993), 85 Man. R. (2d) 64 (Man. C.A.)).

**489** However, the discoverability principle, if it applies, does not assist Apotex. It is arguable that Apotex had effective knowledge of the Settlement Agreement either: (a) as soon as it was placed on the public record in Court File T-228-97 as an appendix to the Nadon Order; or (b) when the '196 Patent issued in 2001. At either of those two points in time, Apotex could be presumed to have been aware that a patent had issued for perindopril and that the '196 Patent had issued pursuant to an agreement among three companies. Even if I cannot definitively conclude that Apotex knew about the alleged conspiracy in 2001, the evidence before me is unequivocal that Apotex knew about the Settlement Agreement no later than April 2003. Mr. Peter Gingras, global program manager with Apotex Inc., in responses to undertakings given during his examination in discovery, advised that Apotex became aware of and received a copy of the Settlement Agreement in April 2003. Thus, even if the discoverability principle applies, the latest date from which the two-year limitation period runs would be April 2003. Apotex is, therefore, well beyond the two-year limitation of s. 36(4).

**490** For these reasons, I find that Apotex is statute barred from bringing an action under s. 36 of the *Competition Act* on the basis that Apotex brings this action more than two years after the alleged conduct was engaged in.

[25] Justice Gauthier has also had occasion to deal recently with section 36(4) and other provisions of the *Competition Act* relevant to the motion that is before me. This occurred in *Eli Lilly and Co. v. Apotex Inc.*, 2009 FC 991, [2009] F.C.J. No. 1229:

**725** The right of action for recovery of damages provided for in s. 36 of the *Competition Act* is a special remedy, contained in a part so labelled. Inquiries into the actions of third parties in the context of applying the substantive provisions of the Act, which is usually the purview of the Commissioner, are thus to take place only in cases where it is clear that allegedly anti-competitive conduct has caused a person to suffer loss or damage. The purpose of s. 36 of the Act is not to encourage persons to take the place of the Commissioner and provoke inquiries into the conduct of others. Rather, it serves the purpose of providing a means of indemnification to victims of anti-competitive conduct.

...

**728** As no criminal proceedings have been brought in relation to Lilly and Shionogi's alleged anti-competitive behaviour, subpara. 36(4)(a)(i) of the *Competition Act* is operative. As such, the Court must determine what constitutes the last day on which conduct alleged to be contrary to s. 45 of the *Competition Act* was engaged in (*Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 25 O.R. (3d) 106, 41 C.P.C. (3d) 75, (On. Ct. (Gen. Div.)), para. 23).

**729** Lilly and Shionogi both rely on the decision of Justice Judith Snider in *Laboratoires Servier* where she held that "when we come to the limitation set out in s. 36(4), the provision refers to the day on which the agreement or conspiracy was entered into." (para. 482). Thus, given that Lilly and Shionogi entered into an agreement for the assignment of patent rights on April 27, 1995, the applicable limitation period expired in 1997.

**730** Even if the discoverability principle, which Lilly and Shionogi argue does not apply to subs. 36(4) of the *Competition Act*, were applied in the present case, Apotex was aware of the assignment no later than 1997, at which point the agreement was pleaded in Lilly's statement of claim. Therefore, the limitation period cannot have expired any later than 1999.

**731** Apotex counters that the Court must consider the elements of the offence proscribed by subs. 45(1) of the *Competition Act* when interpreting its subs. 36(4), an exercise which Justice Snider failed to embark upon in *Laboratoires Servier* and which leads to the conclusion "that the two year limitation period will run, at the earliest, from conduct flowing from the agreement which constitutes an undue lessening of competition."

**732** In Apotex's view, the limitation period should run only from the moment when "Apotex was provided notice that every alternate process that Apotex had employed was asserted by Lilly to be infringing." This, in its view, occurred only in January, 2001, when Lilly amended its statement of claim to add allegations of infringement of the Lilly patents with regards to bulk cefaclor obtained from Lupin.

**733** Alternatively, Apotex submits that subs. 36(4) of the *Competition Act* contemplates ongoing conduct. For Apotex, "Lilly's impugned conduct continues to occur on every day thereafter that Lilly asserted against Apotex patent rights obtained pursuant to the agreement between Shionogi and Lilly and when competition was unduly lessened thereby." As Lilly continues to assert rights under the Shionogi patents in the main action, the conduct contrary to s. 45 of the *Competition Act* is ongoing to this day and thus the limitation period has not expired.

**734** This position was explained by Justice Evans in the context of the Federal Court of Appeal's second decision concerning a motion for summary judgment in respect of Apotex's counterclaim:

Apotex's case is that the assignment must be seen in its context: its enhancement of Lilly's market power, that is, Lilly's additional ability to act independently of the market by virtue of its ownership of the patents for all known, commercially viable processes for manufacturing cefaclor. On this view, the conspiracy continued as long as the assignment had competition-lessening effect. Because of the evidential questions to be resolved, this is not the kind of issue on which it would be appropriate to grant summary judgment.

**735** The assertion that anti-competitive conduct and its effects continue beyond the filing of a statement of claim in an action for

infringement and until such time as the Court renders judgment in such action simply does not merit further comment.

**736** This being said, the Court is prepared to accept that conduct contrary to Part VI of the *Competition Act* may "be an isolated incident or can be ongoing", depending on which offence is in play in the circumstances. However, in the Court's view, ongoing conduct can only be qualified as ongoing for the purposes of subs. 36(4) so long as it continues to constitute an offence under Part VI of the *Competition Act*.

**737** Thus, crucial to the determination of the applicable limitation period is the question of what conduct may form the basis of the offence which is complained of by Apotex, in this case the offence of conspiracy to unduly lessen competition provided for in s. 45 of the *Competition Act*.

**738** In *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, (1992), 93 D.L.R. (4th) 36 (*Nova Scotia Pharmaceutical Society*), Justice Charles Gonthier, writing for the Court, held that an offence under the predecessor to s. 45 of the *Competition Act* (para. 32(1)(c) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23) comprised two material elements:

(1) an agreement entered into by the accused ("Every one who conspires, combines, agrees or arranges with another person"); and

(2) an undue prevention or lessening of competition flowing from this agreement ("to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property...").

**739** The inquiry that must be conducted to ascertain whether the elements of the offence are met is twofold: (i) market structure, "to ascertain the degree of market power of the parties to the agreement"; and, (ii) behaviour of the firms. Given that for the purposes of determining the starting point of the limitation period the Court is concerned with conduct, it is the latter element which is of interest here.



**740** The question of behaviour, however, is not examined from the standpoint of what effects an agreement actually has, but rather what, at the time at which it is entered into, is its object and what are the likely effects of that object on competition. As Justice Gonthier explains, "[t]he object of the agreement is without doubt the most important behavioural element of the inquiry".

**741** Justice Gonthier approvingly cites an earlier decision of the Ontario High Court, *R. v. Northern Electric Co.*, [1955] 3 D.L.R. 449, in which Chief Justice James McRuer held that:

[i]n considering whether the agreement or conspiracy comes within the statute, one does not judge the unlawfulness by what was done pursuant to the agreement (although this may be evidence of the agreement) but, as I have said, one examines the nature and scope of the agreement as proved and decides whether that agreement, if carried into effect, would prejudice the public interest in free competition to a degree that in fact would be undue. To paraphrase what was said by Duff C.J.C. in the *Container Materials* case, [1942], 1 D.L.R. 529, S.C.R. 147, 77 Can.C.C. 129, and to adapt the language of Kerwin J., one examines the agreement arrived at, no matter whether anything was done under it or not, and determines as a question of fact upon a common sense view the direct object of the arrangement complained of and determines whether that object, if put into effect, would result in an undue prevention or lessening of competition. Persons or corporations might well enter into an unlawful agreement which by reason of enforced circumstances they could not carry out; it would nevertheless be an indictable offence.

[Emphasis added, p. 469-470]

**742** Chief Justice McRuer relies on the decision of the Supreme Court of Canada in *R. v. Container Materials Ltd.*, [1942] S.C.R. 147, [1942] 1 D.L.R. 529, where Justice Kerwin held that:

[o]nce an agreement is arrived at, whether anything be done to carry it out or not, the matter must be looked at in each case as a question of fact to be

determined by the tribunal of fact upon a common sense view as to the direct object of the arrangement complained of. The evidence in these cases of what was done is merely better evidence of that object than would exist where no act in furtherance of the common design had been committed.

[Emphasis added, p. 159.]

**743** These cases stand for the proposition that the conduct does not include anything subsequent to the actual conclusion of the agreement, which in this case is nothing other than the assignment concluded by Lilly and Shionogi on April 27, 1995. Effects may be examined for the purposes of determining whether or not this agreement was likely to unduly lessen competition, but it does not extend the period during which such conduct occurred. The strongest evidence of this is that, even if no subsequent actions had been taken pursuant to an agreement, the act of entering into it would still constitute an offence if the other requirements were met.

**744** The Supreme Court of Canada's decision in *R v. Aetna Insurance Co.*, [1978] 1 S.C.R. 731, (1977), 75 D.L.R. (3d) 332 (*Aetna*) does not contradict this. Writing for the majority, Justice Roland Ritchie held that the burden that fell upon the crown was to prove "that that conspiracy, combination, agreement or arrangement *if* it were carried into effect would prevent or lessen competition unduly" (emphasis in the original, p. 748).

**745** The question therefore is not whether the conspiracy indeed had this effect but rather only whether or not this conspiracy would have this effect. Behaviour subsequent to the agreement is of no relevance in determining whether there has been an offence and thus cannot be of any relevance for the purposes of limitations under subs. 36(4) of the *Competition Act*.

**746** The dissenting reasons of Chief Justice Bora Laskin in *Aetna* make this point in a perhaps more forceful fashion:

[the trial judge] asserted that in order to determine whether the offence charged against the appellants had been committed he was obliged to determine "whether or not there has been any undue lessening of competition". This ignores the fact that the

charge is one of conspiracy. It is not an ingredient of the offence that proof must be made that competition was in fact lessened unduly. Even assuming (although the judge nowhere says so) that proof of an actual lessening of competition might provide support for a finding that there was a conspiracy to that end and that it was directed to an undue lessening, the absence of any proof of actual lessening of competition, let alone of an undue lessening, does not conclude the matter against the Crown.

[Emphasis added, p. 739.]

**747** Thus, for the purposes of evaluating the limitation period under subs. 36(4), the Court need not be concerned with the effects of any alleged conspiracy. This approach was recently adopted by the Supreme Court of British Columbia in *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corporation of British Columbia* [1998], 4 C.C.L.I. (3d) 135, 78 A.C.W.S. (3d) 834, where Justice Alexander Henderson held that "[a] claim for damages under s. 45 of the Competition Act must be brought within two years from the day upon which the conduct was engaged in: Competition Act, supra, s. 36(4)(a)(i). The conspiracy alleged here was at an end by April 1, 1993."

[26] Justice Gauthier's conclusions with regard to the crucial distinction between the conspiracy and its effects appear to be confirmed by decisions in other courts. See, for example, *R. v. Howard Smith Paper Mills Ltd.*, [1957] S.C.R. 403 at 427; *R. v. Northern Electric Co.*, [1955] 3 D.L.R. 449 at 452; and *R. v. Aetna Insurance Co.*, [1978] 1 S.C.R. 731 at 740-741, 748.

[27] Against these statements by the Court, the Plaintiff asserts three reasons why the limitation period established by section 36(4) of the *Competition Act* does not exclude its subsection 36(1) claims in this case.

## Discoverability

[28] First, the Plaintiff says that subsection 36(4) is subject to a general discoverability rule and that until the Plaintiff received copies of the acquisition agreements in this case it could not possibly know that it had a claim under 36(1), or the extent of the damages it might suffer. The Plaintiff cites and relies upon various cases where a discoverability rule has come into play. None of these cases casts much light upon whether such a rule is applicable to section 36(4) of the *Competition Act*. Furthermore, I see no applicable authority that establishes a “general rule of discoverability” that must be applied in all cases. In fact, the relevant authorities establish that an application of “discoverability” is a matter of statutory construction. This was established in *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.) at page 206:

In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.

[29] This statement was expressly adopted by the Supreme Court of Canada in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 at paragraph 37, and in *Ryan v. Moore*, [2005] 2 S.C.R. 53 (*Ryan*) at paragraphs 23, 24 and 31. It has also been endorsed by the Ontario Court of Appeal in *Waschkowski v. Hopkinson Estate* (2000), 184 D.L.R. 4<sup>th</sup> 281, [2000] O.J. No. 471, at paragraphs 6-8.

[30] In *Ryan*, above, the Supreme Court of Canada had the following to say on point:

23. While discoverability has been qualified in the past as a "general rule" (*Central Trust*, at p. 224; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at [page68] para. 36), it must not be applied systematically without a thorough balancing of competing interests (*Peixeiro*, at para. 34). The rule is an interpretative tool for construing limitation statutes. I agree with the Manitoba Court of Appeal when it writes:

In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [Emphasis added.]

(*Fehr v. Jacob* (1993), 14 C.C.L.T (2d) 200, at p. 206)

See also *Peixeiro*, at para. 37; *Snow v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182 (Nfld. C.A.).

24. Thus, the Court of Appeal of Newfoundland and Labrador is correct in stating that the rule is "generally" applicable where the commencement of the limitation period is related by the legislation to the arising or accrual of the cause of action. The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action (see *Mew*, at p. 55).

...

31. In my view, the case that best assists this Court in the present matter is the one giving rise to the Ontario Court of Appeal's decision

in *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370. The court had to determine the possible application of the discoverability rule to s. 38(3) of the *Trustee Act*, R.S.O. 1990, c. T.23, the statutory provision in Ontario permitting an action in tort by or against the estate of a deceased person and limiting the period during which such actions may be commenced. Abella J.A., as she then was, concluded, at para. 16, that the discoverability rule did not apply to the section since the state of actual or attributed knowledge of an injured person in a tort claim is not germane when a death has occurred. She explained at paras. 8-9:

In s. 38(3) of the *Trustee Act*, the limitation period runs from a death. Unlike cases where the wording of the limitation period permits the time to run, for example, [page72] from "when the damage was sustained" (*Peixeiro*) or when the cause of action arose (*Kamloops*), there is no temporal elasticity possible when the pivotal event is the date of a death. Regardless of when the injuries occurred or matured into an actionable wrong, s. 38(3) of the *Trustee Act* prevents their transformation into a legal claim unless that claim is brought within two years of the death of the wrongdoer or the person wronged.

The underlying policy considerations of this clear time limit are not difficult to understand. The draconian legal impact of the common law was that death terminated any possible redress for negligent conduct. On the other hand, there was a benefit to disposing of estate matters with finality. The legislative compromise in s. 38 of the *Trustee Act* was to open a two-year window, making access to a remedy available for a limited time without creating indefinite fiscal vulnerability for an estate. [Emphasis added.]

See also *Canadian Red Cross Society (Re)*, [2003] O.J. No. 5669 (QL) (C.A.), and *Edwards v. Law Society of Upper Canada (No. 1)* (2000), 48 O.R. (3d) 321 (C.A.).

[31] I think it is clear, then, that there is no general application of the discoverability rule as alleged by the Plaintiff, that it is always a matter of statutory construction, and that the "law does not

permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action" (*Ryan*, above, at paragraph 24).

[32] From these principles, it is clear why, in *Laboratoires Servier*, above, Justice Snider relied upon *Fehr*, above, to conclude that the time period in subsection 36(4) of the *Competition Act* ran from a specific date that was independent of knowledge and that the discoverability principle did not apply.

[33] For these reasons, then, I think I must conclude that the Plaintiff cannot rely upon the discoverability principle to extend the limitation period in this case. In addition, even if the discoverability principle were applied in this case, on the evidence before me it is clear that the Plaintiff's subsection 36(4) claim would still be time-barred.

[34] Essentially, the Plaintiff argues that it was not in a position to commence its subsection 36(1) claim until it had access to the documentation and/or contents of the acquisition agreements to determine what kind of problem and damages it was facing.

[35] This assertion makes no sense to me because the Plaintiff commenced its action on August 15, 2008, before it was given access to the documents and before it began the discovery process. So the Plaintiff was quite able to commence its subsection 36(1) claim without access to the agreements, thus establishing that a lack of knowledge as to the documentation and its contents, as

well as whatever might be revealed as part of the discovery process, had no bearing upon its ability to commence the subsection 36(1) claim.

[36] The Plaintiff's position in this motion is also refuted by the April 10, 2006 cease and desist letter, written by its solicitors, which explains what is known about the Defendant's activities and which threatens to commence "immediate legal proceedings against DSI Canada and each of its directors personally out of the Canadian Federal Court for patent and trade mark infringement as well as for breach of the *Competition Act*.

[37] There are also earlier indications of knowledge of the three agreements that occur in the cross-examination of Mr. Hedrick on behalf of the Plaintiff that, taken together with the letter of April 10, 2006, suggest a knowledge of the agreements and their implication for the Plaintiff. The Plaintiff sought to avoid legal action and conducted possible licencing arrangements, but clearly, by April 10, 2006, the Plaintiff was fully aware of, and threatening to take action with regard to, what it saw as a breach of the *Competition Act* by the Defendants.

[38] I am satisfied on the evidence that, even if a discoverability principle were applicable to subsection 36(4) of the *Competition Act*, the Plaintiff's claim under subsection 36(1) would still be time-barred.



### **Continuing Action**

[39] Second, the Plaintiff seeks to avoid the application of subsection 36(4) of the *Competition Act* by alleging that the Defendant has engaged in a continuing cause of action, or a continuing offence, which means that the “conduct” under subsection 36(4) is ongoing so that the limitations defence cannot apply. In particular, the Plaintiff alleges that the acquisition agreements contemplate various forms of action that carry forward into the future (non-competition agreements, for example) so that the offending conduct continues and is not time-barred.

[40] I do not think that this line of argument can be reconciled with Justice Snider’s analysis in *Servier*, above, or with Justice Gauthier’s guidance in *Eli Lilly*, above, that “behavior subsequent to the agreement is of no relevance in determining whether there has been an offence and thus cannot be of any relevance for the purposes of limitations under subsection 36(4) of the *Competition Act*.”

[41] The authorities suggest that a continuing offence requires a succession or repetition of separate offences of the same character or kind. See *Manitoba, Province of v. Manitoba Human Rights Commission, Galbraith and Lylyk*, [1983] M.J. No. 413 (Q.B.) at paragraphs 40-42; aff’d [1983] M.J. No. 223 (C.A.): MR vol. 6, Tab 25; *R. v. Rutherford*, [1990] O.J. No. 136 (C.A.): MR vol. 7, Tab 37; and *R. v. Pickles*, [2004] O.J. No. 662 (C.A.): MR vol. 7, Tab 36.

[42] In the present case, we do not have a succession or repetition of the offence under subsection 45(1) of the *Competition Act*. The allegation is of one offence, which occurs when the

agreements are concluded and which has continuing effects or consequences. The fact that the acquisition agreements may contain different components such as non-competition agreements does not change this basic fact. All of the components make up the alleged offence under subsection 45(1), as the Plaintiff's own particulars acknowledge.

[43] As the authorities show, the continuing effects of a conspiracy, agreement or arrangement are not what are actionable under subsection 36(1) of the *Competition Act*. The limitation period in subsection 36(4) is based upon "conduct" – i.e. the conspiracy or agreement in this case – and not upon its effects.

[44] Even though Justice Gauthier accepted in *Eli Lilly*, above, that conduct contrary to Part VI of the *Competition Act* could "be an isolated incident or can be ongoing" depending upon which offence is in play, this does not change the distinction between the offence (the "conduct" for the purposes of subsection 36(4)) and its effects or consequences, and it is the offence in this case that starts the time running. A continuing offence under Part VI of the *Competition Act* would require ongoing acts that, in themselves, are an offence under Part VI, and there is no evidence of that in this case.

[45] In the present case, the alleged offence under section 45 was complete at the time of the conclusion of the acquisition agreement, or agreements, in question, and any ongoing effects do not extend the time period established in subsection 36(4). As the Defendant points out, if the cause of action under subsection 36(1) persisted as long as the effects and consequences of the conduct

prohibited by section 45 of the *Competition Act*, then the limitation period on subsection 36(4) would be illusory.

### **Continuing Damage**

[46] Third, the Plaintiff seeks to avoid the consequences of the limitation period established by subsection 36(4) by saying that it continues as long as the Plaintiff suffers damage as a result of the impugned conduct. No authority that is relevant to the facts in this case is provided for such an argument and, in my view, such a proposition runs directly contrary to the principles and authorities discussed above.

### **Conclusions**

[47] In my view, then, the Defendant has established a case for summary judgment with regard to the Plaintiff's claim for damages and losses pursuant to subsections 36(1) and 45(1) of the *Competition Act*. These claims present no genuine issue for trial because the relevant limitation period under section 36(4) of the *Competition Act* expired before the action was commenced on August 15, 2008.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that**

1. The Plaintiff's claim relating to damages and compensation for losses pursuant to subsection 36(1) of the *Competition Act* is dismissed;
2. The parties may address the Court on the issue of costs. This should be done initially in writing.

“James Russell”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-1270-08

**STYLE OF CAUSE:** GARFORD PTY LTD.

Plaintiff

- and -

DYWIDAG SYSTEMS INTERNATIONAL et al.  
Defendants

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** September 7-8, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT:** HON. MR. JUSTICE RUSSELL

**DATED:** October 6, 2010

**APPEARANCES:**

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Christina Cupone Settimi

PLAINTIFF

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