



[2022] 3 F.C.R. D-16

COMPETITION

Related subject: Practice

Motions by defendants seeking various types of relief, including order striking plaintiff's statement of claim for failure to disclose reasonable cause of action, order dismissing plaintiff's action — Underlying action claiming unspecified aggregate damages on behalf of all persons who sold residential real estate listed on Multiple Listing Service (MLS) owned, operated by defendant Toronto Regional Real Estate Board (TRREB), dating back to March 11, 2010 — Plaintiff alleging that certain defendants (Brokerage Defendants) contravened Competition Act, R.S.C., 1985, c. C-34, s. 45(1) by conspiring, agreeing or arranging with each other to fix, maintain, increase or control price for supply of buyer brokerage services that they provide to purchasers of residential real estate in Greater Toronto Area (GTA) — Further alleging that other defendants (Association Defendants¹ and Franchisor Defendants²) aided, abetted, counselled that purported breach of s. 45, contrary to Criminal Code, R.S.C., 1985 c. C-46 ss. 21(2), 22(1) — TRREB, Canadian Real Estate Association (CREA) not-for-profit professional associations whose membership includes Brokerage Defendants³, brokers and salespersons — Plaintiff claiming that Franchisor Defendants, Association Defendants encouraged, counselled, aided, abetted, assisted, required their members to enter into, maintain "arrangement" (Arrangement) alleged to contravene Competition Act, s. 45 — Plaintiff alleging that, to become member of TRREB or CREA, brokerages must agree to abide by TRREB's or CREA's rules — Issues whether statement of claim disclosing reasonable cause of action under Competition Act, s. 45(1); whether statement of claim pleading conduct capable of constituting aiding, abetting or counselling criminal conspiracy within meaning of Criminal Code, ss. 21(1), 22(1); whether Competition Act, s. 36 applying to defendant party to impugned arrangement by virtue of Criminal Code, ss. 21(1), 22(1); whether plaintiff's claims statute-barred — Test for assessing whether pleadings disclosing reasonable cause of action whether "it is plain and obvious, assuming the facts pleaded to be true, that each of the ... pleaded claims disclose no reasonable cause of action" — Statement of claim asserting that one CREA rule, four TRREB rules, taken together, constituting Arrangement falling within purview of Competition Act, s. 45(1) — Statement of claim maintaining that by joining and maintaining membership in TRREB and expressly agreeing to abide by TRREB, CREA rules, each of Brokerage Defendants agreeing to enter into Arrangement — Plaintiff's allegation of overarching three-way agreement between CREA, TRREB, Ontario Real Estate Association also arguably relevant to this issue — Facts sufficient to meet pleading requirements for "agreement or arrangement", "with a competitor" elements of Competition Act, s. 45(1) — Statement of claim not pleading sufficient material facts with respect to actus reus of conspiracy — Accordingly, claims with respect to alleged conspiracy, agreement or arrangement to "fix", "maintain" or "increase" price of brokerage services in GTA during relevant period struck — Not plain, obvious that Buyer Broker Commission Rule not constituting actus reus contemplated by Competition Act, s. 45(1)(a) — Defendants stating that when Competition Act, s. 45 amended in 2010, Parliament removed statutory language that expressly provided that subjective intention to engage in conduct prohibited by former language of s. 45 not required — Not plain, obvious that subjective mens rea required immediately prior to insertion of foregoing provision into Competition Act in 1986, when that provision initially appeared as s. 32(1.3) — When Parliament established subjective mens rea requirement for another Competition Act provision in 1999, it included explicit language to this effect in that legislation — This suggesting that, had Parliament wished to elevate second mens rea requirement in Competition Act, s. 45 to subjective standard, it would have explicitly done so — Not

plain, obvious that s. 45(1)(a) should be interpreted as having double subjective intent requirement, such that alleged failure to adequately plead such intent fatal to plaintiff's case — Plaintiff's pleadings regarding mens rea raising very arguable case, "worth considering" — Reasonably inferred from plain language of Buyer Brokerage Commission Rule that reasonable business person familiar with residential real estate business in GTA would likely conclude that this rule likely had as object or purpose at least some forms of "control" of price of Cooperating Broker Services — Statement of claim disclosing reasonable cause of action with respect to claimed Arrangement among Brokerage Defendants to "control" price for supply of Cooperating Brokerage Services in GTA during relevant period — Statement of claim arguably pleading conduct capable of constituting aiding, abetting or counselling criminal conspiracy within meaning of Criminal Code, ss. 21(1), 22(1), for Association Defendants, Brokerage Defendants — Interpretation of Competition Act, s. 36(1) words "engaged", "engaged in" contemplating type of conduct alleged in relation to Association Defendants, Brokerage Defendants — Not plain, obvious that grammatical, ordinary meaning of words "engaged in the conduct" limited to persons who actually committed type of conduct described in Competition Act, Part VI, in this case conduct described in s. 45(1)(a) — Reasonably arguable that person found to have been party to offence described in s. 45(1)(a), by virtue of Criminal Code, ss. 21(1) or 22(1) is person who "engaged in" that conduct, within meaning of Competition Act, s. 36(1) — Not plain, obvious that plaintiff's claim time-barred as of two years prior to filing of initial statement of claim on April 1, 2019 — Scheme of Competition Act, s. 36(4) supporting view that discoverability intended to apply to limitation period — Given application of discovery principle, limitation period in s. 36(4) not beginning to run until "the material facts on which [the plaintiff's] claim is based were discovered by him or ought to have been discovered by him by the exercise of reasonable diligence" — Not plain, obvious that representative plaintiff knew about Buyer Brokerage Commission Rule prior to filing of initial statement of claim — Motions of Brokerage Defendants, Association Defendants dismissed in part; motion of Franchisor Defendants granted in part.

SUNDERLAND V. TORONTO REGIONAL REAL ESTATE BOARD (T-595-21, 2023 FC 1293, Crampton C.J., reasons for order dated September 25, 2023, 70 pp. + 19 pp.)

¹ TREB, Canadian Real Estate Association (CREA) (collectively the Association Defendants).

² RE/MAX Ontario-Atlantic Canada, Inc. o/a RE/MAX Integra , Century 21 Canada Limited Partnership, Residential Income Fund L.P., Sutton Group Realty Services Ltd., and HomeLife Realty Services Inc. (collectively, the Franchisor Defendants).

³ Royal LePage Real Estate Services Ltd., Right at Home Realty Inc., Forest Hill Real Estate Inc., Max Wright Real Estate Corporation, Harvey Kalles Real Estate Ltd., Chestnut Park Real Estate Limited, and iPro Realty Ltd. (collectively, the Brokerage Defendants).