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Settlement agreement restricting grey marketing is not an unreasonable restraint of trade

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Anti-trust and competition
Trade-marks and branding

In *Mars Canada Inc. v Bemco Cash & Carry Inc*., 2016 ONSC 7201 (November 18, 2016), the Ontario Superior Court of Justice has granted Mars Canada Inc. summary judgment. Mars the well-known maker of, *inter alia*, candy bars moved for a declaration that the defendants were in breach of their settlement agreement not to import grey-market goods. Mars was the owner of a number of Canadian trade-marks and had sued the defendants when they imported goods from the US parent company. The agreement in question had settled that lawsuit. The defendant raised a number of defenses against enforcement of the settlement agreement, but the principal one concerned the assertion that the agreement not to import such goods was in restraint of trade.

The Superior Court agreed that the agreement was prima facie in restraint of trade but, relying on *Tank Lining Corp. v Dunlop Industrial Ltd.,* 1982 CanLII 2023 (ON CA), this did not end the matter. The court also had to consider whether the restraint could be justified as reasonable in the interests of the parties and whether it could also be justified as reasonable with reference to the interests of the public.

With respect to these latter two points, the court recognized the strong public policy interest in encouraging and enforcing settlement agreements. In addition, the court recognized the unfettered right of the trade-mark owner to enforce its trade-mark rights even against certain allegations of abuse of dominant position under section 79(5) of the *Competition Act* (or as the court put it enforcement of registered trade-mark rights "is not an anti-competitive act for the purpose of the monopoly provisions of the statute").

Finally the court noted that while the defendants are importing genuine, legitimate branded product from abroad, the labeling on the products does not meet Canadian federal labeling standards: there is no French language information on the packaging, weights are not provided in metric and the required nutritional panel is missing. The court also noted that some US-branded products (unlike their Canadian counterparts) may not be manufactured in a "nut-free" facility.

Conclusion

Based on all of these factors the court concluded that the settlement agreement, while prima facie in restraint of trade, was justified as reasonable between the parties and reasonable in the public interest and therefore the settlement agreement was not void in restraint of trade.

The defendants raised additional defenses: i) that the plaintiff breached the settlement by refusing to supply and that in doing so it committed "delivered pricing" in breach of section 81 of the *Competition Act*, ii) that the plaintiff committed the offence of conspiracy with competitors under s. 45 of that statute and iii) committed the tort of intentional interference with economic relations. The court did not consider it advisable or necessary to decide these issues as they did not overlap or risk any conflicting decision concerning the issue of the validity of the settlement agreement.

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