Federal Court  Cour fédérale

Date: 20240226

Docket: T-589-22

Citation: 2024 FC 305

Ottawa, Ontario, February 26, 2024

PRESENT: Chief Justice Paul Crampton

PROPOSED CLASS PROCEEDING

BETWEEN:

PASS HERALD LTD.

Plaintiff

and

GOOGLE LLC, GOOGLE IRELAND LIMITED, GOOGLE CANADA CORPORATION, META PLATFORMS INC., FACEBOOK IRELAND LIMITED, and FACEBOOK CANADA LTD.

Defendants

AMENDED PUBLIC ORDER AND REASONS

I. Introduction

[1] In this Motion, the plaintiff seeks approval of an amended litigation funding agreement (the "**LFA**" or "**Amended LFA**") and a confidentiality order in relation to the confidential version of that agreement.

[2] The plaintiff, Pass Herald Ltd. ("**Pass Herald**"), represents two classes of publishers (collectively, the "**Class Members**"). The first class (the "**Conspiracy Class**") consists of publishers, other than the defendants, who sold an impression for display on a website or application between September 27, 2018 and the date this action may be certified as a class proceeding (the "**Certification Date**"). The second class (the "**Misrepresentation Class**") consists of publishers, other than the defendants, who used a digital display advertising product or services ("**Google Tools**") supplied by Google LLC, Google Ireland Limited, Google Canada Corporation, or any of their affiliates (collectively "**Google**") between February 9, 2010 and the Certification Date.

[3] In its capacity as representative plaintiff, Pass Herald claims various types of relief, including $4 billion in damages against Google and the other defendants (collectively, "**Facebook**"), jointly and severally, for breach of sections 45-47 of the *Competition Act*, RSC 1985, c C-34 (the "**Act**"). Pass Herald also claims a further $4 billion in damages against Google for breach of section 52 of the Act. These claims are brought pursuant to section 36 of that legislation.

[4] The alleged breach of section 45 consists of a conspiracy, agreement or arrangement to fix, maintain, increase, or control the price for services to transact the right to show one Display Ad (an "**Impression**"), contrary to paragraph 45(1)(a) of the Act. A Display Ad is a specific type of advertisement. Among other things, the plaintiff maintains that in the absence of the alleged contravention of paragraph 45(1)(a), Facebook would have bought or built a product that

competed directly with Google Tools, and that this would likely have reduced the fees charged by Google and Facebook to publishers.

[5] The alleged breach of section 46 consists of the implementation by the Canadian defendants (Google Canada Corporation and Facebook Canada Ltd.) of certain directives, instructions, intimations of policy or other communications from the other four defendants.

[6] The alleged breach of section 47 consists of an agreement or arrangement between Google and Facebook to engage in bid-rigging, as that term is defined in that provision of the Act.

[7] The alleged breach of section 52 consists of certain misrepresentations by Google to the public for the purpose of promoting the use of Google Tools, even though it knew or was reckless to the possibility that such statements were false or misleading in a material respect.

[8] To fund this action, the plaintiff entered into the LFA with Omni Bridgeway (Fund 5) Canada Investments Ltd. ("**OBC**") and Class Counsel, Sotos LLP ("**Class Counsel**"). Among other things, the LFA provides for several million dollars in funding for various types of disbursements. Those disbursements include highly specialized economic analysis, including in relation to tens of billions of transactions between publishers and advertisers.

[9] Pursuant to the LFA, OBC would be entitled to a return of 3% of the claim proceeds plus a multiplier of the funds it has advanced under the agreement (the "**OBC Return**"). That

multiplier increases from a minimum of two times the total amount of such advanced funds (the "**Amount Funded**"), if the claim proceeds are received at any time within one year of the date of the LFA, to a maximum of six times that amount, if those proceeds are received on or after the sixth anniversary of that date. If the claim proceeds are received between the first and third anniversaries of the date of the LFA, the multiplier becomes three times the Amount Funded. If those proceeds are received between the third and fifth anniversary of that date, the multiplier becomes four times the Amount Funded. If the claim proceeds are received between the fifth and sixth anniversaries of that date, the multiplier becomes five times the Amount Funded.

[10] The OBC Return is in addition to a reimbursement of the Amount Funded, and is capped at $100 million, which represents 12.5% of the total amount claimed by the plaintiff in this proceeding.

[11] Given this cap, and the multiplier escalation provisions, OBC would receive less than 10% of the claim proceeds in almost 98% of the scenarios between complete failure (zero recovery) and total victory (recovery of $8 billion) for the plaintiff. If total victory were defined as a recovery of $4 billion, the 98% figure would drop to 95%.

[12] For the reasons that follow, and subject to one caveat, I have concluded that it is in the best interests of justice to approve the Amended LFA. Among other things, the Amended LFA is necessary to facilitate access to justice by the Class Members, it will make a meaningful contribution to deterring wrongdoing, it is not champertous, and it is fair and reasonable to current and prospective Class Members. The latter conclusion is subject to the caveat that it

applies solely to an OBC Return of up to 10% of the total claim proceeds. I decline to pre-approve the Amended LFA in relation to the very limited and purportedly unrealistic or unlikely scenarios in which the OBC Return would exceed 10% of the total claim proceeds. If any such scenario arises, the Court will assess the OBC Return at that time.

II. The Parties

A. *Pass Herald*

[13] Pass Herald is a corporation incorporated under the laws of Alberta. It operates Crowsnest Pass Herald, which is a local newspaper in Crowsnest Pass, Alberta.

B. *The Defendants*

[14] The following descriptions are taken from the Fresh as Amended Statement of Claim.

[15] Google LLC is a corporation incorporated under the laws of Delaware. Its headquarters are in Mountain View, California.

[16] Google Ireland Limited is a corporation incorporated under the laws of Ireland. Its headquarters are in Dublin, Ireland. It is part of the same corporate group as Google LLC.

[17] Google Canada Corporation is a corporation incorporated under the laws of Nova Scotia. It has multiple offices in Ontario, including one in downtown Toronto. It is a second-level subsidiary of Google LLC.

[18] Collectively, the three entities described immediately above are said to directly or indirectly offer the services of Google Tools in Canada.

[19] Meta Platforms Inc. is a corporation incorporated under the laws of Delaware. Its headquarters are in Menlo Park, California. It is the successor corporation of Facebook, Inc., which was also incorporated under the laws of Delaware and had the same headquarters.

[20] Facebook Ireland Limited is a corporation incorporated under the laws of Ireland. Its headquarters are in Dublin, Ireland. It is part of the same corporate group as Meta Platforms Inc.

[21] Facebook Canada Ltd. is a corporation incorporated under the laws of Canada. It has an office in downtown Toronto. It is part of the same corporate group as Facebook Inc. It is a second-level subsidiary of Meta Platforms Inc.

C. *OBC*

[22] OBC is a subsidiary of Omni Bridgeway Limited ("**Omni Bridgeway**"). Omni Bridgeway is listed on the Australian Stock Exchange and describes itself as a market leader in investigating, financing and managing recoveries from legal disputes. It has offices in Toronto and Montreal and has a market capitalization of more than $600 million.

III. The LFA

[23] OBC, Pass Herald and Class Counsel executed the initial version of the LFA in June 2023. Before entering into that agreement, Pass Herald sought and received independent legal

advice from Mr. Andrew Wilson, KC, a former managing partner of JSS Barristers.

[24] In broad terms, the LFA provides that OBC will fund the following:

i. Disbursements up to a maximum of [redacted] million; and

ii. Any costs awarded against Pass Herald, up to a maximum of [redacted].

[25] In exchange for its funding commitment and in the event of the recovery of any proceeds, the LFA essentially provides that OBC will be reimbursed for any Amount Funded, and paid the OBC Return, subject to the $100 million cap described above.

[26] Pursuant to Article 3.3 of the Amended LFA, any claim proceeds are required to be distributed in the following order of priority:

i. Reimbursement of the Amount Funded;

ii. Payment of $12.5 million to the Class Members and/or Pass Herald;

iii. Reimbursement of any "project costs" incurred by OBC (subject to a cap of $75,000), and payment of a fee relating to Court-ordered costs;

iv. Payment of any expenses incurred in connection with the implementation and administration of a final resolution of the proceedings;

v. Payment, on a *pro rata* and *pari passu* basis, of:

i. a Class Counsel fee of 30% of the claim proceeds (subject to the Court's approval); and

ii. the OBC Return; and

vi. Payment of the remainder to Class Members.

[27] My understanding is that, if the plaintiff is unsuccessful in this proceeding, or does not reach a settlement of its claims, OBC will not receive any return on its investment or any reimbursement of the Amount Funded.

[28] It is also relevant to note that OBC is required to obtain Court approval before exercising its termination rights under the Amended LFA.

IV. Issues

[29] This Motion raises two principal issues for the Court's determination: (i) whether to approve the Amended LFA, and (ii) whether to maintain the confidentiality of the limited terms that have been redacted from the public version of the Amended LFA.

V. Assessment

A. *The test for approval of a litigation funding agreement*

[30] The general test for approving a litigation funding agreement in this Court is whether it would be in the interests of justice to do so: *Difederico v Amazon.com, Inc.*, 2021 FC 311 at para 35 [***Difederico***]; *Eaton v Teva Canada Limited*, 2021 FC 968, at para 19 [***Eaton***].

[31] In considering whether that test is met, it is appropriate to consider the following factors:

i. Have the basic procedural and evidentiary requirements for the Court's consideration of the LFA been satisfied?

ii. Is third party funding necessary to facilitate meaningful access to justice?

iii. Is the LFA champertous?

iv. Is the LFA fair and reasonable to current and prospective class members as a group?

v. Will the LFA make a meaningful contribution to deterring wrongdoing?

vi. Does the LFA interfere with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding?

vii. Does the LFA protect relevant legal privileges and the confidentiality of the parties' information?

viii. Does the LFA protect the legitimate interests of the defendants?

Difederico, at para 36; *Eaton*, at para 20.

[32] A negative response to any of the questions listed above can be fatal to an LFA.

[33] I will address each of those questions below.

B. *Have the basic procedural and evidentiary requirements for the Court's consideration of the LFA been satisfied?*

[34] The basic procedural and evidentiary requirements that should be met before the Court's consideration of an LFA consist of:

i. the plaintiff obtaining independent legal advice prior to entering into the LFA;

ii. prompt disclosure of the LFA and any legal retainer agreement to the Court;

iii. a prompt request for approval of the LFA;

iv. the provision of reasonable notice to the other parties of the motion requesting approval of the LFA;

v. the provision of a copy of the LFA to the other parties, subject to appropriate redactions; and

vi. the provision to the Court of evidence of the relevant background circumstances pertaining to the LFA.

Difederico, at para 38; *Eaton*, at para 23; *Houle v St. Jude Medical Inc.*, 2017 ONSC 5129 at paras 68-70 and 74 [***Houle 1***].

[35] I am satisfied that each of these requirements has been met. This factor weighs in favour of approving the Amended LFA.

C. *Is third party funding necessary to facilitate meaningful access to justice?*

[36] One of the affiants in this Motion is Lisa Sygutek. She is the owner and publisher of Pass Herald. In her affidavit, Ms. Sygutek states that she expects "the cost of independent experts and other out-of-pocket disbursements to be millions of dollars." She adds that Pass Herald does not have the means to pursue its claims without third-party funding.

[37] In its written representations, Pass Herald underscored the complexity of the economic analysis that will be required to advance its claims, and added that the methodology report filed for its certification motion is 114 pages in length. Pass Herald also noted that it expects the defendants to defend against its claims vigorously, because those claims challenge an important aspect of the defendants' respective business models.

[38] Having regard to the foregoing, Pass Herald reiterated that it "cannot afford to bear the cost of the disbursements" that are likely to be required to advance its claims, and that "without funding, it would be impossible for the plaintiff to prosecute this action."

[39] Pass Herald further explained that funding is not available under Ontario's Class Proceedings Fund ("**CPF**") because the claim was not brought under Ontario legislation. Likewise, Pass Herald stated that funding is not available under Quebec's Fonds d'aide aux actions collectives, because Quebec residents do not account for more than 50% of the Class Members.

[40] Given the foregoing, I find that third-party funding is indeed necessary to facilitate meaningful access to the Court for the purposes of advancing the claims made in this proceeding. My finding on this factor weighs in favour of approving the Amended LFA.

D. *Is the LFA champertous?*

[41] This factor requires an assessment of two issues. The first is whether there is any evidence of any actual improper motive. This is distinct from an assessment of evidence from which an improper motive may be inferred, based on the quantum of the return contemplated by the LFA: *Difederico*, at para 54. There is no such evidence in this case.

[42] The second issue to assess in connection with this factor is whether the proposed OBC Return exceeds the outer limit of what might *possibly* be considered reasonable, fair or proportionate: *Difederico*, at para 55.

[43] The defendants submitted that, in the absence of a percentage cap, the LFA is not reasonable or proportionate. In support of this submission, they stated that OBC's recovery will exceed 10% of the claim proceeds in a range of scenarios towards the lower end of the spectrum of potential outcomes. They suggested that this is a particular problem because, in their view, there is (i) a low likelihood of success in this case, and (ii) no basis to expect significant litigation proceeds. In their view, this is in part because similar proceedings have been dismissed, at least in part, in the United States: e.g., *In re Google Digital Advertising Antitrust Litigation*, 627 F. Supp. 3d 346.

[44] I acknowledge that OBC's recovery will exceed 10% of the claim proceeds in a limited range of scenarios. However, those scenarios account for less than 3% of the range of potential outcomes. In virtually all of the other scenarios, OBC's recovery would be below 10% of the value of the total claims in this proceeding.

[45] Put differently, in over 97% of the potential scenarios between zero recovery and complete success with respect to the $8 billion in damages claimed in this proceeding, the return to OBC would be less than the invariable and uncapped 10% levy that would apply if this proceeding had been commenced under the *Class Proceedings Act* and funded by Ontario's CPF: *Law Society Act*, RSO 1990, c L.8, s 59.3; *Class Proceedings*, O Reg 771/92, subsection 10(3).

[46] Moreover, almost all of the scenarios in which OBC would receive a return above 10% of the claim proceeds would involve recoveries occurring after 36 months. This is due to (i) the higher multipliers that will apply as time increases beyond that point in time, and (ii) according

to Pass Herald, the substantial majority of the funding to be advanced by OBC would be after 24 months and would then increase over time until the trial on the merits has been completed. Pass Herald maintains that the reality of litigation is such that those scenarios (involving an OBC Return above 10% of the claim proceeds) are unlikely, and they become progressively less likely over time. This is in part because Pass Herald is unlikely to spend "significant [additional] funding amounts if it starts to become apparent that its claims are not strong." This is not an unreasonable position: see also *Difederico*, at paras 69-70. In this regard, it is relevant to note that virtually all of the scenarios in which the OBC Return would represent more than 10% of the claim proceeds would also represent a recovery of less than 5% of the damages claimed in this proceeding.

[47] Beyond the foregoing, I note OBC's recovery would *always* be below 10% in the following scenarios:

i. Claim proceeds exceeding $125 million, which represents only 1.56% of the total amount claimed, are received within 36 months. In other words, for 99.5% of the total potential outcomes involving a resolution within three years, OBC's recovery would always be below 10%.

ii. Claim proceeds exceeding $300 million, which represents only 3.75% of the total amount claimed, are received within 48 months. In other words, for 98.9% of the total potential outcomes involving a resolution within four years, OBC's recovery would always be below 10%.

iii. Claim proceeds exceeding $400 million, which represents 5% of the total amount claimed, are received within 60 months. In other words, for 98.3% of the total potential outcomes involving a resolution within five years, OBC's recovery would always be below 10%.

iv. Claim proceeds exceeding $525 million, which represents 6.56% of the total amount claimed, are received beyond 72 months. In other words, for 97.6% of the total potential outcomes involving a resolution beyond six years, OBC's recovery would always be below 10%.

[48] Having regard to the foregoing, I consider that the proposed OBC Return is not champertous. That return does not exceed the outer limit of what might *possibly* be considered to be reasonable, fair or proportionate in the circumstances.

[49] I recognize that there is a very small range of scenarios in which the OBC Return would exceed the benchmark 10% levy applied by the Ontario CPF. However, I also recognize the time value of money, the fact that OBC's risk increases with time, and the fact that the OBC Return, as a percentage of the total claim proceeds, would be well below the 10% threshold in the vast majority of possible outcomes. In addition, the OBC Return will be subject to a cap of $100,000,000, which is approximately 35% lower[1] than the cap of US$100,000,000 that was a feature of the LFA in *Difederico.*

[1] At the current rate of exchange.

[50] It is also relevant to note that in *Jensen v Samsung* (February 7, 2019), Ottawa T-809-18 (FC), this Court approved an LFA that provided for a return to the litigation funder of between 2.5% and 15% of claim proceeds. Moreover, in *Difederico,* the Court approved an LFA that provided for a return to the funder of *the greater of* five times the committed funds and 10% of the claim proceeds, subject to a cap of US$100,000,000. Stated differently, in each of those cases, there were scenarios in which the percentage return to the litigation funder could exceed 10%.

[51] I further recognize that the use of multipliers, rather than a percentage of total claim proceeds, has the potential to raise *prima facie* concerns regarding the level of compensation to a litigation funder. At first blush, potential returns of many times the amount invested may well seem to be unreasonable to some Class Members or to some members of the general public. In the present case, this is particularly so given that the OBC Return includes an additional amount of 3% of total claim proceeds. However, on the facts of this particular case, I find that the potential for such concerns to arise is not sufficient, in and of itself, to warrant a conclusion that the OBC Return would be champertous. I will return to these concerns below, in assessing whether the Amended LFA is fair and reasonable to the Class Members as a group.

[52] Having regard to all of the foregoing, I conclude that the Amended LFA is not champertous. Stated differently, it does not contemplate a return to OBC that, *ex ante*, exceeds the outer limit of what might *possibly* be considered reasonable, fair or proportionate. My finding on this factor weighs in favour of the LFA. However, the question of whether the Amended LFA

is fair and reasonable to current and prospective Class Members as a group is separate and distinct. I will now turn to my assessment of that factor.

E. *Is the LFA fair and reasonable to current and prospective Class Members as a group?*

[53] The determination of what is fair and reasonable is highly contextual: *Houle 1* at para 81.

[54] In her sworn affidavit, Ms. Lisa Sygutek[2] stated that she believes the LFA is fair to Pass Herald and to the class of people she proposes to represent. However, this is "by no means determinative" in the Court's assessment of whether the LFA is fair and reasonable to prospective Class Members as a group: *Dugal v Manulife Financial Corp.*, 2011 ONSC 1785 at para 17; *Difederico*, at para 66.

[55] The defendants disagree with Ms. Sygutek's assessment. They maintain that the LFA is not fair and reasonable because it lacks a percentage cap on the combined return of OBC and Class Counsel. They assert that this gives rise to a significant likelihood that the combined fees paid to OBC and Class Counsel will dwarf any recovery by the proposed class. In this regard, the defendants assert that there are many plausible scenarios in which the LFA, at least as initially structured, would result in a nominal recovery for the proposed class.

[56] In support of their position, the defendants rely on *Schenk v Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, at para 19 [***Schenk***], where a proposed LFA was not approved on the basis that it constituted champerty and maintenance. However, that case is

[2] As previously noted, Ms. Sygutek is the owner and publisher of Pass Herald.

distinguishable on the ground that it was "very possible, if not likely, that [the funder] would receive more than 50 percent of any recovery": *Schenk*, at para 14.

[57] The defendants also rely on *Drynan v Bausch Health Companies Inc.*, 2020 ONSC 4379 [***Drynan***], where the court raised concerns that the proposed LFA could result in very little recovery for the proposed class in certain circumstances; *Drynan*, at paras 4 and 69-75. Ultimately, the agreement was approved only after it was amended to limit total recovery to 33% of the claim proceeds, for the funder and class counsel combined; *Drynan*, at paras 6, 12. However, once again, that case is distinguishable because the funder was responsible for paying 80% of counsel's fees, such that counsel was taking far less risk than in the present circumstances: *Drynan*, at para 68. In addition, the cap was voluntarily agreed to by the parties on their own initiative: *Drynan*, at para 93. I also note that the court approved the LFA subject to the exercise of its discretion to address the fairness of the ultimate combined recovery of the funder and class counsel, when a settlement or final award had been reached: *Drynan*, at para 12.

[58] Despite the fact that I find that the above-mentioned authorities relied upon by the defendants are distinguishable, I consider that the concerns raised by the defendants in relation to certain potential scenarios are valid.

[59] In this regard, the defendants identified three scenarios in which the LFA could result in a nominal recovery for the proposed class. Each of those scenarios assumes an Amount Funded of $4 million and claim proceeds being available to be paid in July 2026 – namely, more than three years after the execution of the LFA, in June 2023.

[60] First, the defendants stated that Class Members would receive nothing if the claim proceeds were less than $29.85 million and Class Counsel received $8.955 million, namely, the full 30% of claim proceeds provided for in their retainer agreement with Pass Herald. Pass Herald states that this scenario is unrealistic for three reasons: (i) a settlement of $29.85 million would represent only 0.37% of the amount claimed in this case, (ii) any settlement at "such a dramatic discount from the amount claimed" would likely occur at an early stage of the litigation – before OBC advances $4 million in disbursements, and (iii) it is debatable whether the Court would approve Class Counsel's fee in that amount.

[61] Second, the defendants maintained that Class Members would receive less than 50% of any proceeds if the ultimate recovery was below $120.588 million. Once again, Pass Herald maintains that this scenario is unrealistic because the recovery would represent only 1.5% of the amount claimed. Pass Herald appears to again consider that points (ii) and (iii) immediately above apply equally to this scenario.

[62] Third, the defendants observed that Class Members would receive less than 60% of the claim proceeds if those proceeds were below $285.7 million. This is because Class Counsel would receive 30% and OBC would receive more than 10% of the claim proceeds. Pass Herald notes that a settlement of $285.7 million would represent only 3.6% of the total amount claimed in this case. For the same reasons as set forth above, Pass Herald maintains that this scenario is unrealistic.

[63] Subsequent to the defendants' submissions and my expression of some sympathy with those submissions during the hearing of this Motion, the LFA was amended to provide for a priority payment of $12.5 million to Class Members. As noted at paragraph 26 above, the proposed class would receive that payment in priority to the payment of the OBC Recovery and any recovery for Class Counsel.

[64] Notwithstanding this amendment, and the assertions of Pass Herald discussed at paragraphs 60-62 above, I remain concerned about the scenarios in which Class Members might receive a disproportionately small return, relative to the combined return of OBC and Class Counsel.

[65] To avoid this possibility, the defendants suggested imposing a cap of 33-35% on the combined recovery of OBC and Class Counsel, relative to the total claim proceeds. This was based on the 30-35% "presumptive range of validity" of the combined return for the funder and Class Counsel, as referenced in *Difederico* and the jurisprudence cited therein: *Difederico*, at para 65. In reply, Pass Herald identified several cases where the court in question approved a combined return of above 35% of total claim proceeds. However, in most of those cases, the court's approval was given after a settlement had been reached. In all but one of the other cases, the maximum return to the funder was 10% of the total claim proceeds. Therefore, these cases do not assist the present analysis, as my concerns relate to the scenarios in which the OBC Return would appreciably exceed 10%, particularly given the 30% return that is contemplated for Class Counsel. The one exception was *Difederico*, which is further discussed at paragraphs 68-69 below.

[66] The appropriate time to assess Class Counsel's return is at the proposed settlement stage, or in rendering judgment if no settlement is reached. Consequently, the *imposition* of a cap on the combined return of OBC and Class Counsel is not appropriate at this point in the proceedings. It is one thing for a plaintiff to request approval of an LFA that contemplates a combined return for the funder and Class Counsel which falls within the presumptive range of validity. It is quite a differently thing to request the Court to impose a cap on that combined return, when considering whether to approve a proposed LFA.

[67] In my view, a better approach, anchored in the jurisprudence, is to pre-approve the return of the funder up to 10% of the total claim proceeds, while preserving the Court's discretion to approve potential returns in excess of 10% at a later point in the proceedings: *Houle v St. Jude Medical Inc.*, 2018 ONSC 6352 at paras 36–44 [***Houle 2***]; see also *Drynan* at paras 15-16 and 80, *JB & M Walker Ltd v TDL Group Corp*, 2019 ONSC 999 at para 5 [***TDL***], and *Flying E Ranche Ltd. v Canada (Attorney General)*, 2020 ONSC 8076 at paras 35-38 [***Flying Ranche***], regarding the preservation of the Court's discretion.

[68] During the hearing of this motion, Class Counsel stated that they took guidance from this Court's decision in *Difederico*, and endeavoured to avoid "breaking new ground." As noted at paragraph 50 above, the LFA in that case provided for a return to the funder of the *greater* of *five* times the committed funds and 10% of the claim proceeds, subject to a cap of US$100,000,000. In the present case, the LFA provides for a potential multiplier of *six* times the Amount Funded, where claim proceeds are received after six years, *plus* 3% of the claim proceeds. So, the proverbial "envelope" is being "pushed," at least relative to *Difederico,* in the scenario in which

a multiplier of six would apply. And it is being pushed to what I consider to the outer bounds of what Class Members and the public may consider to be reasonable.

[69] Other significant differences between *Difederico* and the present case include the following:

i. The "priority payment" of $12.5 million to Class Members (mentioned at paragraph 63 above) is approximately one third less than what it was in *Difederico* (approximately $19 million): *Difederico*, at paras 72-73;

ii. The 10% cap on the funder's fee in *Difederico* was triggered at a much lower point on the range of potential monetary settlements,[3] relative to some of the scenarios in which the OBC Return would exceed 10% of the total claim proceeds;

iii. The maximum amount of funding provided for under the LFA in *Difederico* was substantially greater than the maximum amount provided in the present LFA, such that the risk faced by the funder in that case was substantially greater than the risk faced by OBC in the present circumstances;

iv. Class counsel's fees in *Difederico* were capped at 25%, versus 30% in the present context: *Difederico* at para 26; and

[3] As previously noted that cap was triggered at the point at which 10% of the claim proceeds exceeded the multiplier of five times the amount funded.

v. The Court in *Difederico* sought representations from an *amicus curiae*, who submitted that the LFA was fair and reasonable to existing and prospective class members, in the particular circumstances of that case.

[70] I recognize that the maximum multiplier in *David v Loblaw*, 2018 ONSC 6469 at para 12 [***Loblaw***], was apparently the same as the one being proposed here, namely, six times the amount funded: *Difederico*, at para 63. However, the funder's return in that case was capped at 10%: *Loblaw*, at para 10. Under the LFA in the present case, the OBC Return could significantly exceed 10% in certain circumstances. Despite Pass Herald's assertions that such circumstances would be unrealistic or unlikely, I am not prepared to pre-approve those potential circumstances.

[71] In summary, at this stage of the proceedings, I am only prepared to find that the Amended LFA *is* fair and reasonable to current and prospective Class Members as a group insofar as the OBC Return would not exceed 10% of the total claim proceeds. That accounts for over 97% of all of the scenarios between complete failure for Pass Herald (zero return) and total victory ($8 billion return). Insofar as those 97% of potential scenarios are concerned, the Amended LFA is fair and reasonable to current and prospective Class Members as a group.

[72] My finding on this factorweighs in favour of pre-approving the Amended LFA as it relates to those scenarios.

[73] I will preserve my ability to assess the fairness and reasonableness of any scenario in which the OBC Return exceeds 10% of the total claim proceeds, if and when such a scenario presents itself.

[74] In the meantime, any Class Member who is unhappy with the Amended LFA will be entitled to opt out of the proceeding within the time and in the manner specified in any order certifying the proceeding as a class action: *Federal Courts Rules*, SOR/98-106, r 334.21(1).

[75] If, as the Class Counsel claimed, scenarios involving the potential OBC Returns discussed at paragraphs 60-62 above are unrealistic, then little would have been lost by structuring the LFA to avoid them, and the consequential risks associated with being found to exceed the outer bounds of fairness and reasonability.

[76] I pause to observe in passing that a return to OBC of 6% would have achieved the same or a better result for OBC in over 94% of the possible recovery scenarios.

[77] In my view, proposed returns to funders that are based on a percentage or a sliding scale of percentages of the claim proceeds, below the benchmark 10% levy charged by Ontario's CPF, and subject to a reasonable monetary cap, are less likely to give rise to potential concerns regarding the fairness and reasonableness of the return: *Houle 1*, at paras 83 and 87, aff'd *Houle 2*, at para 52: and *Flying Ranche*, at para 34.

[78] Such a structure would also address the misalignment of incentives associated with the OBC Return, and identified by the defendants. In this regard, the defendants noted that the structure of the OBC Return is such that there are scenarios in which the interests of Class Counsel and OBC would diverge, and pose a potential impediment to settlement. I agree.

[79] It bears underscoring that it cannot be assumed that potential multipliers of many times the amount of funding advanced by a funder will be approved in the future. Each case will fall to be assessed on the particular facts before the Court.

F. *Will the LFA make a meaningful contribution to deterring wrongdoing?*

[80] Pass Herald maintains that the LFA is necessary to facilitate access to justice and to deter wrongdoing.

[81] I agree that the Amended LFA will greatly assist the plaintiff in advancing this action against the defendants. I also agree that, without OBC's funding, the prospect for meaningful behavioural modification on the part of the defendants is likely to be significantly reduced. To the extent that this action is successful, either by resulting in a favourable judgment or award, or in a settlement that reflects a sound claim, it is reasonable to expect that such behaviour modification is likely to occur.

[82] Accordingly, this factor weighs in favour of approving the Amended LFA.

G. *Does the LFA interfere with the solicitor-client relationship, counsel's duty to the Class Members, or the carriage of the proceeding?*

[83] I am satisfied that the Amended LFA will not have any of these adverse effects.

[84] This factor weighs in favour of approving the Amended LFA.

H. *Does the LFA protect relevant legal privileges and the confidentiality of the parties' information?*

[85] In a letter dated January 12, 2024, Class Counsel wrote to the Court to advise that OBC and the defendants had resolved the confidentiality issues between the parties. This is reflected in significant amendments to the LFA and was confirmed during the hearing of this Motion.

[86] Having regard to the foregoing, and my review of the Amended LFA, I am satisfied that the Amended LFA appropriately protects relevant legal privileges and the confidentiality of the parties' information.

[87] This weighs in favour of approving the Amended LFA.

I. *Does the LFA protect the legitimate interests of the defendants?*

[88] Beyond the confidentiality issues addressed immediately above, the defendants raised concerns with respect to provisions in the LFA relating to termination, the assignment of the LFA, amendments, attornment and costs.

[89] Once again, Class Counsel advised the Court that the defendants' concerns with respect to these issues had been resolved. Insofar as termination, assignment and amendments of the LFA are concerned, this is reflected in amendments to the LFA. Regarding attornment and costs,

this is reflected in the Undertaking attached at Schedule A hereto, which is Exhibit C to the Amended LFA.

[90] The resolution of the foregoing issues was also confirmed during the hearing of this Motion, when the parties added that there were no outstanding issues, other than the fairness and reasonableness of the LFA for the current and proposed members of the class, which is discussed in part VI.E above.

[91] Having regard to the foregoing, this factor weighs in favour of approving the Amended LFA.

J. *Conclusion regarding the approval of the LFA*

[92] Given the findings I have reached in relation to each of the factors discussed in parts VI.B – VI.I above, I will approve the Amended LFA, except insofar as it provides for a return in excess of 10% of the total claim proceeds in certain limited scenarios. I will preserve my discretion to revisit those scenarios if and when they present themselves.

VI. Confidentiality Issue

[93] In its Notice of Motion and request for relief, Pass Herald requested an Order authorizing it to file an unredacted version of the LFA under seal, such that the redacted portions are not shared with the defendants or the public, and do not form part of the official record.

[94] The redacted material is very limited. It concerns (i) the maximum amount of funding to be provided under the LFA in relation to disbursements and Court-ordered costs, (ii) a modest fee in relation to Court-ordered costs, and (iii) certain provisions pertaining to termination of the LFA by OBC.

[95] I find that the redacted material ought to remain confidential. This is because it is commercially sensitive and, if disclosed, could well affect the defendants' litigation strategy.

[96] Accordingly, I will grant the requested Order to maintain the confidentiality of the unredacted versions of the initial and Amended LFA under seal.

ORDER in T-589-22 (Litigation Funding Agreement)

UPON considering the representations made on behalf of the parties to this Motion and Omni Bridgeway (Fund 5) Canada Investments Ltd. ("**OBC**");

AND UPON considering the amended version of the Litigation Funding Agreement ("Amended **LFA**") filed with the Court on February 2, 2024, between OBC, the representative plaintiff Pass Herald Ltd. and its counsel, Sotos LLP;

AND UPON considering the amended Form of Undertaking attached at Schedule "A" hereto;

AND UPON being advised by Class Counsel that OBC and Omni Bridgeway Limited have irrevocably attorned to the jurisdiction of this Court, as reflected in the attached Undertaking;

AND UPON considering that the defendants reserve all of their rights to seek additional confidentiality protections, including a confidentiality and protective order, at a later point in the proceedings;

THIS COURT ORDERS that:

1. The Amended LFA is approved insofar as the return to OBC, over and above the reimbursement of the amount funded, does not exceed 10% of the total claim proceeds. The Court will preserve its discretion to address any scenario in which OBC's return would exceed 10%, if and when such a scenario presents itself. This approval is subject to paragraph 4 below.

2. The unredacted versions of the initial LFA and the Amended LFA, respectively, shall remain confidential and under seal.

3. No costs are awarded in respect of this Motion.

4. The approval of the LFA is subject to the delivery by OBC and Omni Bridgeway Limited of a signed undertaking to the defendants in the form of undertaking attached to this Order as Schedule "A."

"Paul S. Crampton"
Chief Justice

SCHEDULE "A"

FORM OF UNDERTAKING

Capitalized terms used in this document and not defined herein will have the respective meanings ascribed to them in the Litigation Funding Agreement, dated May, 2023 among Omni Bridgeway (Fund 5) Canada Investments Ltd., Pass Herald Ltd., as representative plaintiff on behalf of certain Class Members and/or Claimant and Sotos LLP.

PARTIES:

Omni Bridgeway Limited (Australian Company Number 067 298 088)
Level 7, 35 Clarence Street, Sydney, New South Wales 2000, Australia
Attention: General Counsel.
E-mail: lcrglobal@omnibridgeway.com; notices@omnibridgeway.com

Omni Bridgeway (Fund 5) Canada Investments Ltd.
127-250 The Esplanade, Toronto, Ontario, M5A 1J2, Canada
Attention: Chief Investment Officer
E-mail: ca-cio@omnibridgeway.com

DEFINITIONS

CLAIMANT: Pass Herald Ltd.

COURT: Federal Court, or any other court in Canada having jurisdiction over the Litigation.

COURT-ORDERED COSTS: Means any legal fees and disbursements (including any interest thereon) that the Court orders Claimant to pay to Defendants, up to but not exceeding an aggregate of [REDACTED] for all Defendants, provided that the applicable legal fees and disbursements were incurred by one or more of the Defendants after being served with the Statement of Claim and prior to any termination of this Agreement.

DEFENDANTS: Means, individually or collectively, Google LLC, Google Ireland Limited, Google Canada Corporation, Meta Platforms Inc., Facebook Ireland Limited, and Facebook Canada Ltd., and any other defendants to the Proceedings.

GOVERNING LAW: The Agreement is entered into in the Province of Ontario and will be governed by and construed in accordance with the laws of the Province of Ontario applicable to contracts entered into and fully to be performed in such Province, without regard to that Province's conflict of laws rules.

LFA: The Amended Litigation Funding Agreement dated May , 2023, among Omni Bridgeway (Fund 5) Canada Investments Ltd., Claimant and Sotos LLP, filed with the Court on February 2, 2024;

PROCEEDINGS: The legal proceedings in connection with all claims, actions and/or proceedings under the case captioned *Pass Herald Ltd. v. Google LLC et al*, filed against the Defendants pursuant to Federal Court File No. T-589-22.

BY THIS UNDERTAKING, each of Omni Bridgeway Limited and Omni Bridgeway (Fund 5) Canada Investments Ltd., for the benefit of the Defendants:

(a) agrees to comply with any Court-Ordered Costs made by the Court;
(b) attorns to the jurisdiction of the Court, including with respect to its obligations under the LFA and this Undertaking respecting the treatment of Defendants' Information, confidentiality or protective orders made by the Court, and in relation to any order the Court may wish to make directly against Omni Bridgeway Limited or Omni Bridgeway (Fund 5) Canada Investments Ltd., in the Proceedings that Omni Bridgeway Limited or Omni Bridgeway (Fund 5) Canada Investments Ltd., pays any Court-Ordered Costs;
(c) agrees, in the event that any Court-Ordered Costs are not paid by Claimant within twenty-eight (28) days of falling due, not to oppose any joinder application made by the Defendants in the Proceedings for the purpose of seeking an order that Omni Bridgeway Limited or Omni Bridgeway (Fund 5) Canada Investments Ltd. pay any Court-Ordered Costs;
(d) agrees to pay to the Defendants the final, quantified amount of any Court-Ordered Costs such that the Defendants may enforce the payment of that amount as a debt due and owing by Omni Bridgeway Limited or Omni Bridgeway (Fund 5) Canada Investments Ltd. to the Defendants;
(e) agrees to submit to the jurisdiction of the Court for the purposes of the Defendant enforcing any obligation on Omni Bridgeway Limited or Omni Bridgeway (Fund 5) Canada Investments Ltd. to pay the final, quantified amount of any Court-Ordered Costs;
(f) agrees to:
    (i) notify the Defendants in writing of any termination of the LFA within three days of the Court approving such termination; and

    (ii) remain liable, upon termination of the LFA, for any Court-Ordered Costs;

    (For the purpose of paragraphs (f)(i) and (f)(ii), Omni Bridgeway Limited or Omni Bridgeway (Fund 5) Canada Investments Ltd.'s respective obligations will be satisfied by delivery of the required notice by email to [ ]).
(g) agrees that it will not revoke or withdraw this Undertaking prior to meeting any accrued obligations to pay Court-Ordered Costs in favour of the Defendants; and
(h) acknowledges having received valuable consideration for this Undertaking.

[*Signature Page Follows.*]

DATED this day of 20 __.
Executed as an Undertaking

By OMNI BRIDGEWAY LIMITED

Executed as an agreement.)
Executed for and on behalf of Omni)
Bridgeway Limited (ACN 067 298 088) by)
its duly appointed attorneys under a
power of attorney dated 6 February 2023 in the presence of:

Signature of witness Signature of attorney

Name of witness Name of attorney

Signature of witness Signature of attorney

Name of witness Name of attorney

By signing, the attorneys each confirm
that they have had no notice of revocation
or suspension of the power of attorney
specified above.
By OMNI BRIDGEWAY (FUND 5) CANADA INVESTMENTS LTD.

Naomi Loewith, Director Paul Rand, Director

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-589-22
STYLE OF CAUSE:	PASS HERALD LTD. v. GOOGLE LLC ET AL.
PLACE OF HEARING	TORONTO, ONTARIO
DATE OF HEARINGS:	JANUARY 15, 2024
PUBLIC ORDER AND REASONS:	CRAMPTON C.J.
DATED:	FEBRUARY 23, 2024
AMENDED:	FEBRUARY 26, 2024

APPEARANCES:

David Sterns Jean-Marc Leclerc Adil Abdulla	FOR THE PLAINTIFF
James Bunting Anisah Hassan	FOR THE DEFENDANT GOOGLE
David Kent Samantha Gordon Guneev Bhinder	FOR THE DEFENDANT META/FACEBOOK
Peter Griffin	FOR OMNI BRIDGEWAY (FUND 5) CANADA INVESTMENTS LTD.

SOLICITORS OF RECORD:

Sotos LLP	FOR THE PLAINTIFF
Tyr LLP	FOR THE DEFENDANT GOOGLE
McMillan LLP	FOR THE DEFENDANT META/FACEBOOK
Lenczner Slaght LLP	FOR OMNI BRIDGEWAY (FUND 5) CANADA INVESTMENTS LTD.