CITATION: Mancinelli v. Royal Bank of Canada, 2017 ONSC 7384
COURT FILE NO.: CV-15-536174
DATE: 20171211

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
JOSEPH S. MANCINELLI, CARMEN PRINCIPATO, DOUGLAS SERROUL, LUIGI CARROZZI, MANUEL BASTOS and JACK OLIVEIRA in their capacity as THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, and CHRISTOPHER STAINES Plaintiffs	*Louis Sokolov, Andy Seretis* and *Ronald Podolny* for the Plaintiffs
– and –	
ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA CANADA, BANK OF AMERICA NATIONAL ASSOCIATION, THE BANK OF TOKYO MITSUBISHI UFJ LTD., BANK OF TOKYO-MITSUBISHI UFJ (CANADA), BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS CAPITAL CANADA INC., BNP PARIBAS GROUP, BNP PARIBAS NORTH AMERICA INC., BNP PARIBAS (CANADA), BNP PARIBAS, CITIGROUP, INC., CITIBANK, N.A., CITIBANK CANADA, CITIGROUP GLOBAL MARKETS CANADA INC., CREDIT SUISSE GROUP AG, CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES (CANADA), INC., DEUTSCHE BANK AG, THE GOLDMAN SACHS GROUP, INC., GOLDMAN, SACHS & CO., GOLDMAN SACHS CANADA INC., HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC NORTH AMERICA HOLDINGS INC., HSBC BANK	*Lara Jackson* and *Chris Horkins* for the Bank of Montreal, BMO Financial Corp., BMO Harris Bank N.A., BMO Capital Markets Limited *Paul Le Vay, Brendan van Niejenhuis* and *Benjamin Kates* for the Defendants Toronto Dominion Bank, TD Bank, N.A., TD Group Holdings, LLC, TD Bank USA, N.A. and TD Securities Limited *Alannah Forthingham* for the Defendant Deutsche Bank AG

USA, N.A., HSBC BANK CANADA, JPMORGAN CHASE & CO., J.P.MORGAN BANK CANADA, J.P.MORGAN CANADA, JPMORGAN CHASE BANK NATIONAL ASSOCIATION, MORGAN STANLEY, MORGAN STANLEY CANADA LIMITED, ROYAL BANK OF SCOTLAND GROUP PLC, RBS SECURITIES, INC., ROYAL BANK OF SCOTLAND N.V., ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE S.A., SOCIÉTÉ GÉNÉRALE (CANADA), SOCIÉTÉ GÉNÉRALE, STANDARD CHARTERED PLC, UBS AG, UBS SECURITIES LLC and UBS BANK (CANADA)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

HEARD: November 27, 2017

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] On September 11, 2015, pursuant to the *Class Proceedings Act, 1992,*[1] the Plaintiffs sued 16 groups of financial institutions (48 banks in all) about an alleged price-fixing conspiracy that occurred between January 1, 2003 and December 31, 2013. The action against the 16 groups was timely under the *Limitations Act, 2002.*[2]

[2] On July 20, 2016, approximately 2.5 years after the end of the alleged conspiracy, the Plaintiffs sought to add two more groups of Defendants. The proposed new defendants comprised nine financial institutions; namely: (1) Bank of Montreal, BMO Financial Corp., BMO Harris Bank N.A., and BMO Capital Markets Limited ("BMO"); and (2) Toronto Dominion Bank, TD Bank, N.A., TD Group Holdings, LLC, TD Bank USA, N.A., and TD Securities Limited ("TD").

[3] BMO and TD argue, however, that they should not be added because the claims against them are statute-barred under the *Limitations Act, 2002*. The Plaintiffs respond that the claims are not statute-barred because they did not discover their claims against BMO and TD until May 24, 2016. The Plaintiffs submit that discovery of the claims occurred only after the Plaintiffs had signed a settlement agreement with a defendant who proffered evidence that implicated BMO and TD as parties to the alleged conspiracy.

[4] For the reasons that follow, I agree with BMO's and TD's submission, and I dismiss the

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[1] S.O. 1992, c. 6.
[2] S.O. 2002, c. 24, Sched. B.

Plaintiffs' motion to add them as defendants.

B. Legal Background

1. Introduction

[5] Before discussing the factual background and before discussing whether or not the Plaintiffs' claims against BMO and TD are statute-barred and whether that decision should be determined now or later in this action by allowing the joinder but reserving BMO's and TD's right to plead a limitations defence, it is both helpful and also necessary to understand the procedural and legal background.

2. Applicable Limitation Periods and their Operation

[6] The Plaintiffs' claims are subject to ss. 4 and 5 of the *Limitations Act, 2002,* and s.36(4) of the *Competition Act,*[3] which state:

> LIMITATIONS ACT, 2002
>
> *Basic limitation period*
>
> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> *Discovery*
>
> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> *Presumption*
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.
>
> ....

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[3] R.S.C., 1985, c. C-34.

COMPETION ACT

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

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later; and ...

[7] Limitation periods exist for three purposes: (1) to promote accuracy and certainty in the adjudication of claims; (2) to provide fairness to persons who might be required to defend against claims based on stale evidence; and (3) to prompt persons who might wish to commence claims to be diligent in pursuing them in a timely fashion.[4]

[8] Both the limitation period under the *Limitations Act, 2002* and under the *Competition Act* are subject to the discoverability principle,[5] which is codified in ss. 4 and 5 of the *Limitations Act, 2002*. The discoverability principle suspends the running of a limitation period. The discoverability principle postpones the running of the limitation period until the material facts underlying the cause of action are known to or were reasonably discoverable by the plaintiff.[6] The date upon which the plaintiff can be said to be in receipt of sufficient information to cause the limitation period to commence will depend on the circumstances of each particular case; it is a very fact-based analysis. [7]

[9] A plaintiff is required to act with due diligence in determining if he or she has a claim. The suspicion of certain facts or knowledge of a potential claim may be enough to put a plaintiff on inquiry and trigger a due diligence obligation, in which case the issue is whether a reasonable person with the abilities and in the circumstances of the plaintiff ought reasonably to have discovered the claim.[8] The limitation period will not be suspended while a plaintiff sits idle and takes no steps to investigate whether he or she has a claim.[9] The plaintiff must act reasonably in investigating and determining whether he or she has a claim. A consideration of whether the plaintiff has acted reasonably will include an analysis of not only the nature of the potential claim but also the particular circumstances of the plaintiff.[10]

[10] When applicable, the rebuttable presumption in s. 5(2) of the *Limitations Act* means that a

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[4] *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Frohlick v. Pinkerton Canada Ltd.* (2008), 88 O.R. (3d) 401 (C.A.); *Independence Plaza 1 Associates, L.L.C. v. Figliolini*, 2017 ONCA 44.

[5] *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.*, 2016 ONCA 621.

[6] *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549.

[7] *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165 (C.A.); *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851 at para. 71; *Lawless v. Anderson*, 2011 ONCA 102 at para. 22; *Zapfe v. Barnes* (2003), 66 O.R. (3d) 397 (C.A.).

[8] *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16 at para. 42, leave to appeal to S.C.C. ref'd [2017] S.C.C.A. No. 85.

[9] *Longo v. MacLaren Art Centre*, 2014 ONCA 526 at para. 42.

[10] *Longo v. MacLaren Art Centre*, 2014 ONCA 526 at para. 43; *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16 at para. 51, leave to appeal to S.C.C. ref'd [2017] S.C.C.A. No. 85.

plaintiff has the onus of showing that the discoverability rule applies.[11] When a limitation period defence is raised, the onus is on the plaintiff to provide evidence to show that the claim is not statute-barred and that he or she behaved as a reasonable person in the same or similar circumstances using reasonable diligence toward discovering the facts relating to the limitation issue.[12]

40 What a reasonable person in the same or similar circumstances of the plaintiff knew or ought to have known is a question of fact.[13] In determining whether a plaintiff knew or ought to have known of the facts giving rise to the cause of action, the knowledge of his or her solicitors is imputed to the plaintiff.[14]

[11] The objective test under paragraph 5(1)(b) of the *Limitations Act, 2002* requires considering the abilities and circumstances of the plaintiff and whether a person in the same or similar circumstances would have been alerted to the elements of a claim.[15] The question is whether the plaintiff knows or ought to know enough facts to base a cause of action against the defendant, and, if so, then the claim has been discovered and the limitation period begins to run.[16] In assessing what the plaintiff ought to have known it is relevant to consider what reasonable steps the plaintiff ought to have taken; however, the failure to take reasonable steps is not in and of itself a reason to dismiss a claim as statute barred.[17]

3. The Joinder of Defendants by Amendment to the Statement of Claim in an Existing Action

[12] The Plaintiffs move to amend their Statement of Claim to add BMO and TD pursuant to rules 5.04 and 26.01, which state:

> *Proceeding not to be defeated*
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> 5.04(1) No proceeding shall be defeated by reasons of the misjoinder or non-joinder of any party and the court may in a proceeding, determine the issues in dispute so far as they affect the rights of the parties to the proceeding and pronounce judgment without prejudice the rights of all persons who are not parties.
>
> *Adding, deleting or substituting parties*

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[11] *Fennell v. Deol*, 2016 ONCA 249 at para. 26; *Galota v. Festival Hall Developments Ltd.* 2016 ONCA 585 at para. 15, aff'g 2015 ONSC 6177.
[12] *Pepper v. Zellers Inc. (c.o.b. Zellers Pharmacy)* (2006), 83 O.R. (3d) 648 at paras. 20-22 (C.A.).
[13] *Arcari v. Dawson*, 2016 ONCA 715; *Lima v. Moya*, 2015 ONSC 324 at para. 76, aff'd 2015 ONSC 3605 (Div. Ct.).
[14] *Soper v. Southcott* (1998), 39 0.R. 3d 737 (C.A.); *Davenport v. Roughley Estate*, [2003] O.J. No. 679 (Master); *Biancale v. Viera*, [2007] O.J. No. 1579 (S.C.J.); *Colin v. Tan*, 2016 ONSC 1187.
[15] *Ontario Flue-Cured Tobacco Growers Marketing Board v. Rothmans, Benson & Hedges, Inc.*, 2016 ONSC 3939 para. 51 (Div. Ct.).
[16] *Lawless v. Anderson*, 2011 ONCA 102 at para. 23; *Soper v. Southcott* (1998), 39 O.R. (3d) 737 (C.A.); *McSween v. Louis*, [2000] O.J. No. 2076 (C.A.).
[17] *Fennell v. Deol*, 2016 ONCA 249 at paras. 18 and 24; *Galota v. Festival Hall Developments Ltd.* 2016 ONCA 585 at para. 23, aff'g 2015 ONSC 6177.

> (2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
>
> *Adding plaintiff or applicant*
>
> (3) No person shall be added as a plaintiff or applicant unless the person's consent is filed.
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> ....
>
> AMENDMENT OF PLEADINGS
>
> GENERAL POWER OF THE COURT
>
> 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[13] Section 21(1) of the *Limitations Act, 2002* provides that a party cannot be added to an existing proceeding after the limitation period in respect of a claim against it. The court no longer possesses the discretion to extend limitation periods by applying the doctrine of special circumstances.[18] On a motion to add a new defendant, the court is required to scrutinize whether the proposed amendment runs afoul of any limitations period.[19]

[14] When a plaintiff's motion to add a defendant is opposed on the basis that her claim is statute-barred, the motion judge is entitled to assess the record to determine whether, as a question of fact, there is a reasonable explanation on proper evidence as to why the plaintiff could not have discovered the claim through the exercise of reasonable diligence.

[15] The plaintiff will not require much evidence to establish that there is a triable issue that he or she could not have been known with due diligence about the claim or about the identity of the wrongdoer within the limitation period, and it is rare that the applicability of the discoverability principle based on due diligence will be determined on a motion to add a party.[20] However, if the plaintiff's explanation on proper evidence does not raise any triable issue that would merit consideration on a summary judgment motion or at trial and there is no reasonable explanation on the evidence as to why the plaintiff could not have discovered the claim through the exercise of reasonable diligence, the motion judge may deny the plaintiff's motion to join the defendant.[21]

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[18] *Ismail v. Nitty's Food Services Ltd.*, 2014 ONSC 4140 at para. 7; *Joseph v Paramount Canada's Wonderland*, 2008 ONCA 469.

[19] *Melville-Laborde v. 3455 Glen Erin Apartments Inc.*, 2017 ONSC 6004; *Black, Brown v. MacDonald*, 2011 ONSC 76 at para. 29, aff'd 2012 ONSC 2161 (Div. Ct.).

[20] *Fanshawe College of Applied Arts and Technology v. Sony Optiarc Inc.*, 2013 ONSC 1477 and 2014 ONSC 2856; *Wakelin v. Gourley* (2005), 76 O.R. (3d) 272 (Master), aff'd [2006] O.J. No. 1442 (Div. Ct.).

[21] *Pepper v. Zellers Inc.* (2006), 83 O.R. (3d) 648 at paras. 18, 19, 24 (C.A.); *Arcari v. Dawson*, 2016 ONCA 715 at para. 10, leave to appeal refused, [2016] SCCA No. 522; *Wakelin v. Gourley* (2005), 76 O.R. (3d) 272 (Master), aff'd [2006] O.J. No. 1442 (Div. Ct.); *Wong v. Adler* (2004), 70 O.R. (3d) 460 (Master), aff'd [2005] O.J. No. 1400 (Div. Ct.).

C. Factual Background

[16] The Plaintiffs, Joseph S. Mancinelli, Carmen Principato, Douglas Serroul, Luigi Carrozzi, Manuel Bastos, and Jack Oliveira, in their capacity as The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, and Christopher Staines, sue 16 groups of financial institutions.

[17] The Plaintiffs sue: (1) Royal Bank of Canada, RBC Capital Markets LLC; (2) Bank of America Corporation, Bank of America, N.A., Bank of America Canada, Bank of America National Association; (3) The Bank of Tokyo Mitsubishi UFJ Ltd., Bank of Tokyo-Mitsubishi UFJ (Canada); (4) Barclays Bank PLC, Barclays Capital Inc., Barclays Capital Canada Inc.; (5) BNP Paribas, BNP Paribas (Canada), BNP Paribas Group, BNP Paribas North America Inc.; (6) Citibank, N.A., Citibank Canada, Citigroup Global Markets Canada Inc., Citigroup, Inc.; (7) Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG, Credit Suisse Securities (Canada), Inc.; (8) Deutsche Bank AG; (9) The Goldman Sachs Group, Inc., Goldman, Sachs & Co., Goldman Sachs Canada Inc.; (10) HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., HSBC Bank Canada; (11) J.P.Morgan Canada, JPMorgan Chase Bank National Association, JPMorgan Chase & Co., J.P.Morgan Bank Canada; (12) Morgan Stanley, Morgan Stanley Canada Limited; (13) Royal Bank of Scotland Group PLC, RBS Securities, Inc., Royal Bank of Scotland N.V., Royal Bank of Scotland PLC; (14) Société Générale S.A., Société Générale (Canada), Société Générale; (15) Standard Chartered PLC; and (16) UBS AG, UBS Securities LLC and UBS Bank (Canada).

[18] Each of the 16 groups of financial institutions were already defendants in parallel litigation taking place in the United States.[22]

[19] The Plaintiffs allege that between January 1, 2003 and December 31, 2013, the Defendants conspired with each other to fix prices in the futures exchange market (the "FX Market"). It is alleged that through the use of multiple chat rooms with names such as "The Cartel," "The Bandits' Club," and "The Mafia," the Defendants communicated directly with each other to coordinate their: (a) fixing of spot prices; (b) control and manipulation of FX benchmark rates; and (c) exchange of key confidential customer information to trigger client stop loss orders and limit orders. The Plaintiffs allege that the Defendants' conspiracy impacted all manner of FX instruments, including those trading both over-the-counter and on exchanges.

[20] The Plaintiffs, through Mr. Staines, commenced their action by way of Statement of Claim, which was issued on September 11, 2015. The Statement of Claim pleads several causes of action against the Defendants including a statutory right of action for contraventions of Part VI of the *Competition Act*;[23] namely: civil conspiracy, and unjust enrichment. The Plaintiffs claim damages of $1 billion plus punitive damages.

[21] There have been four rounds of settlements with some of the Defendants. Twelve of the 16 groups of defendants have settled.

[22] All the Settlement Agreements provided, among other things, that: the settlement amounts shall be held in an interest-bearing account; and the Settling Defendants agree to

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[22] *In re Foreign Exchange Benchmark Rates Antitrust Litigation,* Southern District Court of New York.
[23] R.S.C. 1985, c. C-34.

provide reasonable co-operation to the Class Members to assist in the continued prosecution of the action against the Non-Settling Defendants.

[23] On May 20, 2016, the Plaintiffs and UBS signed a settlement agreement. The settlement was subject to court approval.

[24] On May 24, 2016, pursuant to its settlement agreement, but before it had been approved by the court, UBS made the first proffer of evidence.

[25] On July 20, 2016, the Plaintiffs served a notice of motion to amend the Statement of Claim to add BMO and TD as defendants. The motion was supported by an affidavit from Robert Gain of Class Counsel, in which he deposed that the involvement of BMO and TD was not discovered by Class Counsel and could not reasonably have been discovered until May 2016.

[26] On August 5, 2016, BMO's counsel requested particulars of the information leading to the discovery of the involvement of BMO in the alleged conspiracy. The Plaintiffs' lawyer responded that further information would be forthcoming. The joinder motion was to be adjourned in the meantime.

[27] On September 27, 2016, without notice to the Defendants and without having sought or obtained letters of request from the court in Ontario, the Plaintiffs commenced an *ex parte* application in the United States District Court for the Southern District of New York seeking an Order pursuant to *28 U.S.C. §1782 (United States Code)* to take discovery for use in the Ontario action from Bloomberg LP.[24]

[28] On November 9, 2016, the first round of settlements, involving UBS, BNP, Bank of America, Goldman Sachs, JPMorgan and Citigroup, received court approval.

[29] On June 22, 2017, Plaintiffs' counsel advised that the Plaintiffs intended to bring on the joinder motion and the motion was subsequently scheduled for November 27 and 28, 2017.

[30] On July 31, 2017, the Plaintiffs served a new motion record to add BMO and TD. The motion record contained a second affidavit from Mr. Gain, who deposed that the involvement of BMO and TD was not discovered by Class Counsel, and could not reasonably have been discovered at the time the action was commenced in September 2015 or at any time before the first proffer in May 2016.

[31] Mr. Gain also deposed that before the commencement of the action to the date of the UBS proffer on May 24, 2016, Class Counsel conducted its own investigations and no public documents referred to BMO or TD being involved in the alleged conspiracy.

[32] On September 13, 2017, TD's counsel requested copies of the first proffer referred to in paragraph 10 of Mr. Gain's second affidavit as well as any other proffers and any associated documents relied on in support of the Plaintiffs' position on discoverability.

[33] On September 14, 2017, Plaintiffs' counsel responded and advised that the information requested would not be provided because the information was privileged and confidential

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[24] See *Mancinelli v. Royal Bank of Canada,* 2017 ONSC 87. Some of the then Defendants moved to arrest the Plaintiffs from examining Bloomberg LP. I granted the Moving Defendants' motion, and I ordered that the Plaintiffs: (a) may not take any step in furtherance of the Bloomberg LP subpoena; and, (b) may not take any steps to acquire documents or any other evidence from non-parties through extra-jurisdictional procedures without further order of this court.

pursuant to the settlement agreements and court orders incorporating those agreements.

[34] On September 29, 2017, TD served its Responding and Cross-Motion Record.

[35] On October 10, 2017, the Plaintiffs served a Supplementary Motion Record consisting of a third affidavit from Mr. Gain. In paragraph 2 of his third affidavit, Mr. Gain describes the Plaintiff's investigations before May 24, 2016:

> 2. From the time prior to the commencement of the action to the date of the first evidentiary proffer on May 24, 2016, Class Counsel conducted its own investigations into the alleged conspiracy that is the subject of this action. This included a review of public documents. None of these public documents referred to or mentioned the proposed BMO Defendants or the Proposed TD Defendants as being involved in the alleged conspiracy.

[36] BMO and TD have not provided any evidence to contradict Mr. Gain's assertion that no public documents identify BMO or TD as being involved in the alleged conspiracy.

[37] On October 20, 2017, Mr. Gain was cross-examined on his affidavits. He refused to provide the content of the proffer or the other proffers. He refused to answer any questions about any of the proffers, including when the Plaintiffs learned about the claims against BMO and TD.

[38] On November 1, 2017, BMO and TD brought a refusals motion to compel Mr. Gain to answer the refused questions. With written reasons to follow, I ordered Mr. Gain to re-attend to answer 11 improperly refused questions and any proper follow-up questions.[25]

[39] Rather than re-attending, Mr. Gain provided written answers to the improperly refused questions. Those answers stated:

- We [Class Counsel] learned for the first time at the UBS proffer of the involvement of BMO and TD in the conspiracy that is alleged in this class action.
- I [Robert Gain] was advised that UBS reviewed approximately 2,000 collusive chats dating as far back as 2008. We were advised that FX traders at TD were among those persons participating in such chats discussing the spreads for currency pairs. The exact number of chatrooms and the identity of the FX traders was not provided at the UBS proffer.
- I was advised that UBS reviewed approximately 2,000 collusive chats dating as far back as 2008. We were advised that FX traders at BMO were among those persons participating in such chats discussing the spreads for currency pairs. The exact number of chatrooms and the identity of the FX traders was not provided at the UBS proffer.

D. Discussion

1. Submissions of the Parties

[40] The Plaintiffs submit that the evidence establishes that they discovered their claims against BMO and TD in May 2016 and that prior to that time they conducted their own investigation but no public documents identified BMO and TD as co-conspirators. Relying on

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[25] *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 6737.

Fennell v. Deol,[26] the Plaintiffs submit that they have rebutted the presumption in s. 5(2) of the *Limitations Act*, that they had discovered the claims against BMO and TD. The Plaintiffs point out that BMO and TD have led no evidence to show that the claims against them were known in public documents or that the claims could have been discovered with reasonable diligence before May 2016. Thus, the Plaintiffs submit that they have met the test under rule 26.01 for leave to amend their Statement of Claim to add BMO and TD. Relying on *Wong v. Adler*[27] and *Pepper v. Zellers*,[28] they submit that the test for joinder is low and joinder should be refused only if the evidence establishes that the identity of the tortfeasor was actually known or knowable; otherwise, the defendant should be added with leave to plead the limitations defence.

[41] BMO and TD submit that in the circumstances of the immediate case, the Plaintiffs have a claim that occurred between 2003 and 2013 and pursuant to s. 5(2) of the *Limitations Act, 2002*, they are presumed to know, unless the contrary is proved, that BMO and TD, the persons against whom the claim is made, were the wrongdoers and, therefore, the Plaintiffs are taken to have discovered their claim between 2003 and 2013. The Defendants submit that the contrary has not been proven, and, therefore, the Plaintiffs' claim is statute-barred having been not advanced before the expiry of the limitation period in 2015.

[42] Further, the Defendants submit that they may rely on the presumption in s. 5(2) of the *Limitations Act, 2002* and there is no onus on them to present evidence to show when the claim against them was discoverable. They submit that the Plaintiffs have not provided an explanation for their assertion that the claims against BMO and TD could not have been discovered by reasonable due diligence before May 2016. They submit that the Plaintiffs have not discharged the evidentiary burden on them of proving that the claim against BMO and TD was not discoverable with due diligence before May 2016 and in this regard, the Defendants submit that there is no evidence about efforts to hire a private investor, to contact potential witnesses, to obtain information from Plaintiffs' counsel in the U.S. litigation, or to contact regulatory or law enforcement agencies.

2. Analysis

[43] While I believe that the Plaintiffs subjectively did not know that they had a conspiracy claim against BMO and TD, I am not persuaded by the Plaintiffs' evidence that with due diligence they could not have known about their price-fixing claims against BMO and TD. I find as a fact that had the Plaintiffs been more diligent than they were, then they would have known enough facts to assert a claim against BMO and TD.

[44] Further, I am not persuaded that the Plaintiffs have provided a reasonable explanation why they could not have discovered the claim against BMO and TD through the exercise of reasonable diligence. I am satisfied that there is no genuine issue requiring a trial as to whether the Defendants have a limitation period defence. They have such a defence, and, accordingly, the Plaintiffs' joinder request should be denied.

[45] In making these findings of fact, I appreciate that the Plaintiffs were confronted with the usual clandestine nature of conspiracies and that the perpetrators in the immediate case disguised

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[26] 2016 ONCA 249.
[27] (2004), 70 O.R. (3d) 460 (Master), aff'd [2005] O.J. No. 1400 (Div. Ct.).
[28] (2006), O.R. (3d) 648 (C.A.).

their identities in the Bloomberg chat rooms and that what counts for making reasonable inquiries to discover the identities of conspirators is not a routine matter or comparable to what counts for a reasonable inquiry in a motor vehicle injury of slip and fall case.[29]

[46] And, I appreciate that the Plaintiffs were rightly cautious and being responsible litigators in not simply joining BMO and TD at the outset based on the bare fact that these banks were significant traders in the Canadian FX market.

[47] However, I find as a fact that while the Plaintiffs explained that they did some investigating, mainly to the extent of researching the information that was publicly available, they did not do much more than that, and they did not explain why they did not or could not have done more to identify BMO and TD as co-conspirators.

[48] I find as a fact that when the Plaintiffs commenced their action in September 11, 2015, they knew that 16 groups of financial institutions carrying on business in Canada, including Canada's largest bank, the Royal Bank of Canada, had been identified as alleged co-conspirators. The Plaintiffs knew that other banks trading in Canada were or might be involved in the conspiracy, and the Plaintiffs knew or they ought to have known that BMO and TD would be "persons of interest" to use the jargon of investigators and regulators, all of which knowledge explains why the Plaintiffs continued their investigations by researching the publicly available information. The Plaintiffs knew enough to be put on notice that they should continue investigating.

[49] The Plaintiffs, through their counsel, testified that the Plaintiffs were investigating, but there is scant evidence about how they were investigating, and there is no evidence about any efforts to hire a private investor, efforts to contact potential witnesses or whistleblowers, efforts to obtain information from Plaintiffs' counsel in the U.S. litigation, or efforts to contact regulatory or law enforcement agencies. It also appears that the Plaintiffs before or after commencing their action did not bring a motion for an *Anton Pillar* Order, a civil search warrant, or a *Norwich* Order, under which a plaintiff may obtain discovery from a person including a person against whom there is no cause of action in order to identify a wrongdoer and to obtain information about wrongdoing so that the plaintiff may bring proceedings or at least consider whether to bring proceedings against the wrongdoer.[30]

[50] To investigate is to systematically gather information, explore, probe, research, inspect, interview, inquire, study, appraise, and analyze. In terms of the evidence offered on their motion to join BMO and TD, it appears that the Plaintiffs' investigation was meagre in anticipation that a settling defendant, like UBS, would in the future proffer evidence that implicated others.

[51] In this last regard, it is significant to note that UBS was able to identify BMO and TD as participants in the chat room shenanigans by reviewing the "collusive chats." That UBS was able to identify BMO and TD demonstrates that through inquiry, appraisal, and analysis, it was possible to identify other alleged co-conspirators.

[52] Apart from their reading of the public record, there is, however, no evidence that the

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[29] *Concord Adex Inc. v. 20/20 Management Ltd.*, 2017 ONSC 6748 (Master); *Central-Epicure Food Products Ltd. v. Weinberg*, 2015 ONSC 5539 (Master).

[30] *GEA Group AG v. Ventra Group Co.* (2009), 96 O.R. (3d) 481 (C.A.); *Isofoton S.A. v. Toronto Dominion Bank*, (2007), 85 O.R. (3d) 780 (S.C.J.).

Plaintiffs attempted to gather evidence or to analyze it. Despite prodding and five opportunities, (three affidavits, one cross-examination, and one written response) to explain what they did and why they said that they could not discover BMO's and TD's involvement earlier than May 2016, Mr. Gain's repeated response was that Class Counsel conducted its own investigations including a review of public documents.

[53] Instead of providing details of their investigations and describing what other investigative efforts they made, the Plaintiffs asserted that the onus was on BMO and TD to prove that the claims against them were known in public documents or that the onus was on BMO and TD to prove that the claims against them could have been discovered with reasonable diligence before May 2016.

[54] As a proposition of law, there is no onus on BMO and TD to expose how they could have been exposed. Rather, there is a very low threshold onus on a plaintiff to provide an explanation as to why he or she did not discover the claim against the defendant before the clanging of the limitation period bell.

[55] But onus aside, from the court's perspective the determinative issues are whether the plaintiff subjectively knew or objectively ought to have known about his or her claim against the defendant before the limitation period had run its course. In the immediate case, I accept the Plaintiffs' evidence that they did not subjectively know that BMO and TD were participating in the price fixing conspiracy, but balanced against the Plaintiffs' ignorance is that they knew: that the conspiracy had been exposed, that many of the conspirators (48) had been exposed, that there likely were more conspirators, and that BMO and TD were prime targets worthy of investigating.

[56] And the Plaintiffs ought to have known - in particular, precisely because conspiracies are clandestine - that there was more that could and should have been done beyond reviewing the public record or waiting for examinations for discovery or a proffer of evidence from a future settling defendant.

[57] And if the Plaintiffs were to take on the mantle of representative plaintiff to achieve access to justice and behaviour modification, they should have acted more like the investigation arm of a regulator and conduct a meaningful investigation. I appreciate that before discovery there were no immediately available rights of search and seizure, but the court has the jurisdiction to grant *Anton Pillar* Orders and *Norwich Orders*, if it is asked and there is a case for it, and the court has is a plenary jurisdiction under s. 12 of the *Class Proceedings Act*, to manage the action before certification and discoveries. However, apart from resorting to *28 U.S.C. §1782 (United States Code)* – after May 2016 - in an attempt to take discovery for use in the Ontario action from Bloomberg LP, there is no evidence that there was much to the Plaintiffs' investigation apart from reviewing the public reports of the investigations of others.

[58] While the threshold on a motion to add a party is low, I am unable to conclude on the evidence tendered on this motion that the Plaintiffs have provided a reasonable explanation as to why BMO and TD were not identifiable and not named as parties to an exposed conspiracy before the expiry of the limitation period under s. 4 of the *Limitations Act, 2002*.[31] I am unable to conclude based on the evidence and on the Plaintiffs' description of their investigation that they demonstrated what a person in the same or similar circumstances would reasonably have done to

[31] *Sloan v. Sauve Heating Ltd.*, 2011 ONCA 91 at para. 5 aff'g 2010 ONSC 3871.

alert themselves to the identify of wrongdoers.

[59] The case at bar can be contrasted with *Fanshawe College of Applied Arts and Technology v. Sony Optiarc Inc.*,[32] where Justice Rady adjourned a motion to join numerous additional defendants to an existing price-fixing conspiracy class action in order to allow the Plaintiffs to provide better evidence that they had exercised reasonable due diligence. The plaintiffs responded with a very fulsome and detailed explanation and description of their investigations, and Justice Rady allowed the joinder without prejudice to the defendants pleading a limitation period defence. Justice Rady was influenced by three factors not present in the immediate case that explained why it took so long to discover the additional defendants; namely: (1) it took more than two years for the original defendants to get on the record; (2) in related U.S. litigation, the first complaint was dismissed for not alleging a plausible conspiracy and it was not until an amended complaint that there was sufficient information to infer a conspiracy; and (3) most Canadian competition law class actions were idling pending the Supreme Court of Canada elucidating whether indirect purchasers had a cause of action for price fixing. None of these features are present in the immediate case as an explanation for the delay in discovering that BMO and TD were also participants in the alleged conspiracy.

[60] In arriving at my conclusion in the immediate case, I appreciate that the case at bar is not like the cases where there was no evidence of any due diligence by the plaintiff or cases where the plaintiff simply waited for the examinations for discovery of the existing parties to investigate or inquire about the identity of other potential defendants.[33] These cases, however, remain relevant for their recitation of the general principles and for their illustrative value, but while I recognize that in the immediate case, the Plaintiffs did investigate before commencing their proposed class action and that they continued their investigations after the action was commenced, a similarly situated person would have done more to expose BMO and TD.

[61] The onus is on the Plaintiffs to provide sufficient evidence to show that the claims against BMO and TD are not statute-barred and that they behaved as a reasonable person in the same or similar circumstances using reasonable diligence in discovering the facts relating to the limitation issue.[34] The determinative issue remains whether in the circumstances of the immediate case the Plaintiffs knew or ought to have known of their claims against BMO and TD with reasonable due diligence. In the case at bar, the Plaintiffs failed to meet the onus, and I find as a fact that their evidence is insufficient to establish that they behaved as reasonable person in the same or similar circumstances to identify BMO and TD as conspirators and the evidence rather establishes that their identity could have been established with reasonable diligence before the expiry of the limitation period.

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[32] 2013 ONSC 1477 and 2014 ONSC 2856.

[33] *Melville-Laborde v. 3455 Glen Erin Apartments Inc.*, 2017 ONSC 6004 (Master); *Klein v. G4S Secure Solutions (Canada) Ltd.*, 2016 ONSC 1930; *Ismail v. Nitty's Food Services Ltd.*, 2014 ONSC 4140; *Black, Brown v. MacDonald*, 2011 ONSC 76 at para. 29, aff'd 2012 ONSC 2161 (Div. Ct.); *Higgens v. Barrie (City)*, 2011 ONSC 2233; *Lockett v. Boutin*, 2011 ONSC 2098; *Blinn v. Burlington (City)*, [2010] O.J. 3063 (S.C.J.); *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, [2009] O.J. No. 1039 (S.C.J.); *Pooran v. 2029301 Ontario Ltd.*, [2008] O.J. No. 2812 (Master); *Wakelin v. Gourley*, [2005] O.J. No. 2746 (Master), aff'd [2006] O.J. No. 1442 (Div. Ct.).

[34] *Pepper v. Zellers Inc. (c.o.b. Zellers Pharmacy)* (2006), 83 O.R. (3d) 648 at paras. 20-22 (C.A.).

E. Conclusion

[62] For the above reasons, I dismiss the Plaintiffs' motion to add BMO and TD.

[63] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with BMO's and TD's submissions within 20 days of the release of these Reasons for Decision followed by the Plaintiffs' submissions with a further 20 days.

Perell, J.

Released: December 11, 2017

CITATION: Mancinelli v. Royal Bank of Canada, 2017 ONSC 7384
COURT FILE NO.: CV-15-536174
DATE: 20171211

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH S. MANCINELLI, CARMEN PRINCIPATO, DOUGLAS SERROUL, LUIGI CARROZZI, MANUEL BASTOS and JACK OLIVEIRA in their capacity as THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, and CHRISTOPHER STAINES

Plaintiffs

– and –

ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA CANADA, BANK OF AMERICA NATIONAL ASSOCIATION, THE BANK OF TOKYO MITSUBISHI UFJ LTD., BANK OF TOKYO-MITSUBISHI UFJ (CANADA), BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS CAPITAL CANADA INC., BNP PARIBAS GROUP, BNP PARIBAS NORTH AMERICA INC., BNP PARIBAS (CANADA), BNP PARIBAS, CITIGROUP, INC., CITIBANK, N.A., CITIBANK CANADA, CITIGROUP GLOBAL MARKETS CANADA INC., CREDIT SUISSE GROUP AG, CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES (CANADA), INC., DEUTSCHE BANK AG, THE GOLDMAN SACHS GROUP, INC., GOLDMAN, SACHS & CO., GOLDMAN SACHS CANADA INC., HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC NORTH AMERICA HOLDINGS INC., HSBC BANK USA, N.A., HSBC BANK CANADA, JPMORGAN CHASE & CO., J.P.MORGAN BANK CANADA, J.P.MORGAN CANADA, JPMORGAN CHASE BANK NATIONAL ASSOCIATION, MORGAN STANLEY, MORGAN STANLEY CANADA LIMITED, ROYAL BANK OF SCOTLAND GROUP PLC, RBS SECURITIES, INC., ROYAL BANK OF SCOTLAND N.V., ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE S.A., SOCIÉTÉ GÉNÉRALE (CANADA), SOCIÉTÉ GÉNÉRALE, STANDARD CHARTERED PLC, UBS AG, UBS SECURITIES LLC and UBS BANK (CANADA)

Defendants

REASONS FOR DECISION

PERELL J.

Released: December 11, 2017