COURT OF APPEAL FOR ONTARIO

CITATION: Mancinelli v. Royal Bank of Canada, 2018 ONCA 544
DATE: 20180613
DOCKET: C64775

Hoy A.C.J.O., Brown and Trotter JJ.A.

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 (Appellants)

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 (Appellants)

Kirk M. Baert, Celeste Poltak and Louis Sokolov, for the appellants

Lara Jackson, Wendy Berman and Christopher Horkins, for the respondents, 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 respondents, Toronto Dominion Bank, TD Bank, N.A., TD Group Holdings, LLC, TD Bank USA, N.A. and TD Securities Limited

Heard: May 14, 2018

On appeal from the order of Justice Paul Perell of the Superior Court of Justice, dated December 11, 2017.

Hoy A.C.J.O.:

[1] The appellants appeal the motion judge's order, dismissing their motion to add the respondents, Toronto Dominion Bank, TD Securities, TD Bank USA, N.A., T.D. Group Holdings, and TD Bank N.A. (collectively "TD") and Bank of Montreal, BMO Financial Corp. BMO Harris Bank N.A. and BMO Capital Markets Limited (collectively "BMO"), as defendants in an existing class action alleging a secret conspiracy to manipulate the foreign exchange market.

[2] For the following reasons, I agree with the appellants that the motion judge erred in dismissing their motion on the basis that their claim against the respondents was statute-barred.

Background

[3] The appellant[1], Christopher Staines, commenced a class action against sixteen groups of financial institutions on September 11, 2015, alleging a price-fixing conspiracy in the foreign exchange or foreign currency market between January 1, 2003 and December 31, 2013. The statement of claim includes allegations that the defendants (including the proposed defendants) took active steps to conceal their participation in the conspiracy by, among other things, engaging in secret communications.

[4] The first group of defendants to settle consisted of UBS AG, UBS Securities LLC and UBS Bank (Canada) (collectively "UBS"). The settlement required UBS to cooperate with the appellants. In fulfilling that obligation, UBS gave an evidentiary proffer on May 24, 2016.

[5] On July 20, 2016, Mr. Staines brought a motion under r. 5.04(2) and r. 26.01 of the *Rules of Civil Procedure* to add the respondents to the action. The respondents opposed the motion on the basis that the claim against them was barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched B. (the "Act") and the *Competition Act*, RSC 1985, c. C-34. No defendant had filed a statement of defence and no discovery had taken place at the time that the motion was heard.

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[1] On October 6, 2016, the Statement of Claim was amended to add the Trustees of the Labourers' Pension Fund of Central and Eastern Canada as plaintiffs.

[6] Class counsel's evidence on the motion was that they learned of BMO and TD's involvement in the alleged conspiracy for the first time at the UBS proffer. UBS advised class counsel that it reviewed approximately 2000 collusive chats dating as far back as 2008 and that FX traders at TD and BMO were among the persons participating in such chats.

[7] Class counsel's further evidence was that from the time prior to commencement of the action to the date of UBS's evidentiary proffer on May 24, 2016, they conducted their own investigations into the alleged conspiracy. Their investigations included a review of public documents and none of the public documents referred to or mentioned BMO or TD as being involved in the alleged conspiracy.

[8] In his reasons, the motion judge acknowledged that there was no evidence that any public documents identified BMO or TD as being involved in the alleged conspiracy. He accepted that the appellants did not know they had a conspiracy claim against the respondents until they obtained the UBS evidentiary proffer.

[9] However, at para. 61 of his reasons, the motion judge found as a fact that the appellants' evidence on the motion was "insufficient to establish that they behaved as reasonable person[s] in the same or similar circumstances to identify [the respondents] as conspirators and the evidence rather establishes that their

identity could have been established with reasonable diligence before the expiry of the limitation period."

[10] As to what other steps the appellants should have taken, the motion judge wrote, at para. 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 [sic], 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.

[11] At para. 51, the motion judge reasoned that the fact that UBS was able to identify BMO and TD as participants in the "chat room shenanigans by reviewing the 'collusive chats'" demonstrated that it was possible to identify other alleged co-conspirators.

[12] He wrote, at para. 57, that "...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 [conducted] a meaningful investigation."

[13] The motion judge dismissed the appellants' motion.

The Framework

[14] The framework in the Act informs the necessary analysis.

[15] In most Ontario cases, including this one, an action must be started on or before "the second anniversary of the day on which the claim was discovered." If it is not, the claim is barred by s. 4 of the Act.

[16] Here, the appellants sought to amend their claim to include the respondents on July 20, 2016. Working backwards, the appellants' claim against the respondents is statute-barred if they discovered it before July 20, 2014.

[17] Section 5 of the Act sets out the scheme for determining when a claim is discovered. It provides in relevant part as follows:

> 5 (1) A claim is discovered on the earlier of,
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> (a) the day on which the person with the claim first knew,
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> (i) that the injury, loss or damage had occurred,
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> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
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> (iii) that the act or omission was that of the person against whom the claim is made, and
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> (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). 2002, c. 24, Sched. B, s. 5 (1).
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> Presumption
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> (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. 2002, c. 24, Sched. B, s. 5 (2).

[18] For the purposes of the motion, the presumption in s. 5(2) of the Act was displaced: the motion judge accepted that the appellants subjectively did not know they had a conspiracy claim against BMO and TD until the UBS proffer. Thus, the date for the purposes of s. 5(1)(a) of the Act was May 24, 2016.

[19] The respondents effectively asserted that the appellants "first ought to have known" that they had a claim against the respondents before July 20, 2014. In other words, the respondents assert that the s. 5(1)(b) date was both before May 24, 2016 and before July 20, 2014. If the s. 5(1)(b) date were not before July 20, 2014, the appellants' claim would not be statute barred.

[20] Having accepted that the appellants did not subjectively know they had a conspiracy claim against BMO and TD until May 24, 2016, the issue to be determined by the motion judge under s. 5(1)(b) was whether the appellants had a reasonable explanation on proper evidence as to why they could not have

discovered their claim against the respondents before July 20, 2014 through the exercise of reasonable diligence.

[21] While the common law discoverability principle is expressly enshrined in ss. 4 and 5 of the Act, the statutory limitation period in s. 36(4)(a)(i) of the *Competition Act* is also subject to the discoverability principle: *Fanshawe College of Applied Arts and Technology v. AU Optronics Corporation*, 2016 ONCA 621, 132 O.R. (3d) 81, at para. 18.

Analysis

[22] As I will explain, the motion judge erred in principle by establishing too high an evidentiary threshold on the motion before him. He further erred by finding that the appellants could have identified the respondents with due diligence in the absence of any evidentiary foundation and failing to determine with sufficient precision when they ought to have discovered their claim.

1. Too high an evidentiary threshold

[23] When a person opposes a plaintiff's motion to add it as a defendant on the basis of the apparent expiry of a limitation period, 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 its claim through the exercise of reasonable diligence. If the plaintiff does not raise any credibility issue or issue of fact about when its claim was discovered that would

merit consideration on a summary judgment motion or a trial and there is no reasonable explanation on the evidence as to why the plaintiff could not have discovered the claim by exercising reasonable diligence, the motion judge may deny the plaintiff's motion: *Arcari v. Dawson*, 2016 ONCA 715, 134 O.R. (3d) 36, at para. 10.

[24] However, the evidentiary threshold that must be met by a plaintiff on such a motion is low: *Pepper v. Zellers Inc.* (2006), 83 O.R. (3d) 648 (C.A.), at para. 14; *Burtch v. Barnes Estate* (2006), 80 O.R. (3d) 365, at paras. 26-27. The plaintiff's explanation should be given a "generous reading": *Wakelin v. Gourley* (2005), 76 O.R. (3d) 272, at para.15, aff'd 2006 CarswellOnt 286 (Div. Ct.). Whether the plaintiff and its counsel acted with reasonable diligence must be considered in context: *Fanshawe College of Applied Arts and Technology v. Sony Optiarc Inc.*, 2014 ONSC 2856, at para. 45 (the "Fanshawe Pleadings Motion".)

[25] While *Arcari*, *Pepper* and *Wakelin* dealt with motions to add defendants that were opposed based on the apparent expiry of the limitation period under the Act, the same approach, and the same low threshold, is warranted where the motion is opposed or also opposed based on the apparent expiry of any statutory limitation period subject to the discoverability principle: see, for example, Fanshawe Pleadings Motion.

[26] In the context of a motion to add defendants in a class action alleging a secret conspiracy brought before any statements of defence had been filed or any discoveries had taken place, the motion judge required the appellants to meet too high an evidentiary threshold.

[27] Giving the requisite generous, contextual reading to the appellants' explanation, the appellants provided a reasonable explanation why they could not have identified the respondents as co-conspirators before July 20, 2014. I note that in the Fanshawe Pleadings Motion, the motion judge permitted plaintiffs alleging a price-fixing conspiracy to amend their statement of claim to add defendants on evidence as to due diligence that essentially consisted of reviewing publically available documents, albeit a more detailed list of those documents was provided.

[28] In the face of the appellant's evidence of their search for other potential defendants, the respondents led no evidence of further reasonable steps that the appellants could have taken to ascertain their identities before July 20, 2014. Rather, the motion judge suggested that the appellants should have taken further steps to investigate whether the respondents were co-conspirators. At least some of the steps he suggested go beyond those a reasonable plaintiff would have taken in the circumstances, indicating that he held the appellants to too high an evidentiary standard. By way of example, it is not apparent how a plaintiff alleging a conspiracy that the defendants took active steps to conceal and that was

conducted through secret "chats" could have possibly obtained the suggested *Anton Pillar* and *Norwich* orders. The evidentiary foundation required to obtain such orders is high.

[29] Further, a representative plaintiff is not akin to the investigative arm of a regulator. Regulators often have investigative powers that civil plaintiffs do not. There was no evidence that any of the sophisticated regulators investigating the alleged conspiracy had identified any of the respondents as co-conspirators before the UBS proffer.

2. Lack of evidentiary foundation

[30] A plaintiff's failure to take reasonable steps to investigate a claim is not a stand-alone or independent ground to find a claim out of time. Instead, the reasonable steps a plaintiff ought to take is a relevant consideration in deciding when a claim is discoverable under s. 5(1)(b): *Galota v. Festival Hall Developments Ltd.*, 2016 ONCA 585, 133 O.R. (3d) (C.A.), at para. 23; *Fennel v. Deol*, 2016 ONCA 249, 265 A.C.W.S. (3d) 1029, at paras. 18, 24.

[31] Where the issue on a motion to add a defendant is due diligence, the motion judge will not be in a position to dismiss the plaintiff's motion in the absence of evidence that the plaintiff could have obtained the requisite information with due diligence, and by when the plaintiff could have obtained such information, such that there is no issue of credibility or fact warranting a trial or summary judgment

motion: *Wong v. Adler* (2004), 70 O.R. (3d) 460 (Ont Master), at para. 45; *Pepper*, at para. 18.

[32] As the respondents appropriately conceded, there was no evidentiary foundation for the motion judge's finding that the respondents' identities as co-conspirators could have been established with reasonable diligence. The fact that UBS – one of the co-conspirators and a participant in the "collusive chats" – was able to identify other participants in the secret chats is no indication that the appellants, who were not co-conspirators, could have done so.

[33] Nor did the motion judge determine with sufficient precision by when the appellants ought to have discovered that they had a claim. As noted above, the appellants claim would be statute barred only if the s. 5(1)(b) date were before July 20, 2014. The motion judge found the identity of BMO and TD could have been established "before the expiry of the limitation period". It is not clear what the motion judge meant by "the expiry of the limitation period". The respondents submitted that the limitation period expired on December 31, 2015 (two years after the end of the alleged conspiracy period). If the motion judge's intended finding were that the appellants could have established the identities of BMO and TD by December 31, 2015, then the appellants' claim against them would not have been statute-barred.

[34] The issue of whether the appellants could have discovered the identities of the respondents with due diligence and, if so, when the appellants could have done so, are issues that require consideration on a summary judgment motion or at trial. The motion judge should have permitted the appellants to add the respondents as defendants, and reserved the respondents' right to plead a limitation defence.

Disposition

[35] I would allow the appeal. I would set aside the motion judge's order and order that the appellants be permitted to amend their statement of claim to add the respondents as defendants to the action and that the respondents be at liberty to plead their limitation defence when they deliver their statements of defence.

[36] As agreed by the parties, I would: order that the appellants be entitled to their costs of the appeal, fixed in the all-inclusive amount of $50,000, payable as to $25,000 by TD, and as to $25,000 by BMO; set aside the costs' award below; and order that BMO pay the appellants $99,724.96 and TD pay the appellants $95, 908.69 as costs of the motion below.

Released: JUN 1 3 2018

Alexandra M A C D D.

I agree. J.A.

I agree Tulloch J.A.