COURT OF APPEAL FOR ONTARIO

CITATION: Di Filippo v. Bank of Nova Scotia, 2024 ONCA 33
DATE: 20240117
DOCKET: C70669 & C70671

Feldman, Huscroft and Paciocco JJ.A.

DOCKET: C70669

BETWEEN

Julius Di Filippo and David Caron

Plaintiffs (Appellants)

and

The Bank of Nova Scotia, Scotia Capital (USA) Inc., Barclays PLC, Barclays Bank PLC, Barclays Capital Canada Inc., Barclays Capital Inc., Barclays Capital PLC, Deutsche Bank AG, Deutsche Bank Securities Limited, Deutsche Bank Securities, Inc., HSBC Bank PLC., HSBC Holdings PLC, HSBC Bank Canada, HSBC Securities (Canada) Inc., HSBC USA Inc., HSBC Securities (USA) Inc., London Gold Market Fixing Ltd., Société Générale, Société Générale (Canada), Société Générale SA, SG Americas Securities, LLC, UBS AG, UBS Bank (Canada) and UBS Securities LLC, JPMorgan Chase & Co., J.P. Morgan Bank of Canada, J.P. Morgan Canada, JPMorgan Chase Bank National Association, Morgan Stanley Capital Group Inc., Bank of America Corporation, and Merrill Lynch Commodities Inc.

Defendants (Respondents)

DOCKET: C70671

AND BETWEEN

Julius Di Filippo and David Caron

Plaintiffs (Appellants)

and

The Bank of Nova Scotia, Scotia Capital (USA) Inc., Deutsche Bank AG, Deutsche Bank Securities Limited, Deutsche Bank Securities, Inc., HSBC Holdings PLC, HSBC Bank PLC., HSBC Bank Canada, HSBC Securities (Canada) Inc., HSBC USA Inc., HSBC Securities (USA) Inc., UBS AG, UBS Securities LLC, UBS Bank (Canada), The London Silver Market Fixing Limited, Barclays PLC, Barclays Bank PLC, Barclays Capital Canada Inc., Barclays Capital Inc., and Barclays Capital PLC, JPMorgan Chase & Co., J.P. Morgan Bank of Canada, J.P. Morgan Canada, JPMorgan Chase Bank National Association*, Morgan Stanley Capital Group Inc., Bank of America Corporation, and Merrill Lynch Commodities Inc.

Defendants (Respondents)

Reidar Mogerman, K.C., for the appellants

Michael Eizenga, Emrys Davis, and Sakina Babwani, for the respondents JP Morgan Chase & Co., J.P. Morgan Bank Canada, J.P. Morgan Canada, and JP Morgan Chase Bank National Association

John Fabello, James Gotowiec, and Colette Koopman, for the respondents Bank of America Corporation and Merrill Lynch Commodities Inc.

Matthew Milne-Smith and Maura O'Sullivan, for the respondent Morgan Stanley Capital Group Inc.

Katherine Kay and Zev Smith, for the respondents UBS AG, UBS Bank (Canada), and UBS Securities LLP

Mark Evans, Adam Goodman, and Theresa Cesareo, for the respondents HSBC Bank Canada, HSBC Bank PLC, HSBC Holdings PLC, HSBC Securities (Canada) Inc., HSBC USA Inc., and HSBC Securities (USA) Inc.

Imad Alame, for the respondents The Bank of Nova Scotia and Scotia Capital (USA) Inc.[1]

[1] Imad Alame appeared but made no written or oral submissions on behalf of the respondents.

Emilie Dillon and Christopher Naudie, for the respondents Barclays PLC, Barclays Bank PLC, Barclays Capital Canada Inc., Barclays Capital Inc., and Barclays Capital PLC[2]

Lara Jackson, for the respondent London Gold Market Fixing Ltd.[3]

Lawrence Thacker and Jessica Kras, for the respondents Société Générale, Société Générale (Canada), Société Générale SA, and SG Americas Securities, LLC[4]

Heard: April 20, 2023

On appeal from the orders of Justice Edward P. Belobaba of the Superior Court of Justice, dated April 26, 2022.

Feldman J.A.:

Overview

[1] The plaintiffs moved to amend their pleadings in this class action brought against a number of financial institutions for conspiracy to fix the market and the trading prices of gold and silver over a period of years. The action claims that the defendants used various illegal methods and practices to fix the prices, depriving the class of the actual value of their trades.

[2] The amendments sought to add a number of financial institutions as defendants and to amend the claims against the existing defendants. The motion judge dismissed the motion in its entirety. He found that the proposed amendments

---

[2] Emilie Dillon and Christopher Naudie appeared but made no written or oral submissions on behalf of the respondents.
[3] Lara Jackson appeared but made no written or oral submissions on behalf of the respondent.
[4] Lawrence Thacker and Jessica Kras appeared but made no written or oral submissions on behalf of the respondents.

constituted time barred new claims, and in the case of one bank, while the claim was not time barred, it could not be joined in the action because it did not arise out of the same transaction or occurrence.

[3] For the reasons that follow, I would allow the appeal, set aside the order of the motion judge and allow the amendments to the statements of claim.

Factual Background

[4] The representative plaintiffs commenced two class actions against a number of financial institutions that were involved in the international gold and silver trading markets as "market makers", for conspiracy to fix the prices of gold and silver respectively, and implementing the fixes in a number of ways, all to the detriment of the class. The action in respect of gold ("Gold action") was commenced on December 18, 2015, and the action in respect of silver ("Silver action") was commenced on April 15, 2016. Similar class proceedings had been commenced and were ongoing at various stages in the US.

[5] In the Silver action, the plaintiff class is described in the proposed Fresh as Amended statement of claim as follows:

> *All persons or entities in Canada who, between January 1, 2004 and December 31, 2016 (the "**Class Period**") transacted in a Silver Market Instrument*[1] *either directly or indirectly through an intermediary, and/or purchased or otherwise participated in an investment or equity fund, mutual fund, hedge fund, pension fund or any other investment vehicle that transacted in a Silver Market Instrument. Excluded from the class are the*

> *defendants, their parent companies, subsidiaries, and affiliates.*
>
> > *[1] Silver Market Instrument includes but is not limited to: silver bullion or silver bullion coins, silver futures contracts traded on an exchange operated in Canada, shares in silver ETFs, silver call options traded on an exchange operated in Canada, silver put options traded on an exchange operated in Canada, over-the-counter silver spot or forward transactions or silver call options, over-the-counter silver put options, leases for silver.*

[6] In the Gold action, the plaintiff class is similarly described in the proposed Fresh as Amended statement of claim as follows:

> *All persons or entities in Canada who, between January 1, 2004 and December 31, 2016 (the "**Class Period**") transacted in a Gold Market Instrument[1] either directly or indirectly through an intermediary, and/or purchased or otherwise participated in an investment or equity fund, mutual fund, hedge fund, pension fund or any other investment vehicle that transacted in a Gold Market Instrument. Excluded from the class are the defendants, their parent companies, subsidiaries, and affiliates.*
>
> > [1] *"Gold Market Instrument" includes but is not limited to: gold bullion or gold bullion coins, gold futures contracts traded on an exchange operated in Canada, shares in Gold ETFs, gold call options traded on an exchange operated in Canada, gold put options traded on an exchange operated in Canada, over-the counter gold spot or forward transactions or gold call options, over-the-counter gold put options, leases for gold, gold certificates.*

[7] Prior to the motion to amend, the statements of claim had already been amended a number of times. The motions for certification were scheduled for October 2020, but then adjourned to allow the representative plaintiffs to seek further amendments, following the release of decisions in 2019 and 2020 by the U.S. regulatory body, the Commodity Futures Trading Commission ("CFTC"), which made findings and orders against two of the existing defendant institutions, UBS and HSBC, and against four other financial institutions, Bank of America, Merrill Lynch, JP Morgan, and Morgan Stanley. These orders and the reasons given arose following a settlement with Deutsche Bank in the U.S. litigation, which included provisions requiring Deutsche Bank's cooperation in pursuing claims against the remaining defendants.

[8] The CFTC findings related to a method of fraudulently manipulating the gold and silver trading markets, labelled "spoofing". Spoofing essentially involved placing a fake order for the metal, which order was later withdrawn after another transaction went through at an inflated or deflated price that was influenced by the placing of the fake order.

[9] The findings with respect to Bank of America, Merrill Lynch, Morgan Stanley, and HSBC concerned spoofing by traders within each individual bank, referred to in these proceedings as "intra-bank spoofing". There was no discussion about whether there was any spoofing by those three institutions with other financial institutions or of a conspiracy.

[10] In respect of UBS, the findings included both intra-bank spoofing as well as conspiratorial spoofing with other financial institutions.

[11] In respect of JP Morgan, the CFTC findings relate to thousands of spoofing transactions by JP Morgan traders, resulting in a criminal penalty plus compensation for victims and disgorgement of unlawful gains in the total amount of $920.2 million under a deferred prosecution agreement. Separate CFTC orders were made against two JP Morgan traders, who also pleaded guilty to charges of conspiratorial spoofing in the U.S. The pleas described conspiracies with other traders at the same bank but did not specify whether the traders conspired with traders at other banks.

The Findings of the Motion Judge

[12] The motion was heard in a Zoom video conference. The reasons were provided in an informal written format. They begin with an introductory explanation. I set out the introductory explanation and the first heading of “Rulings” in full:

> *Two proposed class actions alleging a multi-bank conspiracy to manipulate pricing in the London gold and silver Fix auctions – Parallel U.S. proceedings were commenced in 2014 – The proposed class actions herein were commenced in 2015 and early 2016 – After several pleadings amendments to the core conspiracy claim and six years after the actions were filed, Ps bring this motion to add new party defendants and to amend pleadings to add non-conspiracy “manipulative conduct”, in particular non-collusive (individualized) “spoofing” allegations - Ds oppose on various grounds, including provincial and federal limitation periods.*

> **Rulings:** Ps' motions to amend pleadings and add new defendants are dismissed. This Endorsement is deliberately abbreviated but will be fully understood by counsel for the parties.

[13] Under the next heading, "Reasons", the motion judge recites some discussion he had had with counsel at the outset of the motion hearing. Specifically, the motion judge had advised counsel that the motion raised deep judicial concerns that adding a new damages claim that focused not just on the multi-bank conspiracy but on the unrelated individual and intra-bank-only misconduct of some traders – "the non-conspiracy spoofing allegations" – "will make an already complicated conspiracy proceeding unwieldy and unmanageable". He was inclined to order under s. 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 that the plaintiffs should pursue the non-conspiracy trader misconduct claims in a separate proceeding under the new CPA. He concluded by saying that because the motion was argued primarily on limitations and not on the larger unmanageability problem, and because the result would be *de facto* the same, he would confine his rulings accordingly.

[14] The motion judge then addressed the proposed amendments in relation to each financial institution.

[15] With respect to UBS and HSBC, the two existing defendants, the motion judge found that the proposed amendment adding a claim for non-collusive intra-bank spoofing was time barred. He rejected the application of the case law that

suggests that limitation issues should generally be deferred where discoverability is disputed, and instead accepted the submission of counsel that the proposed amendments regarding non-collusive spoofing were indisputably time barred for two reasons. The first is that they allege new facts regarding non-collusive intra-bank spoofing and propose a new cause of action. The second is that class counsel had "actual knowledge" of the allegations against UBS and HSBC from the CFTC press release and spoofing orders against the two banks, dated January 29, 2018. These were included in an affidavit filed by class counsel on March 27, 2018, which was more than two years before the motion to amend was brought.

[16] Second, the motion judge found that the motion to add as new defendants Bank of America and Merrill Lynch was also clearly time barred. This conclusion was based on the motion judge's finding that class counsel had "actual knowledge" "at least as of March 27, 2018 that Bank of America or Merrill Lynch had been added to the U.S. proceedings and/or were otherwise potentially involved in the impugned conspiracies re the precious metals Fix auctions." This knowledge came from counsel's affidavits filed for an earlier certification motion that appended certain pleadings from the U.S. litigation, which were related to, and filed at the same time as, other pleadings naming Bank of America and Merrill Lynch. Based on his finding of counsel's knowledge of the U.S. pleadings, the motion judge found that class counsel "had actual knowledge of BofA or Merrill [Lynch]'s possible

involvement and potential liability in the precious metals (including the gold and silver) Fix auctions more than two and a half years before this motion to add was served."

[17] Third, regarding the proposed addition of Morgan Stanley as a new defendant, the motion judge also found that the motion to add was clearly time barred. This was based on class counsel's "actual knowledge" as of March 27, 2018, that "Morgan Stanley was one of the banks being targeted in the Swiss WEKO investigation of big-bank collusion in precious metals auction-pricing." The Swiss Competition Commission ("WEKO") press release and related media stories named Morgan Stanley "as one of the targets of the investigation and potentially implicating them in the impugned conspiracy." Therefore, class counsel knew "the who and the what" more than two years before the motion to add.

[18] Fourth was the motion to add JP Morgan as a defendant in the action based on the CFTC Order of September 29, 2020, which the motion judge stated "named and fined certain individual JPM traders for *intra-bank non-conspiracy* misconduct", but not for inter-bank collusion or conspiracy. On that basis, the motion judge found that "JP Morgan is not a proper party defendant to the existing conspiracy actions and that the joinder test under Rule 5 has not been satisfied."

[19] The motion judge concluded that the motion to add and amend was therefore dismissed in its entirety.

Issues on the Appeal

[20] This appeal raises the following issues:

1) Regarding UBS and HSBC, did the motion judge err in law by finding that the proposed claim for non-collusive spoofing constituted a new cause of action and was therefore time barred?
2) Regarding Bank of America, Merrill Lynch and Morgan Stanley, did the motion judge err in law by finding that class counsel had "actual knowledge" of a claim for conspiracy to fix precious metals prices based on knowledge of pleadings in a U.S. action or of an investigation in another country?
3) Regarding JP Morgan, did the motion judge err in law by finding that it was not a proper party to the class proceedings and did not meet the joinder test under Rule 5 of the *Rules of Civil Procedure* because the CFTC Order of September 2020 found the bank guilty of intra-bank spoofing and not collusive spoofing?

Analysis

A. Standard of Review

[21] A finding that a proposed amendment constitutes a new claim "is a legal determination, which is subject to the correctness standard of review on appeal": *Polla v. Croatian Credit (Toronto) Union Limited*, 2020 ONCA 818, at para. 31, citing *Blueberry River First Nation v. Laird*, 2020 BCCA 76, 32 B.C.L.R. (6th) 287,

at paras. 20-21; and *Strathan Corporation v. Khan*, 2019 ONCA 418 (Ont. C.A.), at paras. 7-8.

[22] The question whether a limitation period has commenced is "typically a question of mixed fact and law and therefore subject to review on a 'palpable and overriding error'": *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 30. However, where there is an extricable error in principle, the standard of review is correctness: *Fercan Developments Inc. v. Canada (Attorney General)*, 2021 ONCA 251, 157 O.R. (3d) 81, at para. 11; see e.g., *Kaynes v. BP p.l.c.*, 2021 ONCA 36, 456 D.L.R. (4th) 247, at para. 24.

[23] The facts relevant to the limitation period issues in this case are not in dispute. The only question is whether the motion judge erred in finding that the plaintiffs had actual knowledge of their claims as of March 27, 2018 within the meaning of s. 5(1)(a) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. Like in *Kaynes*, where the issue was similarly whether knowledge of U.S. pleadings was sufficient at law to trigger the commencement of the limitation period, the standard of review with respect to this finding is correctness.

B. The Existing Statements of Claim

[24] The proposed amendments must be considered and understood in the context of the existing pleadings in the two actions.

[25] The Silver action statement of claim states that the action arises from conspiracies among the defendant banks to fix the price of silver and silver investment instruments and to fix and control the bid-ask spread[5] used by participants in the silver market between 2004 and 2014. Three of the defendant banks, the Bank of Nova Scotia, Deutsche Bank, and HSBC, were responsible for the standardized "London Silver Fixing", a process which required them to meet daily to set a benchmark price for Silver. They are alleged to have conspired daily to unreasonably raise, decrease, maintain, stabilize, or control the fix price. The statement of claim further pleads that employees of some or all of the defendant banks carried out the conspiracy by manipulating the price of silver market instruments and the bid-ask spreads in the silver market. They are also alleged to have secretly co-ordinated their strategies to control and manipulate the price of silver and to maintain supra-competitive bid-ask spreads.

[26] Under the heading "Methods of Controlling the Fixes", the Silver action statement of claim lists a number of illegal tactics that the banks are alleged to have used in silver trade transactions in order to control or manipulate the fixing of prices. Each of the following tactics is described in the pleading: "netting off", "building", "painting the screen", "rigging the auction", and "spoofing". The class

[5] The bid-ask spread is the difference between the price at which a market maker is willing to buy and subsequently sell a silver market instrument. Market makers are financial institutions that stand ready to buy and sell silver on a regular and continuous basis. All of the defendant banks are alleged to have been market makers for at least some time between 2004 and 2014.

members suffered losses because they engaged in silver market transactions when the prices had been illegally manipulated by one or more of these tactics to advantage the defendant banks at the expense of the class members.

[27] The Silver action statement of claim is structured to make the allegations against some or all of the defendant banks without seeking to identify specific conduct by institution.

[28] The Gold action statement of claim is similar to the Silver action pleading except that it does not identify “spoofing” by name. However, it does refer to what appears to be the same conduct but by a different name (also referred to in the Silver action pleading), “Painting the Screen”, as one of the “Methods of Controlling the Fixes” through the conspiracy. It is described as follows:

> If the defendants did not have enough “ammo” to move the market, they would invent it. The process, called “*painting the screen*,” involves placing orders to give the illusion of activity that would impact the Fixing with the intention that these orders would be cancelled after the Fixing had been closed.

[29] The proposed amendments to both statements of claim consist of the addition of the proposed new defendant banks, plus a number of changes throughout the pleading including to some of the headings. For example, the prayers for relief originally asked for two declarations: first, that some of the defendant banks conspired to fix the price of silver or gold, and the second, a declaration that some or all of the defendant banks conspired to fix the bid-ask

spreads in the silver or gold market. The amendments add a request for a declaration that some or all of the defendant banks manipulated the price of silver or gold (i.e., regardless of a conspiracy). Another amendment changes the claim for damages for "waiver of tort" to "unlawful means" tort. The amended claims now define the illegal acts, including spoofing, used to manipulate the silver and gold markets as "manipulative conduct", whether it was carried out in furtherance of the alleged conspiracy or not.

[30] Another important addition in the proposed amended pleadings, under the existing heading "Government Investigations", is the recital of details from each of the CFTC orders, which include the admitted spoofing conduct of UBS, HSBC, Bank of America and Merrill Lynch, Morgan Stanley and JP Morgan, as well as the penalties that were imposed. It was these orders that formed the basis for the request to amend the statements of claim.

(1) Regarding UBS and HSBC: Did the motion judge err in law by finding that the proposed claim for non-collusive spoofing constituted a new cause of action and was therefore time barred?

[31] To review, the CFTC order dated January 29, 2018 against Deutsche Bank, UBS and HSBC was made more than two years before the motion to amend on October 30, 2020. Therefore, the proposed amendment was out of time if it sought to add a new claim, as defined in the *Limitations Act*.

[32] The motion judge found that "…the proposed amendments (re non-collusive spoofing) are indisputably time-barred...they allege new facts re non-collusive, intra-bank spoofing and propose a new cause of action."

[33] Although the motion judge's reasons are very briefly stated, it is clear that he viewed non-collusive spoofing and collusive spoofing as giving rise to two different causes of action: spoofing and conspiracy to spoof. He also stated that new facts are alleged to support the non-collusive spoofing claim.

[34] Section 4 of the *Limitations Act* provides the basic limitation period which is based on the date of discovery of a claim. The section reads:

> 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.

[35] Claim is defined in s. 1 as:

> "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission.

[36] Section 5(1)(a) then sets out the criteria for determining when a claim is discovered:

> 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….

[37] With respect to criterion (iv)[6], a proceeding would only be appropriate if the circumstances give rise to one or more legally recognized causes of action on which to base the proceeding. The wrong must have a legally recognized remedy. It is only in this sense – that legal recourse must be appropriate to address a loss caused by the proposed defendant's act or omission – that the term "claim" has any legal specificity.

[38] In *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, 461 D.L.R. (4th) 613, the Supreme Court clarified when a plaintiff discovers that they have a claim. It is when they have knowledge, either actual or constructive, "of the material facts upon which a plausible inference of liability on the defendant's part can be drawn": at para. 42. The plausible inference standard means that the plaintiff does not have to be certain that the known facts will give rise to legal liability, but the plaintiff must have knowledge of the material facts that form the basis for the plausible inference of legal liability.

---

[66] This part of the definition of claim is not replicated in the New Brunswick *Limitations Act* discussed by the SCC in *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, 461 D.L.R. (4th) 613.

[39] This court summarized what type of amendments are allowable after the expiry of a limitation period in *Polla*, at para. 33:

> … [A]n amendment to a statement of claim will be refused if it seeks to assert a "new cause of action" after the expiry of the applicable limitation period…[I]n this context, a "cause of action" is "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person" (as opposed to the other sense in which the term "cause of action" is used – as the form of action or legal label attached to a claim). [Citations omitted.]

[40] These cases make it clear that it is the pleading of the facts that is key. If a statement of claim pleads all the necessary facts to ground a claim on more than one legal basis, and the original statement of claim only asserts one of the legal bases – that is, one cause of action based on those facts – the statement of claim can be amended more than two years after the claim was discovered to assert another legal basis for a remedy arising out of the same facts – that is, another cause of action. This is because it is only the discovery of the claim, as defined in the *Limitations Act* and the case law, that is time barred under s. 4, not the discovery of any particular legal basis for the proceeding.

[41] In the textbook *The Law of Civil Procedure in Ontario*, Paul M. Perell & John W. Morden 4th ed. (Toronto: LexisNexis Canada, 2020), at pp. 220-21, the authors explain when an amendment will be allowed in the following passage:

> A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts

> previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based… Thus, where a limitation period has run its course, allowing or disallowing the amendment depends upon whether the allegations of the proposed amendment arise out of the already pleaded facts, in which case the amendment will be allowed, but if they do not the amendment will be refused. An amendment of a statement of claim to assert an alternative theory of liability or an additional remedy based on facts that have already been pleaded in the statement of claim does not assert a new claim for the purposes of s. 4 of the *Limitations Act*. [Citations omitted.]

[42] In *Klassen v. Beausoleil*, 2019 ONCA 407 at para. 30, this court instructed that the application of this test should not be stringent or overly technical:

> In the course of this exercise, it is important to bear in mind the general principle that, on this type of pleadings motion, it is necessary to read the original Statement of Claim generously and with some allowance for drafting deficiencies.

[43] I turn now to the application of this test to the statements of claim and the proposed amendments. While the legal basis or cause of action for the original remedy that was sought against the defendants was conspiracy, particularized as both civil conspiracy and conspiracy pursuant to Part VI of the *Competition Act*, R.S.C. 1985, c C-34, the pleadings allege as facts that the conspiracy was carried out by the defendants. They fixed the prices of gold and silver on the trading markets over a lengthy period of time using a number of illegal techniques, including what the wrongdoers have called spoofing and painting the screen. This

is colloquial nomenclature[7] which, as defined in the pleading, appears to describe the same conduct.

[44] For example, para. 106 of the unamended Silver action statement of claim sets out four conversations that describe spoofing transactions among traders from some of the defendant banks:

> January 29, 2008:
>
> Deutsche Bank Trader-Submitter: UBS BORING THE MKT AGAIN
>
> Fortis Trader: THSX MATE DID HE OFFER IT DOWN?
>
> Deutsche Bank Trader-Submitter: HE SPOOFED IT TO BUY IT AND I THINK HE JUST
>
> SOLD IT TO BUY IT . . . JUST LIKE THEM TO BID IT UP BEFORE THE FIX THEN
>
> GO IN AS A SELLER . . . THEY SELL TO TRY AND PUSH IT BACK
>
> March 7, 2008:
>
> Bank of Nova Scotia Trader: lost to hsbc got it back fm ubs cheaper
>
> Deutsche Bank Trader-Submitter: did ubs call out?
>
> Bank of Nova Scotia Trader: nah offereed 8.25 in ebs

[7] Section 4(c)(a)(5)(C) of the U.S. *Commodity Exchange Act* refers to conduct that is "of the character of, or is commonly known to the trade as, ''spoofing'' (bidding or offering with the intent to cancel the bid or offer before execution)".

Deutsche Bank Trader-Submitter: hs called in silver before

Deutsche Bank Trader-Submitter: i was high in both and they opassed both

Bank of Nova Scotia Trader: yeah we were high in silver but cudnt work out what he was doin

Deutsche Bank Trader-Submitter: me either

Deutsche Bank Trader-Submitter: maybe spoofing silver lower . . .

April 23, 2008:

UBS Trader: did u just quote that lac of silver?

Deutsche Bank Trader-Submitter: yean

Deutsche Bank Trader-Submitter: im ashamed

UBS Trader: u should be!

UBS Trader: its called the transmit button!

UBS Trader: hehehe

Deutsche Bank Trader-Submitter: hehehehe

Deutsche Bank Trader-Submitter: i knew u were a seller buy u spoofed it u mother

July 4, 2008:

Deutsche Bank Trader-Submitter: did u see the spoof

Barclays Trader: no what was that?

> Deutsche Bank Trader-Submitter: when he called
>
> Deutsche Bank Trader-Submitter: the futures went a buck wide
>
> …
>
> Deutsche Bank Trader-Submitter: shud make ubs 2 usd wide at leats today if hes spoofing

[45] The main additions to the amended statements of claim are the recitation of the content of the orders made by the CFTC against some existing defendants and against the proposed defendants. The orders recite the findings by the tribunal that in each case, multiple spoofing transactions were carried out during the claim period causing loss to the people who made the trades. UBS was found to have carried out these transactions from 2008 to 2013, HSBC from 2011 to 2014, Bank of America and Merrill Lynch from 2008 to 2014, Morgan Stanley from 2013 to 2014, and JP Morgan from 2008 to 2016. Huge fines and restitutionary orders were included.

[46] Because the statements of claim already pled that spoofing (or painting the screen in the gold pleading) transactions were carried out by the defendants, the CFTC orders merely provide confirmatory evidence or further details of what was already pled. The claim for damages for the losses caused by the spoofing transactions is an additional remedy to the claim for damages for conspiracy to spoof, arising from the same facts, the same losses.

[47] According to the CFTC findings, there were hundreds of thousands of spoofing transactions by the defendants during the claim period. The plaintiffs do not know which, if any, were done pursuant to an agreement between two or more institutions, nor do the CFTC orders address that issue.

[48] To summarize, the motion judge erred in law by finding that the proposed amendments were statute barred because they allege new facts and a new cause of action. The additional facts in the proposed amendments constitute evidence of the facts already pleaded or further details of those facts. Further, the proposed amendments, which include claims for damages for non-conspiratorial spoofing, constitute "an alternative theory of liability or an additional remedy based on facts that have already been pleaded". They do not plead a new claim under the *Limitations Act*.

[49] As a result, the proposed amendments are not statute barred.

(2) Regarding Bank of America, Merrill Lynch and Morgan Stanley, did the motion judge err in law by finding that class counsel had "actual knowledge" of a claim for conspiracy to fix precious metals prices based on knowledge of pleadings in a U.S. action or of an investigation in another country?

[50] To review, the motion judge found that the proposed amendments seeking to add Bank of America and Merrill Lynch as new parties to the action were statute barred. The basis for this finding by the motion judge was "the affidavits [by

two lawyers for the class] of February [27, 2017] and March 27, 2018 that show class counsel had actual knowledge of BofA or Merrill [Lynch]'s possible involvement and potential liability in the precious metals (including the gold and silver) Fix auctions more than two and a half years before this motion to add was served". Those affidavits did not actually attach pleadings that named the two banks in the U.S. proceedings, but did attach related pleadings that were filed at the same time as pleadings that did allege that the two banks were part of the conspiracy or conspiracies.

[51] With respect to Morgan Stanley, the motion judge found that the proposed amendment to add that bank as a defendant was also statute barred. Again, the basis for the finding was that class counsel had actual knowledge, based on the affidavit of March 27, 2018 filed by a lawyer for the class on a previous motion, "that Morgan Stanley was one of the banks being targeted in the Swiss [WEKO] investigation of big-bank collusion in precious metals auction-pricing". The impugned affidavit had attached the WEKO Press Release of September 28, 2015 and related media stories that named Morgan Stanley as one of the targets of the investigation "potentially implicating them in the impugned conspiracy." The motion judge agreed with the submission of counsel that class counsel therefore "knew 'the who and the what' more than two and a half years (at the very least) before serving this motion."

[52] The narrow issue on the appeal of these findings is whether the motion judge erred in law by finding that class counsel had actual knowledge of the claim, based on allegations in a pleading or the announcement of an investigation.

[53] The framework for determining the commencement of a limitation period is found in the *Grant Thornton* decision. As stated above, the broad test for what has to be discovered is: "the material facts upon which a plausible inference of liability on the defendant's part can be drawn." To meet this standard, the plaintiff must have "actual or constructive knowledge that: (a) the injury loss or damage occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of the defendant.": at para. 43.

[54] The court explained how to assess the plaintiff's knowledge at para. 44:

> In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise. (*Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 42).

[55] This court explained in *Crombie* that suspicion may trigger the due diligence obligation, but suspicion does not constitute actual knowledge. The full paragraph clearly explains the difference:

> That the motion judge equated Crombie's knowledge of possible contamination with knowledge of actual contamination is apparent from her statement that "[a]ll the testing that followed simply confirmed [Crombie's] suspicions about what had already been reported on" (at para. 31). It was not sufficient that Crombie had suspicions or that there was possible contamination. The issue under s. 5(1)(a) of the *Limitations Act*, 2002 for when a claim is discovered, is the plaintiff's "actual" knowledge. 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, under s. 5(1)(b). Here, while the suspicion of contamination was sufficient to give rise to a duty of inquiry, it was not sufficient to meet the requirement for actual knowledge. The subsurface testing, while confirmatory of the appellant's suspicions, was the mechanism by which the appellant acquired actual knowledge of the contamination.

[56] Similarly, in *Kaynes v. BP p.l.c.*, this court held that knowledge of allegations in pleadings does not, without more, constitute actual knowledge of one's claim. In that case, a U.S. claim for misrepresentation in securities filing documents was required to allege fraud, referred to as "scienter", in order to make out a legally enforceable action. The allegation of scienter did not give Canadian class plaintiffs actual knowledge of any fraudulent intent by BP. It was only an allegation to be investigated.

[57] The motion judge below made the same error as was made in *Crombie*. He treated facts which might trigger a duty to investigate as material facts sufficient to

trigger the limitation period – in his words, “the who and the what”. The class plaintiffs in this case had actual knowledge that there was a conspiracy among a number of financial institutions to fix and manipulate the price of gold and silver on the trading markets. That is the “what.”

[58] However, based on the allegations in the U.S. pleadings and in the press release of the WEKO investigation, they only had suspicion of the “who”. Both a statement of claim and a government investigation, by their very nature, express allegations, not facts. In fact, the U.S. pleadings naming Bank of America and Merrill Lynch were ultimately struck with prejudice in July 2018, and the WEKO investigation into Morgan Stanley was terminated after Swiss authorities determined that suspicions of conspiracy were not substantiated.

[59] These examples draw out an important distinction from *Grant Thornton*: actual knowledge does not materialize when a party can make a “plausible inference of liability.” Rather, actual knowledge materializes when a party has “the material facts upon which a plausible inference of liability on the defendant’s part can be drawn” [emphasis added]. While class counsel may have had reason to suspect that Bank of America, Merrill Lynch and Morgan Stanley were part of the conspiracy, that suspicion was not actual knowledge. The motion judge erred in law by finding actual knowledge.

[60] Because the U.S. pleadings and WEKO press release did not disclose the necessary material facts, it was an error of law to find that the proposed amendments were statute barred on the basis that class counsel had actual knowledge of the claims against Bank of America, Merrill Lynch and Morgan Stanley more than two years before the motion to amend was brought.

[61] Section 5(1)(b) of the *Limitations Act* sets out an alternative, objective basis for finding that a limitation period has commenced, based on when the plaintiff ought to have known the facts that form the basis for the claim and therefore had constructive knowledge of it:

> A claim is discovered on the earlier of,
>
> …
>
> (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).

[62] The motion judge in this case did not decide when the plaintiffs had constructive knowledge that they had a claim under s. 5(1)(b) because he agreed with the submissions of the defendants that the plaintiffs had actual knowledge of it.

[63] In *Mancinelli v. Royal Bank of Canada*, 2018 ONCA 544, this court held that where the facts regarding discoverability under s. 5(1)(b) are in dispute, the correct approach is for the motion judge to allow the addition of the new parties, but also

allow the new parties to plead the limitations defence, with the issue to be determined at trial or on summary judgment.

[64] The effect of s. 5(1)(b) is to impose an obligation of due diligence on those who have reason to suspect that they may have a claim, but who do not yet have actual knowledge of the material facts giving rise to that claim: *Crombie*, at para. 42. Where potential plaintiffs sit idle or fail to exercise due diligence, the limitation period will commence on the date that the claim would have been discoverable had reasonable investigatory steps been taken. In other words, it is the date when the potential plaintiffs have constructive, as opposed to actual knowledge of their claim: *Grant Thornton*, at para. 44.

[65] A court determining this issue will require evidence of how the material facts could reasonably have been obtained more than two years before the motion to add was brought: *Mancinelli*, at paras. 28, 31; *Morrison v. Barzo*, 2018 ONCA 979, at paras. 61-62.

(3) Regarding JP Morgan, did the motion judge err in law by finding that it was not a proper party to the class proceedings and did not meet the joinder test under Rule 5 of the *Rules of Civil Procedure* because the CFTC Order of September 2020 found the bank guilty of intra-bank spoofing and not collusive spoofing?

[66] The motion judge found that JP Morgan was not a proper party to the conspiracy actions because the evidence relied on by the class plaintiffs for

amending the statements of claim to add JP Morgan as a party came only from the CFTC order that found extensive spoofing by JP Morgan traders over many years, but did not find that they did it as part of an inter-bank conspiracy.

[67] Rules 5.02(2), 5.04(2), and 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 state:

> 5.02(2) Two or more persons may be joined as defendants or respondents where,
>
> (a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;
>
> (b) a common question of law or fact may arise in the proceeding;
>
> (c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;
>
> (d) damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; or
>
> (e) it appears that their being joined in the same proceeding may promote the convenient administration of justice.
>
> …
>
> 5.04(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.
>
> …
>
> 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.

[68] The motion judge denied the motion to amend to add JP Morgan because the CFTC order against JP Morgan did not find conspiratorial spoofing that would have connected JP Morgan to the conspiracy pleaded against the other banks. There was no limitation issue.

[69] The motion judge made a palpable and overriding error of fact by finding that the CFTC order found that none of the spoofing by JP Morgan was conspiratorial spoofing. In his review of the CFTC order dated September 29, 2020 against JP Morgan, the motion judge failed to consider a number of the findings that were made, including: that over the period from 2008 to 2016, JP Morgan traders "engaged in a pattern of spoofing in the precious metals futures market and in the U.S. Treasury futures market" which the CFTC thereafter referred to as a "scheme" in which hundreds of thousands of orders to buy and sell future contracts with the intent to deceive market participants and manipulate market prices; these traders did in many instances cause artificial prices; by virtue of this conduct, JP Morgan engaged in manipulation and attempted manipulation contrary to a number of statutory provisions; the spoofing was done by traders with the knowledge and

consent of superiors; the spoofing scheme, described in detail in the order, benefitted JP Morgan financially in the amount of $172,034,790 and inflicted harm on the markets and other market participants resulting in $311,737,008 in market losses; during that period, two JP Morgan traders, Christian Trunz and John Edmonds, pled guilty to spoofing and conspiracy to spoof.

[70] From the size, extent and number of years that the spoofing scheme took place at JP Morgan, overlapping with the period when the other banks were allegedly conducting their conspiracy, and the fact that two JP Morgan traders pled guilty to spoofing and conspiracy to spoof, it cannot be said from the CFTC order and the other information about JP Morgan's involvement in the market manipulation through spoofing, that only intra-bank and not conspiratorial spoofing took place.

[71] In addition, because the proposed amendments to the statements of claim that allege intra-bank spoofing conduct by each of the defendant banks will be allowed, as discussed above, there is no legal basis to deny the amendment adding the defendant JP Morgan to the actions.

Conclusion

[72] I would allow the appeal, add the proposed amendments to the statements of claim and add the proposed new parties to the appellants' claims. In accordance with *Mancinelli v. Royal Bank*, the respondents Bank of America, Merrill Lynch and Morgan Stanley are not precluded from pleading a limitations defence based on s. 5(1)(b) of the *Limitations Act*, if so advised, with the issue to be determined at trial or on summary judgment, again as advised.

[73] These appeals from the order of the motion judge dismissing the motion to amend the statements of claim are being allowed based on errors of law and misapprehension of the factual record, as the reasons of the motion judge state that his decisions were made not as case management decisions but on the legal grounds that he articulated.

[74] Although the case management judge was concerned about complexity, the complexity is the result of the alleged conduct of the defendants. By allowing these amendments, all of the alleged conduct by the defendants that caused losses to the plaintiff classes can be explored on discovery without objection that a particular allegation is not part of the pleading.

[75] It will be up to the class action case management judge who decides the certification motion to determine whether and on what bases, including procedural considerations, the common issues will be certified.

[76] For example, if it can be determined through the discovery process which losses were caused by conspiratorial conduct of the defendants and which losses were caused by non-conspiratorial conduct of individual defendants, further procedural considerations may become relevant.

[77] As agreed, there will be no costs of the appeal.

"K. Feldman J.A."
"I agree. David Paciocco J.A."

Huscroft J.A. (dissenting in part):

[78] I have read my colleague's reasons. I agree that the amendments to the UBS, HSBC, and JP Morgan pleadings should be allowed. However, and with respect, I would dismiss the appeal in all other respects. The motion judge's decision that the claims against Bank of America, Merrill Lynch, and Morgan Stanley are time barred is entitled to deference.

[79] The motion judge was managing these proceedings for an extended period of time and was well familiar with the facts. His reasons are short but they do not preclude appellate review. The motion judge's finding that plaintiffs' counsel had actual knowledge of ongoing investigations and parallel U.S. legal proceedings commenced earlier is amply supported in the record.

[80] I do not accept that there is an extricable error that is subject to review for correctness. Whether a limitation period has expired prior to the commencement of an action is a question of mixed fact and law subject to review on a palpable and overriding error standard: *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 31. Determining when a claimant has obtained actual knowledge of a claim is case-specific: *Albert Bloom Limited v. London Transit Commission*, 2021 ONCA 74, 40 C.E.L.R. (4th) 161, at para. 31. Absent a palpable and overriding error or an extricable error of

principle, the determination is entitled to deference: *Fercan Developments Inc. v. Canada (Attorney General)*, 2021 ONCA 251, 157 O.R. (3d) 81, at para. 11.

[81] In my view, the motion judge did not err in concluding that the record and inferences he drew from it were sufficient to satisfy the actual knowledge of material facts standard. *Kaynes v. BP p.l.c.*, 2021 ONCA 36, 456 D.L.R. (4th) 247, is distinguishable, as it was an appeal from a decision in a pleadings motion under r. 21.01(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to determine a question of law and did not involve a factual inquiry.

[82] In this case, the pleadings in the U.S. proceedings asserted facts and it was open to the motion judge to find that a plausible inference of liability for the Bank of America and Merrill Lynch could be drawn from them. Although the Swiss Competition Commission ("WEKO") press release concerning Morgan Stanley is less detailed than the pleadings involving the Bank of America and Merrill Lynch, the appellants relied on that investigation in their statement of claim.

[83] Further, although the motion judge pointed to some documents as sufficient to show actual knowledge, there was general knowledge of the investigations and foreign proceedings that were underway – the motion judge referred to "wide-spread media reports and the publicly available information (easily accessible on Google or PACER) that would have been known to class counsel as far back as December 2016."

[84] Again, it was open to the motion judge to find the appellants had actual knowledge of their claims against Bank of America, Merrill Lynch, and Morgan Stanley more than two years before they brought their motion to amend. Accordingly, I would dismiss the appeal with respect to these three respondents.

Released: January 17, 2024 “K.F.”

“Grant Huscroft J.A.”