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Ontario Court Denies Plaintiffs' Motion to Add New Defendants to Proposed Class Action Outside Limitation Period

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Cassels successfully resists a motion to add its clients as defendants to a proposed billion-dollar class action arising from allegations of an international price-fixing conspiracy.

Key Takeaways

- **Low bar does not mean no bar.** The plaintiffs failed to meet the low evidentiary burden of showing that they acted with reasonable diligence in discovering the proposed claim to justify abrogating the otherwise presumptive two year limitation period.
- **Class counsel cannot sit back on the basis that civil conspiracies are clandestine in nature.** Rather, class counsel will be expected to take an active role in investigating the identity of potential defendants.

Summary and Background

The proposed class action arises from the highly publicized “Libor scandal” in the international foreign currency exchange market. The Statement of Claim alleges that between January 1, 2004 and December 31, 2013, the defendant financial institutions conspired with one another through the use of online chat rooms to coordinate the fixing of spot prices for currency pairs, the control and manipulation of benchmark rates and the exchange for confidential customer information to trigger stop loss orders and limit orders.

The proposed class action was commenced in 2015, naming 48 financial institutions as defendants. It has yet to be certified, other than with respect to limited certification orders issued for settlement purposes. Beginning in May 2016, the plaintiffs entered into a series of settlement agreements with various defendant financial institutions compromising the majority of the original 48 defendants. In July 2016, more than two years after the end of the alleged conspiracy, the plaintiffs sought to add Bank of Montreal and certain affiliates (BMO), represented by Cassels Brock, and Toronto Dominion Bank and certain of its affiliates (TD).

In seeking to add BMO and TD as defendants, the plaintiffs claimed that they did not and could not have discovered the alleged involvement of BMO and TD prior to receiving a confidential proffer of information

pursuant to the first settlement agreement reached in May 2016. The plaintiffs sought to rely on this assertion in arguing that the discoverability principle applied to extend the limitation period applicable to their claims against BMO and TD and permit the addition of these new defendants more than two years after the end of the class period.

Amendment Denied

In refusing to allow BMO or TD to be added, Justice Perell found that the plaintiffs had failed to meet their low evidentiary burden of showing that they acted with reasonable diligence in discovering the proposed claim to justify abrogating the otherwise presumptive two year limitation. While accepting that the plaintiffs had no subjective knowledge of their potential claims against BMO and TD prior to May 2016, Justice Perell was not persuaded that the plaintiffs could not have discovered these potential claims with reasonable due diligence.

The plaintiffs' evidence of having conducted a review of public documents was found to be insufficient, particularly in light of the plaintiffs' knowledge from the outset that other major banks may be involved in the alleged conspiracy and that BMO and TD were "persons of interest" in the case, worthy of investigation by nature of their involvement in the foreign exchange market. In these circumstances, Justice Perell suggested that the plaintiffs had a duty to do more to investigate the identities of other potential defendants beyond simply reviewing public documents and waiting for a settling defendant to provide information. As a result, Justice Perell found there was no genuine issue requiring a trial that the claims against BMO and TD were statute-barred and denied the amendment.

The Upshot

In light of the implications for defendants being added to large class proceedings after the expiry of a presumptive limitation period, this decision is a reminder that the court plays an important gatekeeper role in respect of attempts to bring forward late claims. While the threshold for adding defendants outside of the presumptive limitation period is low, Justice Perell's decision underscores that there is still a threshold for class counsel to meet in bringing such a motion and that raising a discoverability argument is not, in and of itself, enough. Class counsel will be expected to take an active role in investigating the identity of potential defendants and will not simply be permitted to rely on the clandestine nature of a civil conspiracy claim to extend the applicable limitation period.

BMO was represented at the motion by Cassels litigators Lara Jackson and Chris Horkins, with a defence team including Wendy Berman and Stephanie Kerzner. The plaintiffs have commenced an appeal which is currently pending.

The reasons for decision of Justice Perell on the motion are available here.

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